MANITOBA

LAW REFORM COMMISSION
COMMISSION DE RÉFORME DU DROIT

REPORT

ON

THE CASE FOR A PROVINCIAL BILL OF RIGHTS

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FOREWORD

In February, 1973, the Hon. A.H. Mackling, Q.C., then Attorney-General of Manitoba, referred to the Law Reform Commission the subject of the advisability and practicability of a Bill of Rights for Manitoba. In his letter, the Attorney-General said:

> As you may recall, the question of entrenchment of some matters concerning rights was under active consideration by the Federal Government and the various Provinces during the course of meetings dealing with the proposed development of a new Canadian constitution, but there has been no further progress made recently, and the last meeting was held in Victoria in 1971.
>
> In its consideration of this matter, but without limiting the generality of assessment which the Law Reform Commission considers necessary, we would think it useful to consider:
>
> 1. Whether a Bill of Rights for Manitoba is desirable or needed and practical.
> 2. Whether or not a constitutionally entrenched Bill of Rights in Manitoba would be more or less desirable and needed, and more or less practical than a locally enacted Bill of Rights for Manitoba.
> 3. What kind of Bill of Rights encompassing which categories of civil liberties (e.g. political, economic, legal,religious or egalitarian) would be appropriate in Manitoba.
> 4. Which restrictions, if any, ought to limit the most extensive expression and articulation of economic, religious, egalitarian and property rights in Manitoba.
> 5. A consideration of the impact of a Bill of Rights on the continuing effectiveness of the Parliamentary process, and the administration of justice in the Province.
> 6. A consideration of various models, proposals and drafts of Bills of Rights throughout Canada and the world.
> 7. If a Manitoba Bill of Rights be concluded to be desirable, needed and practical, a proposed draft of same.

In light of those terms of reference, and because of the fact that Manitoba has no integrated provincial Bill of Rights, the Commission decided that it could best approach its task by issuing for public comment and criticism a Working Paper which was frankly formulated as the case in

favour of a provincial Bill of Rights. In so doing, of course, the Commission did not foreclose any flexibility or objectivity in our ultimate recommendations to the Government of Manitoba on this subject in accordance with the stated terms of reference. The Working Paper was issued in December, 1974.

In order to generate public attention and response, therefore, the Commission considered that a *positive* case should be stated, with a model of a Bill of Rights. To have done otherwise would have been to limit or diminish the scope of philosophical response and technical commentary.

The Commission considers that it was our good fortune to have engaged the services of Professor Walter S. Tarnopolsky, B.A. (Sask.), A.M. (Columbia), LL.B., LL.M. (London) to assist us in this study. Prof. Tarnopolsky is the distinguished author of a definitive work entitled *The Canadian Bill of Rights** as well as of numerous published articles on the subject, and is a teacher of Constitutional Law and Administrative Law at Osgoode Hall Law School of York University. The contents of the Working Paper were produced by Prof. Tarnopolsky in close consultation with the Commission.

In past centuries, and even today in some lands, the paramount power in society was the might of an aristocracy. Where the unrestrained exercise of that might bore intolerably upon the populace they overthrew it where possible by revolution. In some instances the gathering force of the revolutionaries themselves was exercised without restraint and they perpetrated a tyranny as bad as that of the oppressors whom they replaced. In some instances, where there occurred a relatively orderly, evolutionary transfer of might, the paramount power came to rest in the hands of the bourgeois or the corporate elite. There it remains in some societies. In parliamentary democracies such as ours the legislative and executive power of the state is disposed every four or five years, and some times more frequently, by the adult citizenry. In constitutional terms, that power is as absolute as the legislative jurisdiction of the legislature or parliament itself, restrained or limited only by the constitution of the country. (As, for partial example, the distribution of powers expressed in Sections 91 and 92 of *The B.N.A. Act.)* In practical and political terms that power is further restrained by the usual hope of those who wield it, not to be deprived of it by a dissatisfied electorate at the next election. In this regard it has often been said that new governments do not so much win elections as existing or 'old' governments actually defeat themselves.

A period of four or five years in an individual's lifetime is not an insignificant time when a new law, or a new application of an old law infringes civil rights. But the number of such individuals and their friends and relations may not be sufficient to make any impact in the electoral process. On the other side of the process, those who wield power may be so

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*The Carswell Company Limited, Toronto, 1966. Second Revised Edition, McClelland and Stewart Limited, Toronto, 1975.

convinced of the righteousness of their administration and legislation that they cannot easily or often foresee the day when they will, in effect, 'dis-elect' themselves. Or they may fail to appreciate that the increasing governmental powers, which they arrogate through legislation, will someday be wielded by their opponents and inevitable successors. When a government has, in effect, got itself dis-elected it must be apparent that it had already lost its popular support some time before the end of its term of office. But it could be easy enough, history teaches, for those who govern to persuade themselves that yesterday's majority-might can acceptably suppress today's minority-right.

A whimsical but not imperceptive view suggests that citizens dealing with their government are like chickens dancing with an elephant. Some are likely to be injured, and perhaps unintentionally. It is only when and if the chickens can get sufficiently organized to act in unison that they could ever hope to move the elephant in a desired direction. They need something to restrain and guide dancing elephants even though, from time to time, they can choose a new, more tractible elephant.

Civil libertarians say that a civilized self-respecting democracy needs built-in countervailing restraints on the power of modern elephantine government and its agencies. They urge that the power which the people periodically confer on those whom they elect should not be absolute, but restrained and modified by concepts of individual freedoms and rights, which need protection lest they be negligently trampled.

Those who see all the protection which anyone needs inherent in free elections say that the restraints effectuated by a Bill of Rights are unnecessary. They urge that one should not fetter the democratic process by placing any such restraint on the actions of the people's elected representatives. Within its jurisdictional sphere, they assert, the Legislature is supreme: that is where the people's mandate is given — and not to the judiciary. According to this theory the notion of a Bill of Rights is contrary to parliamentary supremacy.

In somewhat stark and abbreviated form, these are the main considerations of the question: Should the province have a Bill of Rights? We answer: "Yes", for the reasons elaborated in the following pages. One kind of a Bill of Rights is recommended in this Report as Appendix A. Others have been studied, and have been found meritorious in some respects and wanting in others.

There are people who justifiably, say they cannot answer the main question without knowing what kind of Bill of Rights is proposed. For example, the model Bill attached to this Report makes no provision for securing property rights or the right to work. Equally, it does not attempt to secure any right to provincial welfare assistance, medical care or any of the other economic benefits provided by the modern welfare state. Some explanation for this posture is expressed in the material which follows.

Considerable discussion in the Commission was generated by Section 11 of the model Bill which is appended. That section is a revised formulation. It is not intended to restrict people's right to arbitrate or conciliate their

contractual differences by any kind of tribunal which they may freely choose to have. Nor is it intended to convert every intra-office, or business, commercial, employment, tenure or opinion survey enquiry into a full-dress judicial proceeding — not because administrative convenience is more important than justice — but because full-dress proceedings may not always be just or practical in terms of time and expense. The proposed provisions are intended, despite any inconvenience however, to ensure natural justice in the proceedings before every non-consensual tribunal to which people must by law resort or respond. If an arbitration board should correspond to that description, then the provisions would apply to its proceedings. On the other hand, many arbitrations, if not all, are intended to dispose summarily and finally of the disputes they have to resolve. For that reason, there is a separate provision for appeal.

The provision of at least one appeal on the merits of any adjudication puts again the concepts of justice and efficiency into competitive juxtaposition. Our explanation of the inclusion of such a provision is expressed in Chapter IV, dealing with the content of a Bill of Rights.

Some explanation is expressed, in Chapter V, for the creation of a Manitoba Commissioner of Civil Liberties, in Part II of the model Bill. After discussion, the Commission decided to leave the reference in the model Bill. As may be perceived from the text concerning the proposed Commissioner, we are reluctant to recommend the creation of yet another public office or board especially if the projected duties could be adequately performed by an existing body or official.

Our Working Paper was distributed directly to a mailing list of 250 recipients. Publicity accorded to its release generated approximately 150 requests for copies beyond the mailing list. Few responses were received by us. One may wonder whether near silence on the part of the public indicates assent or apathy. Perhaps the volume and complexity of the study dissuaded people from responding.

Although small in quantity, however, the responses we received were significant in quality. They treated the subjects of parliamentary sovereignty, the environment, freedom of information, the power of a municipality to restrict vehicular access to private property on a seasonal basis, and arbitration procedures. We responded to all those who wrote to us.

Two of the responses should be mentioned here. The subject of parliamentary sovereignty was raised by a correspondent who urged us to eliminate our recommendation for a "notwithstanding" clause in any enactment which would be intended by the Legislature to override the Bill of Rights. We explained that the provision was included because we think it neither possible nor right to bind the Legislature in circumstances where the Bill of Rights is not constitutionally entrenched. The "notwithstanding" clause which we do recommend in Part II of the proposed Bill of Rights is a kind of local, provincial entrenchment and would be important in making people conscious of civil liberties. It would help to reify the notion of responsible government.

The correspondent who called for provisions guaranteeing freedom of information will be more successful in generating further response and study on our part than the one mentioned above. The veritable explosion of information about almost every aspect of the individual's life and the easy access to that information which is made possible by sophisticated storage and retrieval systems make this subject a matter of current and future concern. We have accordingly decided to undertake a study of this subject which will likely conclude with a recommendation favouring the enactment of a proposed Freedom of Information Act. Indeed, such a study is currently being organized by us.

THE CASE FOR A PROVINCIAL BILL OF RIGHTS

CHAPTER I

TRADITIONAL ANGLO-CANADIAN ATTITUDES TOWARDS WRITTEN BILLS OF RIGHTS

One could not start this Chapter with a better illustration of the total rejection of written Bills of Rights by nineteenth century English writers than Bentham's unqualified assertion:[1]

> Look to the letter, you find nonsense — look beyond the letter, you find nothing . . . there are no such things as natural rights — no such things as natural rights opposed to, in contradistinction to legal . . . Natural rights is simple nonsense: natural and imprescriptible rights, rhetoric nonsense — nonsense upon stilts. But this rhetoric nonsense ends in the old strain of mischievous nonsense: for immediately a list of these pretended natural rights is given, and those are so expressed as to present to view legal rights.

Perhaps the best summation of the traditional British view of written Bills of Rights was provided by Dicey in 1885. The following extracts are from the most recent edition of his classic work on *Introduction to the Study of the Law of the Constitution:*[2]

> There is in the English Constitution an absence of those declarations or definitions of rights so dear to foreign constitutionalists. . . . [T]he relation of the rights of individuals to the principles of the constitution is not quite the same in countries . . . where the constitution is the result of the legislative act, as it is in England, where the constitution itself is based upon legal decisions. In . . . countries possessing a constitution formed by a deliberate act of legislation, you may say with truth that the rights of individuals to personal liberty flow from or are secured by the constitution. In England, the right to individual liberty is part of the constitution because it is secured by the decisions of the courts . . . . [T]he question whether the right to personal freedom or the right to freedom of worship is likely to be secure does depend a good deal upon the answer to the inquiry whether, the persons who consciously or unconsciously build up the constitution of their country begin with definitions or declarations

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[1] J. Bentham, *Anarchical Fallacies:* Works, V. II, 497, 500 and 501, referred to by S.A. de Smith, "Fundamental Rights in the New Commonwealth" (1961) 10 I.C.L.Q. 83, 84.

[2] London: Macmillan, 10th Edition, 1965, 197-199.

of rights, or with the contrivance of remedies by which rights may be enforced or secured. Now, most foreign constitution-makers have begun with declarations of rights. For this, they have often been in nowise to blame. Their course of action has more often than not been forced upon them by the stress of circumstances, and by the consideration that to lay down general principles of law is the proper and natural function of legislators. But any knowledge of history suffices to show that foreign constitutionalists have, while occupied in defining rights, given insufficient attention to the absolute necessity for the provision of adequate remedies by which the rights they proclaimed might be enforced .... [T]he Englishmen whose labours gradually framed the complicated set of laws and institutions which we call the Constitution, fixed their minds far more intently on providing remedies for the enforcement of particular rights or (what is merely the same things looked at from the other side) for averting definite wrongs, than upon any declaration of the Rights of Man or of Englishmen. The Habeas Corpus Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty.

The following extract from Dicey perhaps explains best the traditional view of Anglo-Canadian lawyers on the efficacy of the English approach as compared to that of countries with written Bills of Rights:[3]

> The fact ... that in many foreign countries the rights of individuals, *e.g.* to personal freedom, depend upon the constitution, whilst in England the law of the constitution is little else than a generalisation of the rights which the courts secure to individuals, has this important result. The general rights guaranteed by the constitution may be, and in foreign countries constantly are, suspended. They are something extraneous to and independent of the ordinary course of the law .... [English lawyers] can hardly say that one right is more guaranteed than another. Freedom from arbitrary arrest, the right to express one's opinion on all matters subject to the liability to pay compensation for libellous or to suffer punishment for seditious or blasphemous statements, and the right to enjoy one's own property, seem to Englishmen all to rest upon the same basis, namely, on the law of the land. To say that the "constitution guaranteed" one class of rights more than the other would be to an Englishman an unnatural or a senseless form of speech .... The matter to be noted is, that where the right to individual freedom is a result deduced from the principles of the constitution, the idea readily occurs that the right is capable of being suspended or taken away. Where, on the other hand, the right to individual freedom is part of the constitution because it is inherent in the ordinary law of the land, the right is one which can hardly be destroyed without a thorough revolution in the institutions and manners of the nation.

[3] *Ibid.*, 200-201.

A similar view was expressed in the 1930's by that eminent constitutionalist, K.C. Wheare, in the following terms:[4]

> The ideal Constitution . . . would contain few or no declarations of rights, though the ideal system of law would define and guarantee many rights. Rights cannot be declared in a Constitution except in absolute and unqualified terms, unless indeed they are so qualified as to be meaningless.

Perhaps the best known statement of the most extreme evolution of the Diceyan view is to be found in the report of the Simon Commission on the Constitution of India which stated:[5]

> Many of those who came before us have urged that the Indian Constitution should contain definite guarantees for the rights of individuals in respect of the exercise of their religion and a declaration of equal rights for all citizens.
>
> We are aware that such provisions have been inserted in many constitutions, notably in those of the European States formed after the War. Experience, however, has not shown them to be of any great practical value. Abstract declarations are useless, unless there exists the will and the means to make them work.

This view was stated even more strongly by the Joint Select Committee of Parliament on Indian Constitutional Reform, whose report led to the Government of India Act, 1935:[6]

> [A] cynic might indeed find plausible arguments, in the history during the last ten years of more than one country, for asserting that the most effective method of ensuring the destruction of a fundamental right is to include a declaration of its existence in a constitutional instrument. But there are also strong practical arguments against the proposal, which may be put in the form of a dilemma: for either the declaration of rights is of so abstract a nature that it has no legal effect of any kind or its legal effect will be to impose an embarrassing restriction on the power of the legislature and to create a grave risk that a large number of laws may be declared invalid by the Courts because inconsistent with one or other of the rights so declared.

Subsequent supporters of the Diceyan view, however, failed to note that Dicey was arguing that liberties were as well secured in England as in countries with written Bills of Rights. He was concerned with emphasizing the importance of providing for remedies by which rights might be enforced or secured, rather than relying upon mere proclamations without remedies.

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[4] *Modern Constitutions,* Oxford University Press, 1951, (reprinted 1962), 71.

[5] Simon Commission Report, Cmd. (1930), v. II, 22-3.

[6] Joint Select Committee Report, H.L. 6, H.C. 5, 1933-34 Session, 216.

Moreover, he did not dismiss the various Bills of Rights in the constitution of the United States, and the constitutions of the separate states as being without value. The fact that Dicey did not reject Bills of Rights totally, and that he felt that they could be effective, can be illustrated in the following passage:[7]

> Nor let it be supposed that this connection between rights and remedies which depends upon the spirit of law pervading English institutions is inconsistent with the existence of a written constitution, or even with the existence of constitutional declarations of rights. The Constitution of the United States and the constitutions of the separate States are embodied in written or printed documents, and contain declarations of rights. But the statesmen of America have shown unrivalled skill in providing means for giving legal security to the rights declared by American constitutions. The rule of law is as marked a feature of the United States as of England.

It is interesting to note as well that Dicey drew the distinction between the English Bill of Rights and Petition of Rights, and the American Bills of Rights, on the one hand, from foreign declarations of rights on the other, by stating that the English proclamations were not so much[8]

> . . . "declarations of rights" in the foreign sense of the term, as judicial condemnations of claims or practices on the part of the Crown, which are thereby pronounced illegal. It will be found that every, or nearly every, clause in the two celebrated documents negatives some distinct claim made and put into force on behalf of the prerogative. No doubt the Declarations contained in the American Constitutions have a real similarity to the continental declarations of rights. They are the product of eighteenth century ideas; they have, however, it is submitted, the distinct purpose of legally controlling the action of the legislature by the Articles of the Constitution.

As stated earlier, Dicey was not arguing against written Bills of Rights, particularly in countries with written constitutions, as much as he was concerned with showing the equally or greater importance of remedies, in the absence *or* presence of a written Bill of Rights, and with showing that the largely unwritten English Constitution assured rights and liberties as well, if not better than constitutions with written Bills of Rights. He was speaking of England, and not of countries with written constitutions like the United States, or for that matter, Canada.

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[7] *Supra,* footnote 2, 199-200.

[8] A.V. Dicey, *Introduction to the Study of The Law of The Constitution,* London: Macmillan, 10th edition, 1965, fn. 1 at p. 200.

In any case, the rather ironic sequel to the strong rejection of a written Bill of Rights for India by the Simon Commission, and the special Joint Parliamentary Committee on Indian Constitutional Reform, was that when the Indians themselves drew up their constitution in the period from 1947 to 1950, they adopted a written Bill of Rights. It is Part III on "Fundamental Rights", articles 12 to 35. They also included hortatory provisions on "Directive Principles of State Policy", which are comprised as Part IV, articles 36 to 51. Recent events in India could be said to have demonstrated that the less rights and freedoms are emplaced in the conscious determination of the people and the judiciary, the more easily can they be suspended, as Dicey perceived. It is too soon to make conclusive judgments of those events. Perhaps, too, the world is well into a new era in which authoritarian government is finding ever more favour for the age-old reasons of 'efficiency', 'progress' and, of course, 'security'.

By 1950, English constitutional lawyers were themselves involved in preparing the European Convention on Human Rights. And it was Winston Churchill, as early as 1948 who, in supporting the movement for European unity through the Council of Europe, suggested that "in the centre of our movement stands the idea of a Charter of Human Rights, guarded by freedom and sustained by law".[9]

The European Convention of Human Rights indicates the important change in English attitudes in several ways. They were actively involved in drafting the Convention. The Convention was not a mere declaration like the 1948 United Nations Universal Declaration of Human Rights, but implied an international commitment. It was binding upon the United Kingdom from the 8th of March, 1951, when the Convention was ratified. In the early years, the President of the European Court of Human Rights was Lord McNair, and the president of the European Commission of Human Rights was also British, Sir Claud H.M. Waldock.

Moreover, the European Convention on Human Rights became the model for the written Bill of Rights included in the Constitution of Nigeria, in 1960. Once again, the Nigerian delegates to the conference in London preparatory to the adoption of the constitution asked for a Bill of Rights, but initially the Colonial Office was not sympathetic. In fact, the Colonial Secretary is reputed to have said that if the delegates wished to put "God is love" in the constitution, they could do so, but not while he was in the Chair. He ridiculed some of the clauses of the proposed "Charter of Human Rights".[10] Subsequently, however, the Colonial Office appointed a Commission to draw up a constitution and it recommended the incorporation of a Bill of Rights because it "defines beliefs widespread among democratic countries and provides a standard to which appeal may be made by those whose rights are infringed".[11]

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[9] Quoted in *The Rights of the European Citizen,* Strasbourg: Council of Europe, 1961, p. 21.

[10] G. Ezejiofor, *Protection of Human Rights Under the Law,* London: Butterworths, 1964, 180.

[11] *Ibid.*, 181.

The ultimate irony was that after 1960, and the constitution drawn up for Nigeria, the United Kingdom constitutional lawyers probably gained greater expertise in the drafting of Bills of Rights through repetition than the constitutional lawyers of any other country, because Bills of Rights were included in the succeeding years for all the newly independent members of the Commonwealth including, amongst others, Kenya, Uganda, Sierra Leone, Malta, Jamaica, Trinidad and Tobago, and so on and so forth.

In Canada, the traditional Diceyan view prevailed at first. Although as early as 1945 members of the C.C.F. Party in Parliament submitted motions favouring the adoption of written Bills of Rights,[12] and John G. Diefenbaker, as early as 1945, and then at regular intervals thereafter,[13] these proposals were not adopted.

In May, 1947, a Joint Committee of the Senate and House of Commons on Human Rights and Fundamental Freedoms was set up to inquire into the feasibility of adopting a Bill of Rights for Canada. After canvassing Provincial Attorneys-General and Deans of Law Schools, the Committee concluded:[14]

> The Committee is of the opinion that to attempt to enact a Bill of Rights for Canada as a Federal statute would be unwise . . . . The power of the Dominion Parliament to enact a comprehensive Bill of Rights is disputed.

In 1950, the Senate of Canada set up a Special Committee on Human Rights and Fundamental Freedoms. After hearing some thirty-six witnesses in eight public sessions, the Committee concluded that a Bill of Rights in the *B.N.A. Act*, to be entrenched beyond the reach of the Provinces and in the Federal Parliament, would require an amendment by the United Kingdom Parliament, which would be an unwise surrender of sovereignty at a time when Canadians were asserting it. Therefore, the Committee recommended that such amendment await a future Dominion-Provincial Conference which might agree on a procedure for amending the constitution and in the interim recommended that:[15]

> As an interim measure, the Canadian Parliament adopt a Declaration of Human Rights to be strictly limited to its own legislative jurisdiction.

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[12] See for example, *Hansard*, 1945, 1900, Allistair Stewart, M.P.

[13] *Hansard*, 1945, 2455-61; 1946, 513; 1947, 3149 ff.; 1948, 28-46; 1952, 720; 1955, 894 ff.

[14] Special Joint Committee of the Senate and the House of Commons of Canada on Human Rights and Fundamental Freedoms, *Minutes of Proceedings and Evidence*, 211.

[15] Special Senate Committee on Human Rights and Fundamental Freedoms, 1950, *Minutes of Proceedings and Evidence*, 306.

However, the 1950 Dominion-Provincial Constitutional Conference failed to agree on a procedure to amend the *B.N.A. Act*, and nothing further was done by the Government to introduce Federal legislation by way of a Bill of Rights. It was not until Mr. Diefenbaker became Prime Minister in 1957, and after his second electoral victory in 1958, that he introduced the proposal for a federal Bill of Rights, which was finally enacted on August 10th, 1960.

The attitudes of Canadian constitutional lawyers at that time on the subject of a written Bill of Rights can be found in the proceedings of the Special Committee of the House of Commons on Human Rights and Fundamental Freedoms,[16] and in a special issue of the *Canadian Bar Review* in 1959, which contained a symposium of articles on the draft of the Bill of Rights submitted by Mr. Diefenbaker in 1958. These views will be summarized in the next section dealing with arguments for and against a written Bill of Rights.

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[16] Special Committee of the House of Commons on Human Rights and Fundamental Freedoms, *Minutes of Proceedings and Evidence*, 1960 (hereafter (1960) *Special Committee Proceedings.)*

CHAPTER II

MORE RECENT ARGUMENTS PRO AND CON A WRITTEN BILL OF RIGHTS

The traditional opposition of English constitutional lawyers to a written Bill of Rights has been picked up and expanded in Canada. Some of the arguments in opposition were raised at the time when the Canadian Bill of Rights was first mooted in late 1958 to 1960.[1]

Perhaps the most persistent and effective opponents of a written Bill of Rights to this very day are Dean Douglas A. Schmeiser[2] of the University of Saskatchewan, and Professor Donald V. Smiley[3] of the University of Toronto. The Honourable Mr. James C. McRuer, in his detailed study of Civil Rights,[4] gives a recent assessment which on balance comes to a negative conclusion on the matter of entrenchment, although not necessarily on the principle of a Bill of Rights.

The arguments against a written Bill of Rights can probably be summarized as follows:

(1) History shows that human rights and fundamental freedoms are not immutable; they are subject to change.

(2) Many of the countries which have included written Bills of Rights in their constitutions have ignored any such restrictions.

(3) English constitutional experience shows that Bills of Rights are not so effective for safeguarding rights and liberties as are practical remedies and the force of public opinion.

(4) A general definition of these values tends to limit them. They are better developed to meet changing needs through the provision of speedily available remedies.

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[1] See for example D.W. Mundell, Memorandum presented to the Council Meeting of the Canadian Bar Association in 1959 and printed in (1959) 37 *Can. Bar Rev.* 247, 251-52; A.M. Carter, letter to the editor, (1959) 37 *Can. Bar Rev.* 259; also see (1960) *Special Committee Proceedings;* for the submissions by the Canadian Bar Association, 107-8; Professor W.F. Bowker 138, 157-61; Professor O.E. Lang, 343-9; and J.B. McGeachy, "Will Rights' Bill Keep Us Free?", *The Financial Post,* No. 8, 1958.

[2] See his submission to the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence,* 3rd Session, 28th Parliament (hereafter (1972) *Joint Committee on the Constitution of Canada)* 49: 4-57 and his article "The Case Against Entrenchment of a Canadian Bill of Rights", (1973) 1 *Dalhousie Law Journal* 15.

[3] See his submissions to the (1972) *Joint Committee on the Constitution of Canada: proceedings,* 25:5-45.

[4] Report of the Royal Commission Enquiry Into Civil Rights, Report No. 2, Volume 4, Ontario: Queen's Printer, 1969.

(5) The federal power of disallowance provides all the protection needed against provincial encroachments, whereas Parliament will not infringe upon them except in times of emergency, and then even a Bill of Rights will not help.

(6) A Bill of Rights is a denial of the practical sovereignty of Parliament. Such a formidable change is not justified.

(7) A written Bill of Rights, when placed in the hands of the judiciary, gives them the power of deciding grave issues of policy. This is not only harmful to the judiciary, but it is the transference of a power from the legislature which is better suited to use it.

The arguments in favour of a written Bill of Rights, which were presented at the time the *Canadian Bill of Rights* was enacted,[5] and subsequently during the 1968 to 1971 constitutional debate,[6] can probably be summarized as follows:

(1) Protection and promotion of human rights and fundamental freedoms has now been recognized by the world community through the various declarations, covenants and conventions of the United Nations, and bind Canada as a signatory.

(2) A written Bill of Rights provides an effective standard by which the role of opposition and public opinion to test legislation can be enhanced.

(3) A written Bill of Rights has an educative value for citizens, civil servants, and legislators.

(4) The essence of a democratic society is that the majority rules. A written Bill of Rights at least makes the majority think twice before oppressively overruling the rights of minorities.

(5) Although even a written Bill of Rights will not stop a determined majority from ultimately having its way in a democratic society, at least the judiciary armed with a written Bill of Rights forces society to consider the rights of minorities — often unpopular minorities.

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[5] See D.W. Mundell, *supra,* footnote 1, 239-50; Submission of Professor F.R. Scott, *Proceedings and Evidence,* 1950, (hereafter (1950) *Special Senate Committee Proceedings)* 16-25; Professor A.R.M. Lower in (1960) *Special Committee Proceedings,* 316-319.

[6] See the submissions in (1972) *Special Joint Committee on the Constitution: proceedings,* Strayer, 3: 8-44 and 7: 8-12; Constitutional Sub-section, Ontario Branch of the Canadian Bar Association, 94: 22-34; Scott, 17: 11-13; and Tarnopolsky, 8: 7-35. Also see the Federal Government Proposal to the Constitutional Conferences issued under the name of the Honourable Pierre Trudeau, *Canadian Charter of Human Rights,* Ottawa; Queen's Printer, 1968.

(6) A written Bill of Rights does not preclude various institutions like the Ombudsman, or a Human Rights Commission, or other remedies like *Habeas Corpus*. In fact, a Bill of Rights should not be considered as a substitute for these, but as a supplement operating for other purposes in other ways.

It is not proposed to discuss all of the arguments pro and con separately, rather it is intended to summarize the arguments against a written Bill of Rights in five main points and to raise the arguments in favour in answer to these. This Report is intended to be "a case for a Provincial Bill of Rights", and that will be the object of this discussion. For the opposing views one should consult in greater detail the authorities which have been listed in the footnote references to those who are opposed.

Fundamental arguments against a Bill of Rights are:

(1) A Bill of Rights introduces rigidity into the Constitution.

(2) The history of countries like Nigeria and the Soviet Union show that Bills of Rights are not effective in protecting civil liberties.

(3) A Bill of Rights transfers the ultimate decision-making, on grave issues of policy, from the legislatures to the judiciary.

(4) A Bill of Rights is a denial of the sovereignty of Parliament.

(5) Specifically designed institutions and remedies are more effective than a Bill of Rights.

(1) A Bill of Rights Introduces Rigidity into the Constitution

It is quite true that our concepts of human rights and fundamental freedoms undergo constant change. In the nineteenth century, one might have asserted freedom of contract and right to property as being amongst the most fundamental of civil liberties. In this century, however, in order to promote equality of opportunity, in order to assure minimum standards of living, and minimum protections for the less fortunate, we have overridden both freedom of contract and right to property with such egalitarian civil liberties as equality of access to jobs, homes, and public places, minimum wages and maximum hours, prohibitions against child labour, and perhaps even, in the near future, a guaranteed annual income.

Nevertheless, the history of the interpretation of the United States Bill of Rights shows that the courts are able to adapt terms chosen at the end of the eighteenth century, and in the third quarter of the nineteenth century, to meet changing needs and in some cases, such as the civil rights of the black man, even ahead of the legislatures. Although it is true that for a long while in the field of what might be called the economic civil liberties, the American Supreme Court was not merely behind the legislatures in progressive thinking, but was an actual fetter upon reforms, on the other hand, they have humanized the criminal law and criminal procedures more effectively than did the legislatures. And again, as mentioned earlier, the United States Supreme Court after World War II forced the pace of

desegregation upon the legislatures of the South, and was ahead even of Congress. The rather sad history of the substantive due process interpretation, which dominated the thinking of the United States Supreme Court in the late nineteenth century until well into the third decade of the twentieth, clearly shows that a Bill of Rights should be so drafted as to minimize the possibilities of the judiciary interfering in economic and social welfare policy and decision-making.

(2) **The History of Countries like Nigeria and the Soviet Union Show that Bills of Rights are not Effective in Protecting Civil Liberties.**

It is true that the Soviet Constitution of 1936 included a Bill of Rights, but did not stop either the purges proceeding at that time or subsequent denials of fundamental liberties continuing to this day. It is true, also, that the Nigerian Bill of Rights did not prevent a civil war nor the suspension of the Bill of Rights during that time. (Indeed, as earlier mentioned, one wonders whether full civil rights will ultimately be restored in India.) However, it must be remembered that a Bill of Rights is no more sacrosanct than the constitution of which it forms a part. If the constitution is suspended during a period of civil war, as in Nigeria, a Bill of Rights can be ignored, overriden, or merely brushed aside. A Bill of Rights would be effective only where the constitution is respected.

It is spurious to raise the examples of Nigeria or the Soviet Union and apply them to a country which prides itself on being governed according to its constitution. If a constitution is not considered binding, neither will a Bill of Rights be so considered. On the other hand, if a constitution is respected: should the Bill of Rights be any less so? This is an argument on which no time should be wasted.

(3) **A Bill of Rights Transfers the Ultimate Decision-Making, on Grave Issues of Policy, From the Legislatures to the Judiciary**

This argument raises a fundamental question of which institutions should be the ultimate guardians of our civil liberties — the legislatures or the courts? The answer cannot simply be one or the other. Experience in the United Kingdom, the United States, and Canada shows that the essential conservatism of the judiciary, at least partly determined by the necessity of having to operate from case to succeeding case on the basis of precedent, results in the courts being opposed to radical change. Moreover, since the judiciary is selected from the Bar, and the Bar tends to be part of the establishment of any society economically and socially, as well as politically, judges tend to exhibit an inherent conservatism. Therefore, the record of the legislatures in all three countries on matters of social and economic reform have on the whole been far more progressive than the courts.

To some extent, especially in the United Kingdom and in Canada, although less so in the United States, the legislatures have tended to be more progressive than the courts with respect to the egalitarian civil liberties.[7] Thus, in the United Kingdom and Canada, special human rights legislation, and enforcement of it by full-time Human Rights Commissions, has been found to be necessary in the face of judicial decision which have upheld acts of discrimination.

However, even in this area, the decisions of the Courts were not always opposed to the development of the egalitarian civil liberties. Thus, for example, as early as 1945 one Ontario court[8] held racially restrictive covenants to be contrary to public policy, while the Supreme Court of Canada invalidated them on other grounds.[9]

In the United States, as indicated earlier, the decision in *Brown v. Board of Education*[10] heralded a new era of desegregation, despite the objection of several legislators, and even well in advance of the action of Congress in the Civil Rights Act of 1964. In this field, the Supreme Court of the United States provided Congress with the justification and the incentive for legislation to protect and promote human rights.

However, it is in the field of the political civil liberties and the legal civil liberties that the need for judicial review of legislative and administrative action, based upon a written Bill of Rights, appears most obvious. This will be discussed more fully at the end of this Chapter, but suffice it to say that without a Bill of Rights the main restraint on Parliament from passing oppressive legislation is the possibility of defeat in the House of Commons, or at the next election. A government with a secure majority, especially if it acts well in advance of the next election, and more particularly when those who might suffer are a minority, can get Parliament to enact any legislation it wishes. The remedy available is at best slow, and at worst unavailable to those who might suffer.

Moreover, in the field of legal civil liberties we are concerned at least as much, if not more, with the administrative, not the legislative process. Parliament cannot and, except to a very limited extent, does not even try to regulate delegated decision-making. This rule has been assumed by the Courts as part of their inherent jurisdiction, or is assigned to special review or supervisory tribunals. If such a power of review and supervision is already well developed and accepted in many areas of administrative law, it is far more obviously applicable to review and supervision of the administration of the criminal process, to which a Bill of Rights would apply.

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[7] See for example, *Christie v. York Corporation* [1940] S.C.R. 139; *Loew's Montreal Theatres v. Reynolds* (1921) 30 Q.R.K.B. 459 (Que. Q.B.); *Franklin v. Evans* (1924) 55 O.L.R. 349 (Ont. H.C.); *King v. Barclay and Barclay's Motel* (1960) 31 W.W.R. (Alta. D.C.):— dismissed without reasons, (1961) 35 W.W.R. 240 (Alta. C.A.).

[8] *Re Drummond Wren* [1945] O.R. 778 (H.C.).

[9] See the Supreme Court decision in *Noble and Wolf v. Alley* [1951] S.C.R. 64.

[10] (1954) 347 U.S. 483.

(4) A Bill of Rights is a Denial of the Sovereignty of Parliament

This may be true where a Bill of Rights is entrenched. However, since the matter of entrenchment will be discussed in the next section, suffice it to say here that even an entrenched Bill of Rights, requiring a special amendment procedure, does not necessarily deny or contravene parliamentary sovereignty, but merely provides certain specific constitutional procedures for the exercise of the sovereignty of Parliament. In any case, let us assume that a written Bill of Rights, entrenched in the Constitution, does contravene parliamentary sovereignty. Does this mean that this doctrine of the supremacy of Parliament could never be changed? It is true that through the preamble to the *B.N.A. Act* we are to have a "Constitution similar in principle to that of the United Kingdom", but similar in principle does not mean that it is identical. For one thing, surely the evolution of the Constitution is accepted as a possibility in the United Kingdom. If so, why not here? Otherwise, our Constitution, especially the unwritten part of it, would be frozen as of 1867, and we know that this is not so. Second, ours is a federal state, and to that extent parliamentary sovereignty in Canada cannot be the same as in the United Kingdom. Even Dicey, the foremost proponent of parliamentary sovereignty in the United Kingdom, asserted that in a federal state the Constitution is "the immutable law of the land", and "the Courts inevitably become the interpreters of the Constitution".[11]

Even apart from these arguments, however, is the question whether the principle of parliamentary sovereignty, which was developed during the seventeenth century to justify curbing the power of the Stuart kings of England, is so sacrosanct that the people cannot decide today that it is time for a modification? Can one not argue that what suited the needs of seventeenth century England does not necessarily suit twentieth century Canada?

It must be noted in the time since the seventeenth century, Parliament has itself become Cabinet-dominated. In the contemporary context parliamentary sovereignty amounts to executive sovereignty, which can be as arbitrary as that of the absolute monarchies of the seventeenth century. Just as parliamentary sovereignty was a curb on the absolute monarchy of the early seventeenth century, so a written Bill of Rights could be an expression of the curb on the Cabinet-dominated Parliament by the sovereignty of the people expressed through the rule of law embodied in a Bill of Rights.

Somewhat related to the argument that a written Bill of Rights is a denial of parliamentary sovereignty is the argument that it is a republican innovation inconsistent with the British monarchical-parliamentary system. This argument overlooks the fact that the United Kingdom has a Magna Carta as well as a Bill of Rights, and an Act of Settlement. Although these are not entrenched in the sense that the United States' Bill of Rights is entrenched against the ordinary amending procedure of the Legislature, they

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[11] *Supra,* Chapter I, footnote 2, 167-8.

are entrenched by more than seven hundred years of tradition kept by a very small, closely-related, homogeneous elite. Moreover, since 1950 India has had a constitution which has retained fully the British parliamentary system while yet having a written Bill of Rights. And finally, as mentioned earlier, since 1947 British constitutional lawyers have drafted more Bills of Rights than have the lawyers of any other country. In addition, the United Kingdom helped draft the European Convention of Human Rights, and has bound itself to its terms by signing and ratifying the Convention.

Dean Schmeiser argues further[12] that a disadvantage of judicial review is the loss of political experience. He urges that it is good for society to become involved in social questions and to seek solutions for them, rather than to rely upon the courts. In effect, this is an argument that if, whether through lack of wisdom, or through hasty judgment, or merely through changing circumstances, legislation proves to be unwise or arbitrary, one must wait for the action of Parliament. It overlooks the fact that the civil liberties issues with which Bills of Rights are concerned are often not ones to catch the popular imagination. It may be that the people whose civil liberties suffer are a small, or unpopular, minority. It may be that the issues are not such as concern the overwhelming majority. All lawyers know that amendments to what might be called "lawyers' law" (and many of the issues in the field of legal civil liberties are within this category) are not exactly great vote-getters.

In any case, a written Bill of Rights, even during the height of the substantive due process interpretation in the United States, does not mean an emasculation or total destruction of the legislative process. One might wonder whether the political learning experience, and the involvement of society in burning social questions, is not more intense in the United States where there has been some struggle between the Supreme Court and the legislatures, than in Canada where without a written Bill of Rights there is no basis upon which society could challenge, much less learn about, laws considered unwise or oppressive, except several years later at an election. Moreover, when people vote for one party or another the civil liberties position of the parties is only one fact of many which determines the choice. Mr. Diefenbaker was not defeated in 1963 because he had given Canada a Bill of Rights, but despite that accomplishment.

(5) Specifically-designed Institutions and Remedies are More Effective than a Bill of Rights

This is the traditional argument of Dicey and his followers. Dean Schmeiser has argued[13] that rather than an entrenched Bill of Rights one should establish federal and provincial Human Rights Commissions to reduce discrimination, and federal and provincial Ombudsmen to settle disputes between citizens and government. He suggests establishing active law reform commissions to scrutinize laws to ensure that they are consonant with our ideals of freedom and justice.

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[12] See, *supra,* Chapter II, footnote 2.

[13] "Disadvantages of an Entrenched Canadian Bill of Rights" (1968) 33 *Sask. L. Rev.* 249, 252.

The simple answer to this argument is that it pre-supposes that one must choose between a written Bill of Rights on the one hand, and specific remedies or institutions on the other. There is just no reason for this, and both the United States and India, with written Bills of Rights, have not been precluded from supplementing them with specific statutes providing necessary remedies, or specific institutions like Human Rights Commissions to promote certain of the civil liberties. No one would argue that the egalitarian civil liberties could be effectuated merely by a written Bill of Rights. The active involvement of administrative agencies to promote education, to both receive and initiate complaints, to attempt to achieve settlements, and to enforce a policy of non-discrimination, is absolutely necessary.

An argument in favour of a written Bill of Rights does not preclude the need for specific provisions not only to enforce the written Bill of Rights itself, but to enforce and promote those civil liberties like the economic civil liberties, which are not enforceable in the usual way in the regular courts. Even with respect to those civil liberties which are included in a Bill of Rights, attention must be given to additional remedies. Moreover, the Bill of Rights itself could contain enforcement provisions, which will be discussed in Chapter V of this Report.

Why a Bill of Rights?

In closing this Chapter, it is necessary to make some further suggestions regarding the efficacy of a Bill of Rights. Some of these have been developed in the course of discussing the arguments of those who are opposed. These will not be repeated. However, there are others which could be added.

In the first place, a written Bill of Rights has an educative value. It promotes consciousness of civil libertarian values. The common law foundations of the fundamental freedoms and protections for the citizen from arbitrary officialdom are difficult enough to explain even to university students, much less the students of our primary and secondary schools. A written Bill of Rights provides effective guidance for school children, and it is at this stage that civil libertarian values should be inculcated. Moreover, there is a tendency for different people to make different lists. At times it seems that whatever is important is asserted as a right or liberty. A Bill of Rights constitutes an authoritative declaration as to what a society agrees upon as being of fundamental importance.

One should not overlook as well the importance of a written Bill of Rights as a guidance for the public service and for politicians. The existence of a written Bill of Rights (particularly with a provision such as that in s. 3 of the *Canadian Bill of Rights* requiring the Department of Justice to scrutinize all legislation submitted to Parliament, and all delegated legislation, to see that it accords with the Bill of Rights), ensures that these principles are continually kept in mind both by those who draft legislation and by those who have to administer it. For the politician who believes legislation to be excessively oppressive or arbitrary, reliance on a written Bill of Rights is a much more effective aid than merely characterizing the

proposed legislation as being arbitrary or oppressive. One should recall the rise and fall of Police Bill 99 in the Legislature of Ontario in 1964 to see how effectively the opposition parties and the news media referred to the presence of a written Bill of Rights, even though it was not applicable to Ontario law, as a standard by which the proposed legislation failed.

Besides the educational benefit for the citizen, for the civil servant, and for the politician, one cannot overlook the effectiveness of a written Bill of Rights particularly in the field of the political civil liberties and the legal civil liberties. As far as the first are concerned since, in the absence of a written Bill of Rights, legislatures are supreme within their jurisdictional limits, there is no limitation on the rights that can be withdrawn or the liberties which can be contravened. In our democratic parliamentary system it is the majority that rules, and if it chooses to enact legislation which is oppressive towards a minority, the parliamentary system does not provide the minority with the means of stopping such legislation.

In our history we have had many examples. At various times the various legislatures have enacted legislation denying the franchise, providing for segregated schools, denying admission to the professions, denying access even to menial occupations, and restricting the areas where people could live. More recently we have had such examples as the expulsion of the Japanese-Canadians from the west coast, the denial of fundamental protections to those accused of spying in 1945 and, of course, we have had at least two outstanding examples of provincial legislatures and provincial administrators who had to be restrained by the courts from undue restrictions on the fundamental freedoms.

The first of these is, of course, the attempt by the Legislature of Alberta in the 1930's to regulate newspapers by requiring them to print government rebuttals of stories carried, and to reveal their news sources. Although in the famous *Alberta Press Bill* case[14] only three of the six judges of the Supreme Court of Canada found the legislation to be invalid (as contravening freedom of speech and of the press in such a way as to interfere with the workings of the parliamentary system brought into Canada through the preamble to the *B.N.A. Act)*, and although the Judicial Committee of the Privy Council held the legislation to be invalid on other grounds, we have nevertheless a leading illustration of how the courts can restrain legislatures from excessive interference with civil liberties.

The other incident involving what the courts considered to be excessive interference by a legislature, and provincial officials, with the civil liberties of a minority, occurred in Quebec under the regime of Premier Maurice Duplessis in his struggle with the Witnesses of Jehovah. In the case of *Boucher v. The King*[15] the Supreme Court, by a restrictive definition of sedition, protected the right of Jehovah's Witnesses to make strong attacks

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[14] [1938] S.C.R. 100.

[15] [1951] S.C.R. 265.

on the religion of the majority. In three famous private actions — *Chaput v. Romain*,[16] *Lamb v. Benoit*,[17] and *Roncarelli v. Duplessis*[18] — the Supreme Court granted damages to individuals aggrieved by arbitrary and illegal actions of administrators in the Province of Quebec, including the Premier. Then, in the famous *Padlock* case *(Switzman v. Elbling)*[19] the Supreme Court invalidated a Quebec law which purported to forbid the dissemination of "bolshevism" and "communism". The Supreme Court held that the suppression of ideas was essentially within the criminal law, and so came within the jurisdiction of Parliament and not the provincial legislature. In *Saumur v. The City of Quebec*[20] the Supreme Court, by a bare majority, held that prior restraint arbitrarily exercised by the Chief of Police with respect to permission to distribute religious pamphlets in the streets was not valid. Although only four members of the court found that this contravened freedoms within the jurisdiction of Parliament, and the fifth member of the majority based his decision upon the *Quebec Freedom of Worship Act*, it is important to note that the result was to restrict excessive interference with freedom of religion.

[Apart from the civil liberties issues involved, one should note as well that the Supreme Court would have been moved to protect the individuals concerned, and could only do so by finding that the matter was within the jurisdiction of Parliament. Provincial legislatures might well contemplate whether in the presence of a provincial Bill of Rights the federal power might not have been expanded quite so far.]

With respect to the political civil liberties, it must be obvious that our democratic system of government operates through the rule of the majority. It is in the nature of governments responsible to democratically-elected legislatures to consider the public interest over private interests. This will continue to grow as governments become more involved with the welfare of society. And this is as it should be. However, in this process it is natural to prefer efficiency to delays in procedures which involve protective devices to ensure the maximum possible individual liberty. Therefore, a Bill of Rights provides a balance by protecting the interests of minorities, often unpopular minorities, for whom there is little sympathy in the community.

In the field of legal civil liberties the role of the courts in protecting the rights of the subject becomes even more apparent. While no one can deny the role of Parliament in defining legal civil liberties through the Criminal Code provisions and appropriate protections in criminal procedure, it must be obvious that no definition covers every situation. Violations of civil liberties often become obvious only on a case by case basis. Moreover, the

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[16] [1955] S.C.R. 834.

[17] [1959] S.C.R. 321.

[18] [1959] S.C.R. 121.

[19] [1957] S.C.R. 285.

[20] [1953] 2 S.C.R. 299.

Criminal Code and our rules of criminal procedure do not cover all aspects of police behaviour and enforcement of the criminal laws. It is only the judge, who has all of the facts of the case presented to him, who is in a position to assess whether the procedures followed by the police were fair to the accused, and whether in the circumstances there is evidence of such lack of fair procedure as to convince him to invalidate the proceedings, either by acquitting the accused, or excluding evidence obtained pursuant to methods contrary to those required by a written Bill of Rights.

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In conclusion, it should be recognized that if a government or a legislative body is prepared to act unconstitutionally, and if neither the courts nor the electorate are willing to stop it, a written Bill of Rights will not stand in the way. However, in a country which strives to live under the rule of law, a written Bill of Rights can remove contentious issues from the heat of legislative debate to the more calm and detached atmosphere of a court of law. If a court of law should prove to be wrong, and if the issue is important enough to the country, even an entrenched Bill of Rights can be amended. In the meantime, however, at least the decision will be openly debated, hopefully soberly considered, and enacted with full knowledge of the competing claims, and assessed in the light of civil libertarian values which the community agrees upon as a fundamental basis of its system of government.

CHAPTER III

PROVINCIAL CONSTITUTIONS AND THE QUESTION OF ENTRENCHMENT

When contemplating the adoption of a Bill of Rights, one has to consider alternatives as to form, content and constitutional status. In Chapter IV of this study the matter of form and content will be discussed; in this Chapter alternatives as to constitutional status will be considered.

(1) What is a "Constitution"?

When trying to define a "constitution", it should be kept in mind that the term has been used in two senses. On the one hand the term "constitution" has been used in the narrow sense of one document, or a few closely-related documents, which contain a selection of the legal rules determining the government of the country. This is the sense in which the term is used when referring to a "constitution" such as that of the United States of America, or that of the countries of continental Europe. The term has been used in a second and wider sense when referring to the "constitution" of the United Kingdom. In this sense a "constitution" describes the whole system of government, and is the collection of rules which establish and regulate or govern the government. K.C. Wheare describes the rules which comprise a constitution in the following terms:[1]

> These rules are partly legal, in the sense that courts of law will recognize and apply them, and partly non-legal or extra-legal, taking the form of usages, understandings, customs, or conventions which courts do not recognize as law but which are not less effective in regulating the government than the rules of law strictly so called.

Although Wheare goes on to use the narrower definition of "constitution" as being applicable to the countries of the Commonwealth, and uses the wider definition as being applicable only to the United Kingdom, this is not a distinction which seems to be justified in the case of Canada. It will be seen in the discussion which follows that the main instrument in our constitution, i.e., the *British North America Act*, does not embody most of the rules defining the Government of Canada, but merely those determining the distribution of powers in our federal constitution.

The wider definition of a "constitution" is as applicable in Canada as it is in the United Kingdom. Thus, R. MacGregor Dawson[2] points out that the *B.N.A. Act* "does not pretend to be a comprehensive document", and that there are "very many vital things about the Government of Canada and the

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[1] K.C. Wheare, *Modern Constitutions*, 2nd ed., Oxford Paperbacks, University Series, 1967, 1.

[2] *The Government of Canada*, 3rd ed. rev., University of Toronto Press, 1961, Part II, c. IV.

provincial governments which are not stated or even hinted at in the *B.N.A. Act*", and even those which are, frequently "given in such fashion that they become ambiguous and sometimes misleading".[3] He points out that our "constitution" includes the *B.N.A. Act*, as well as customs and usages, conventions, and also[3a]

> embraces principles of the common law as defined by the courts; British and Canadian acts of Parliament and order in council; judicial interpretations of the written constitution and other laws; the rules and privileges of Parliament; and many other habitual and informal methods of government in addition to those noted above. All these, many of them (despite the misleading term 'unwritten') committed to writing, others in much more intangible and elusive form exert a powerful influence on constitutional practice.

(2) What is the Constitution of the Province of Manitoba?

Therefore, unlike the constitutions of the countries of continental Europe, or the United States, or India, our constitution like that of the United Kingdom, is not only unwritten, in the sense that much of it is determined by usages, customs and conventions, but also in the sense that the written part of it is not to be found merely in one document. In our case, unlike the United Kingdom, we do have a *B.N.A. Act* (more correctly the *B.N.A. Acts*, 1867 to 1965), which does create a Parliament and some provincial legislatures (although not all), and does provide for a distribution of legislative authority; but on the other hand it is silent on some of the most important features of our constitution.

For example, the *B.N.A. Act* does not mention the Prime Minister, or the Cabinet, or political parties, or the Loyal Opposition, or responsible government. The executive branch of our government is largely unreferred to. In fact, not only are the legislatures and executives of the provinces which joined Canada after 1867 dealt with in separate Acts of the Parliament of Canada, but even in the case of two of the constituent provinces, i.e. Nova Scotia and New Brunswick, the *B.N.A. Act* merely provides for the continuation of the executive and legislative branches of government existing in those provinces at the time of Confederation.

The constitution of the courts, of all other officers judicial, administrative and ministerial, are not explicitly dealt with, except for the few restrictions in ss. 96 to 101 of the *B.N.A. Act*. Instead, s. 129 provides for their continuation as they existed in the constituent provinces before Confederation. Even the ultimate court of appeal, the Supreme Court of Canada, is only contemplated by s. 101 of the *B.N.A. Act*, and is constituted by a separate Act of the Parliament of Canada.

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[3] *Ibid.*, 67.

[3a] *Ibid.*, 70.

The *Supreme Court Act* is not the only statute which establishes or affects branches of government, or even governments themselves, and is not yet part of the *B.N.A. Act.* As far as the sovereignty of Canada as an independent country is concerned, the *Statute of Westminster*, 1931, is even more important than the *B.N.A. Act.* It relieved Canada from the fetters of the *Colonial Laws Validity Act*, 1865, enabling the legislatures and Parliament of Canada to enact legislation which could contravene any Imperial legislation thereto applying, except for the *B.N.A. Acts*, 1867 to 1931. (This would probably be interpreted today as *B.N.A. Acts* 1867 to the present.) Moreover, at the federal level there are many Acts dealing with organs of governments which are ordinary statutes of Parliament, but which constitute part of our "constitution" as that term is used in the wider sense, e.g., the *Governor-General's Act*, the *House of Commons Act*, the *Canada Elections Act*, etc., etc. Moreover, there are other statutes which are not part of the *B.N.A. Act* as such, which created provinces and provided them with their first governments. Thus, Alberta and Saskatchewan were constituted as provinces by federal statutes known by the respective names of these provinces. Manitoba was constituted by the Parliament of Canada through the *Manitoba Act*, and a special *B.N.A. Act*, 1871, was enacted by the Imperial Parliament to remove any doubt as to the validity of this federal statute.

One need not continue detailing the many examples which indicate that even the written parts of our constitution are not all to be found in the *B.N.A. Act.* When one speaks, then, of the "constitution" of Canada or of any province it is totally erroneous to point merely to the *B.N.A. Act.*

If one were to define the written Constitution of Manitoba one would obviously have to start with the *B.N.A. Act.* In selecting those parts of the *B.N.A. Act* which pertain to the Constitution of Manitoba as a province, and not just as a part of the federation, one could start with ss. 91 to 95 of the *B.N.A. Act*, which comprise Part VI — "Distribution of Legislative Powers". Part VII — "Judicature", does affect courts in the province, although only to a limited extent. Part VIII — "Revenues; debts; assets; taxation" largely concerns the founding provinces, and only s. 121, which could be said to provide for free trade between the provinces by in effect prohibiting customs barriers between them, and s. 125 providing for exemption of public lands and properties from taxation, can be said to apply to Manitoba. Of the "Miscellaneous provisions" comprised in Part IX, there are no sections directly relevant to the Constitution of the Province of Manitoba, except for the overall provisions affecting the whole of the country, like the provision in s. 132 for the power of Parliament to implement treaty obligations of the British Empire, and s. 133 which requires the use of English and French languages in Parliament and the Quebec Legislature, as well as the courts of Quebec, and federal courts. Finally, s. 146 could be mentioned because it provided for the admission of Rupert's Land and the North-western Territory. Since these territories were admitted before the twentieth century, s. 146 is no longer an important part of the Constitution of Manitoba.

Many of the sections in Part V of the *B.N.A. Act* — "Provincial Constitutions" do not apply to Manitoba. Thus, ss. 69 to 89 applied only to the legislatures of the four original provinces. Many of these are now spent because they are covered by explicit provincial statutes. The only important section still applicable in this Part to the legislature of Manitoba is s. 90 by which the Governor in Council, i.e., the federal cabinet, has the power to, *inter alia*, reserve and disallow provincial legislation which is otherwise valid. Sections 58 to 68 deal with "Executive Power" in the provincial constitutions. Some of these deal explicitly with the four original provinces, although ss. 58 to 61 inclusive, and ss. 66 and 67 deal with the office of Lieutenant-Governor, which provisions apply to all provinces.

Only a few of the provisions in ss. 1 to 57 of the *B.N.A. Act* apply explicitly to the provincial Constitution of Manitoba, as they are largely concerned with the formation of Canada, and with the legislative and executive powers at the federal level. There are, however, some provisions which must be considered to constitute part of the Constitution of Manitoba. Thus, for example, s. 9 provides that the executive power of the country continues to be vested in the Queen. By s. 15 she is the Commander-in-Chief of all armed forces.

Finally, and perhaps this is where one could have started, the preamble to the *B.N.A. Act* must be considered in defining a provincial constitution because it declares an important principle which is incorporated and made applicable to the constitution of the country as a whole, as well as to each component part. The preamble proclaims the desire of the provinces "to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom". The importance of this provision will be made clear further in this discussion.

To summarize: if one were to exclude those provisions which deal with the country as a whole, the provisions in the *B.N.A. Act* which deal with the constitutions of all provinces, and not just the original four, are the following:

The Preamble
Sections 9, 10 and 15
Sections 53 to 57
Sections 58 to 61, 66, 67 and 90
Sections 91 to 95
Sections 96 to 101
Sections 121 and 125
Sections 132 and 133
Section 146 and (in the case of Newfoundland and P.E.I.) Section 147

In the discussion which follows, not all of these provisions will be referred to, except for those which determine what comprises a provincial constitution, and how a provincial constitution can be amended. One should

not forget, however, as pointed out earlier, that in addition to the *B.N.A. Act*, the Constitution of Manitoba is determined by two other Imperial statutes, i.e., the *B.N.A. Act*, 1871, and the *Statute of Westminster*, 1931, as well as the federal statute, the *Manitoba Act*.

Furthermore, there are numerous statutes of the Province of Manitoba which constitute the Constitution of Manitoba. Power to enact these is given by s. 92(1) of the *B.N.A. Act* which provides that the provincial legislatures may make laws in relation to:

> (1) The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.

It should be noted that this power is broad enough to change most of what is provided for in the *Manitoba Act*, and this has been done through Acts of the Manitoba Legislature.

In the sense of our definition at the beginning of this Chapter of what is the "constitution", it is easy to identify some of the Manitoba statutes which must be included. In the first category are those statutes which deal with the legislature. Included would be *"The Legislative Assembly Act"*,[4] *"The Election Act"*,[5] *"The Electoral Divisions Act"*,[6] and *The Controverted Elections Act"*.[7] Then there are the statutes which deal with the courts and the judiciary including *"The Court of Appeal Act"*,[8] *"The County Court Judges' Criminal Courts Act"*,[9] *"The County Courts Act"*[10] *"The Queen's Bench Act"*,[11] *"The Federal Courts Jurisdiction Act"*,[12] *"The Surrogate Courts Act"*,[13] and *"The Act for Expediting the Decision of Constitutional and other Provincial Questions"*.[14]

It is somewhat more difficult to identify those of the statutes of Manitoba, dealing with or affecting the executive branch of government, which constitute part of the Constitution of the Province of Manitoba. Thus,

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[4] R.S.M. 1970, c. L110; amended S.M. 1970, c. 101; S.M. 1971, c. 80 and c. 82; S.M. 1972, c. 81; S.M. 1974, c. 68.

[5] R.S.M. 1970, c. E30; amended S.M. 1970, c. 105; S.M. 1971, c. 30.

[6] R.S.M. 1970, c. E40; amended S.M. 1970, c. 96.

[7] R.S.M. 1970, c. C210.

[8] R.S.M. 1970, c. C240; amended S.M. 1971, c. 8; S.M. 1972, c. 32; S.M. 1974, c. 59.

[9] R.S.M. 1970, c. C250; amended S.M. 1974, c. 59.

[10] R.S.M. 1970, c. C260; amended S.M. 1970, c. 25; S.M. 1971, c. 7, 18, 77, 82; S.M. 1972, c. 38; S.M. 1974, c. 16.

[11] R.S.M. 1970, c. C280; amended 1970, c. 79; S.M. 1972, c. 7; S.M. 1973, c. 15.

[12] R.S.M. 1970, c. C270; amended S.M. 1971, c. 82.

[13] R.S.M. 1970, c. C290; amended S.M. 1970, c. 96; S.M. 1971, c. 82; S.M. 1974, c. 9.

[14] R.S.M. 1970, c. C180.

for example, one would readily include *"The Executive Government Organization Act"*.[15] However, would one include those statutes dealing with the various departments such as, for example, *"The Department of Public Works Act"*,[16] or those Acts which deal with specific Ministers of the Crown such as *"The Attorney-General's Act"*[17]? Would these latter Acts be included? Probably strictly speaking not, although they would certainly affect the organization, powers, and means of operation of the executive and administrative branches of the government. Further, could one include such statutes as *"The Civil Service Act"*,[18] or *"The Emergency Measures Act"*[19]?

In summary, one can see that the provincial Constitution of Manitoba is comprised of several Imperial statutes, i.e., the *British North America Acts*, 1867 to 1965, the *Statute of Westminster*, 1931, at least one federal statute, i.e., the *Manitoba Act*, and a number of provincial statutes. Some of these are in one category as evidently part of the Constitution, and some are in a second category as peripherally affecting it. Included in the first category would be such statutes as *"The Legislative Assembly Act"*, *"The Executive Government Organization Act"*, *"The Election Act"*, the various Acts dealing with the judiciary, and maybe such a statute as *"The Crown Lands Act"*.[20] Included in the second category would be the various statutes dealing with departments of the government and ministers of the government of Manitoba, and perhaps even such statutes as *"The Emergency Measures Act"* and *"The Civil Service Act"*.

(3) Parliamentary Sovereignty, Entrenchment and Manner and Form Requirements

Having now attempted to define the Constitution of the Province of Manitoba, we can consider what status a written Bill of Rights could possess in this context. In the first place, a Bill of Rights could apply to the Province of Manitoba if it were included as part of the *B.N.A. Act* affecting both Parliament and the provincial legislatures. The second alternative could be for the legislature of the Province of Manitoba to adopt its own Bill of Rights.

If the first alternative were realized, Manitoba would be bound by a Bill of Rights which could only be amended in the manner required to amend that part of the Constitution which affects both the federal and provincial orders of government. In other words, whatever amendment formula would be agreed upon with respect to that part of the basic constitutional

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[15] R.S.M. 1970, c. E170; amended S.M. 1970, c. 17.

[16] R.S.M. 1970, c. P300; amended S.M. 1972, c. 3; S.M. 1974, c. 45.

[17] R.S.M. 1970, c. A170; amended S.M. 1970, c. 56; S.M. 1974, c. 17.

[18] R.S.M. 1970, c. C110; S.M. 1974, c. 46.

[19] R.S.M. 1970, c. E80; amended S.M. 1971, c. 82.

[20] R.S.M. 1970, c. C340; amended S.M. 1971, c. 82.

document which affects both orders of government would be the formula to apply to the amendment of a Bill of Rights which formed part of that Constitution. In this sense, Manitoba would have a Bill of Rights which is "constitutional" in either the narrower or wider definition of that term. The Bill of Rights would be as entrenched as any other part of that Constitution would be entrenched. However we may favour it, a Bill of Rights entrenched in the *B.N.A. Act*, and affecting both Parliament and the provincial legislatures, does not seem feasible at the moment. "Patriation" of the constitution would be a reasonable occasion to consider entrenchment.

The other alternative, available now, is for the Legislature of the Province of Manitoba to enact a Bill of Rights just as it would any other statute, e.g., *"The Legislative Assembly Act"*, *"The Court of Appeal Act"*, or *"The Executive Government Organization Act"*. Such a Bill of Rights would be "constitutional" in the sense defined by Dawson. However, as with any other "constitutional" statute enacted by the Legislature of the Province of Manitoba, such a Bill of Rights could subsequently be amended by the Legislature. Two important questions arise, however. The first is: could such a Bill of Rights be entrenched? The second is: does it really matter whether such a provincial Bill of Rights is entrenched or not?

In order to answer these questions one must deal at least briefly with the issues of parliamentary sovereignty, entrenchment, and manner and form requirements. It is beyond the scope of this study to consider these in detail. Greater elaboration can be found elsewhere.[21]

As noted earlier, s. 92(1) of the *B.N.A. Act* gives the Province of Manitoba the power to amend its Consititution, "notwithstanding anything in this Act . . . except as regards the Office of Lieutenant Governor". However, as pointed out earlier, the preamble to the *British North America Act* speaks of the federal union as being one "with a Constitution similar in Principle to that of the United Kingdom". It has been suggested that it is this provision which introduces the unwritten customs, conventions and principles of the parliamentary system of government into the Constitution of Canada, including that of the provinces. Is the parliamentary system protected against amendment by the province because it is part of "the Office of Lieutenant-Governor", or because of the preamble? Attempting to combine the office of head of government with head of state, like the President of the United States, would be in contravention of the preamble to the *B.N.A. Act*, as well as s. 92(1). But does this mean that there can be *no* modification of the parliamentary system of government?

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[21] See Dicey, *op. cit., supra.,* Part I, footnote 2; G. Marshall, *Parliamentary Sovereignty in the Commonwealth,* Oxford: Clarendon, 1957; D.V. Cowen, "Legislature and Judiciary, I, II", (1952) 15 *M.L.R.* 282 (1953) 16 *M.L.R.* 273; Sir Owen Dixon, "The Law and the Constitution", (1935) 51 *L.Q.R.* 590; H.R. Gray, "The Sovereignty of Parliament Today", (1953) 10 *U. of To. L.J.* 54, and "Comment — The Bribery Commissioner v. Ranasinghe", (1964) 27 *M.L.R.* 705; Pierre E. Trudeau, "Les Droits de l'homme et la suprématie parlementaire", in A.E. Gotlieb, ed., *Human Rights, Federalism and Minorities,* C.I.I.A., 1970, 3; W.S. Tarnopolsky, *The Canadian Bill of Rights,* Toronto: Carswell, 1966, c. 3.

According to Dicey, one of the most important principles of the British parliamentary system is parliamentary sovereignty. Dicey has defined parliamentary sovereignty as having two main characteristics: (1) that Parliament can make or unmake any law; and (2) that no body or person has a right to override or set aside the legislation of Parliament. Without going into a detailed discussion of Dicey's view of parliamentary sovereignty, suffice it to say that for the purposes of this study one should note an important qualification of the second characteristic, and the important result of the first. The qualification on his second characteristic is that in the Canadian context, the courts do exercise the power of judicial review with respect to the distribution of legislative power as set out in ss. 91 to 95 of the *B.N.A. Act*. Nevertheless, this does not necessarily mean that judicial review can invalidate a statute of the Legislature, enacted within the jurisdiction established for it by s. 92. This brings us to the important result of the first characteristic mentioned by Dicey, and that is that if Parliament can make or unmake any law, then presumably Parliament cannot bind a future Parliament with respect to the legislation which can be enacted. Thus, the provisions of a later statute, to the extent of inconsistency with an earlier statute, must prevail.

It will readily be seen that if Dicey's view of parliamentary sovereignty is to be accepted as being in full vigour today, it would be impossible for a provincial legislature to enact a Bill of Rights which could not be amended. Of even greater importance, any statute passed subsequently could not be tested in the light of the Bill of Rights.

However, Dicey's nineteenth century definition must now be interpreted in the light of twentieth century decisions in the Commonwealth. The three most important decisions for our purposes are: *Attorney-General for New South Wales v. Trethowan*,[22] *Harris v. Minister of the Interior* (the South African Voters case),[23] and *The Bribery Commissioner v. Ranasinghe*.[24] These cases will be discussed in turn.

The *Trethowan* case was concerned with the *Constitution Act*, 1902, of the Australian state of New South Wales. This Act, which was an ordinary statute capable of repeal or amendment by simple legislation, was a consolidation of a number of constitutional statutes. In 1929, the N.S.W. Legislature enacted a statute providing that the second chamber, the Legislative Council, could not be abolished except by a Bill which had received the approval of the electors at a referendum. Furthermore, the statute required that it could only be repealed by the same process. In 1930, a new Labour Government passed two Bills through the Legislative Assembly and the Legislative Council, one to repeal the above-mentioned requirement, and the second to abolish the Legislative Council. An attempt was made to submit these Bills for Royal Assent without first holding a referendum. The

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[22] [1932] A.C. 526.

[23] [1952] (2) S.A.L.R. (A.D.) 428.

[24] [1965] A.C. 172.

High Court of Australia[25] granted an application for a declaration that the action was illegal, as well as an injunction to restrain the responsible Ministers from presenting the Bills to the Governor for Royal Assent. This decision was upheld by the Judicial Committee of the Privy Council.[26]

Although the High Court of Australia could not agree as to whether the U.K. Parliament could effectively shackle itself for the future, there was certainly agreement that the N.S.W. Legislature, which had a statutory origin, had its powers determined by the statutes which gave it life. Since by s. 5 of the *Colonial Laws Validity Act*, 1865, there was a requirement that legislatures could only legislate in the "manner and form" which may from time to time be required, the High Court held that the 1929 amendment did prescribe a "manner and form" requirement which had to be followed.

There was some question as to whether this decision applied only to non-sovereign legislatures fettered by the *Colonial Laws Validity Act*, 1865, which fetter was removed by the *Statute of Westminster*, 1931. However, the *South African Voters* case rejected this contention.

This case was concerned with the provision in the *South Africa Act* of 1909, s. 35 of which provided that the franchise in Cape Province could be changed only by vote of both Houses of Parliament sitting together, and after approval at a third reading by two-thirds of the total numbers of both Houses. Section 152 of the *South Africa Act* provided for simple amendment of the Constitution, except for ss. 35 and 152, which could only be passed by Parliament in the manner outlined above, i.e., unicamerally and by a two-thirds majority of the total number of members of both Houses. Following the enactment of the *Statute of Westminster*, 1931, the Union Parliament in 1931 passed the *Status of the Union Act* which, *inter alia*, re-enacted the *Statute of Westminster*, 1931, as an Act of the Union Parliament, and this Act provided, in s. 2, that: "The Parliament of the Union shall be the sovereign legislative power in and over the Union".

In 1951, an amending Act was passed bicamerally, i.e., by the House of Assembly and the Senate sitting separately, and not "unicamerally", i.e., in the joint sitting contemplated by ss. 35 and 152 of the *South Africa Act*. In the action before the courts of South Africa it was argued that because of parliamentary sovereignty there could be only one manner of law-making, and therefore the attempted amendment in 1951 overrode, or did not have to comply with, the entrenched provisions in the *South Africa Act* of 1909. However, the South African High Court held that a sovereign Parliament does not necessarily have to act in the manner in which the U.K. Parliament acts. It held that Parliament could not adopt any procedure it thought fit, but could only act in accordance with the requirements of the Constitution: in this case, for the purpose contemplated, by the special amendment procedure.

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[25] (1931) 44 C.L.R. 394. For the background to this case see W. Friedmann, "Trethowan's Case, Parliamentary Sovereignty, and the Limits of Legal Change", (1950) 24 *Australian L.J.* 103.

[26] [1932] A.C. 526.

Any doubt as to the authority of *Trethowan's* case and the *South African Voters* case was dispelled by the Judicial Committee of the Privy Council in the *Ranasinghe* case. Section 29(4) of the Constitution of Ceylon provided that no Bill for the amendment of any part of the Constitution shall be presented for Royal Assent unless it had endorsed on it a certificate of the Speaker of the House that at least two-thirds of the whole number of members of the House cast their votes in favour thereof. It also provided that such certificate should be conclusive for all purposes and not questioned in any court of law. In 1954, the Parliament of Ceylon passed the *Bribery Act* establishing a system of tribunals for trying public servants charged with corruption. It was alleged that the members of these tribunals were judicial officers, and the manner chosen for their appointment was in effect an amendment to the Constitution, and so required the special procedure in s. 29. The 1954 Act, therefore, had the necessary certificate of the Speaker. However, in 1958 the *Bribery Amendment Act*, which did not have the certificate of the Speaker, created a new system of Bribery Tribunals. The respondent was prosecuted, and appealed to the Supreme Court of Ceylon on the ground that the 1958 amendment was invalid because it did not conform with s. 29(4) of the Constitution. The Supreme Court of Ceylon allowed his appeal and the Judicial Committee upheld that decision.

The Judicial Committee answered the question whether a sovereign Parliament could be required to follow a special amending procedure in the following terms:[27]

> . . . [A] legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law. This restriction exists independently of the question whether the legislature is sovereign . . . or whether the constitution is "uncontrolled".
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> . . . [S]uch a Constitution can, indeed, be altered or amended by the legislature, if the regulating instrument so provides and if the terms of those provisions are complied with: and the alteration or amendment may include the change or abolition of those very provisions. But the proposition which is not acceptable is that a legislature, once established, has some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be a valid law unless made by a different type of majority or by a different legislative process.

In answer to an allegation that such a restriction contravened parliamentary sovereignty, the Judicial Committee said the following:[28]

> The limitation thus imposed [a two-thirds majority] on some lesser majority of members does not limit the sovereign powers of Parliament itself which can always, whenever it chooses, pass the amendment with the requisite majority.

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[27] *Supra,* footnote 24, 197-8.

[28] *Ibid.,* 200.

Therefore, one has to conclude that whatever parliamentary sovereignty might have meant in Dicey's time, and whatever parliamentary sovereignty means in the United Kingdom, the legislatures of the Commonwealth, perhaps because they have been created by partly-written Constitutions, would have to follow whatever "manner and form" requirements the Constitution contains. In the case of the United Kingdom Parliament, no entrenchment has ever been tried. In the case of Canada, however, most of our Constitution has been entrenched in the sense that much of it cannot be amended by a mere Act of Parliament or of a provincial legislature. Can there be any suggestion that the Parliament of Canada could ignore the requirement of s. 91(1) of the *B.N.A. Act* for a two-thirds majority of the House of Commons to extend the life of the House beyond five years?

It should be remembered that entrenchment does not mean total inability to amend. The United States Bill of Rights is entrenched, in the sense that it cannot be amended by a simple act of Congress, and the approval of a requisite majority of the State legislatures. Similarly, it is not contended that either Parliament or the provincial legislatures could be prevented from legislating with respect to any subject matter within their jurisdiction; rather it is contended that if the Constitution prescribes a "manner and form" for repeal or amendment, that manner and form must be followed.

Earlier in this Chapter it was suggested that perhaps the question of parliamentary sovereignty and entrenchment is irrelevant in any case. The reason this was suggested is that it is extremely unlikely on the one hand that Parliament, or a provincial legislature, once having enacted a Bill of Rights, would amend or repeal it except to replace it with what is in the opinion of the legislature a "better" Bill of Rights. On the other hand, if a majority of the electorate, and a requisite majority of their representatives, decide to repeal or amend a Bill of Rights, they will not be stopped. The requisite majority of "manner and form" will be followed.

A far more important issue is how to convince the courts that when Parliament or a provincial legislature enacts a Bill of Rights, whether with or without a "manner and form" requirement for the amendment or repeal of the Bill, the legislature intends thereby to have all legislation interpreted subject to the Bill of Rights, and declared inoperative if contrary to its plain terms. In other words, the most important result of including a Bill of Rights in the *B.N.A. Act*, entrenched or not, would be to convince the judiciary that the Bill of Rights was intended to override any legislation which contravenes it.

In our own case in Canada, the Supreme Court has decided in the *Drybones* case,[29] reaffirmed in the *Curr* case,[30] and on this point the *Lavell* case[31] has not changed the rule, that the *Canadian Bill of Rights* was

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

[30] *Curr v. The Queen* [1972] S.C.R. 889.

[31] *Attorney-General for Canada v. Lavell, Bedard v. Isaac et al* (1973) 38 D.L.R. (3d) 481; [1974] S.C.R. 1349.

intended to apply, and will be applied, to legislation whether enacted before or after the *Canadian Bill of Rights*. In both the *Drybones* and *Curr* cases, majorities in the Supreme Court of Canada held that the clearly-expressed intention of Parliament was that in the absence of a clause providing that legislation shall operate "notwithstanding the *Canadian Bill of Rights*", and in cases where legislation cannot be construed and applied so as not to contravene the *Canadian Bill of Rights*, such legislation will be held inoperative.

Therefore, to sum up, the following propositions may be stated:

1. A Bill of Rights, since it is concerned with the powers and functions of government organs, their relationships with each other, and their manner and form of operation, is part of the Constitution in the sense defined by Dawson.

2. Whether in the Bill of Rights, or in another statute such as the *Legislative Assembly Act*, provision *could* be made for a Bill of Rights, with some form of entrenchment by way of a "manner and form" requirement for its amendment.

3. For the purpose of convincing the courts that the Legislature intended such a Bill of Rights, and such entrenchment provision, to result in inconsistent legislation being declared inoperative, the best position for the Bill of Rights might be in the *Legislative Assembly Act*.

4. In furtherance of this aim of convincing the judiciary that the Bill of Rights for Manitoba is intended to be overriding, somewhat more explicit words should be chosen than those used in the opening paragraph of s. 2 of the *Canadian Bill of Rights*. As suggested by the Government of Canada at the Constitutional debates, 1968-71, with reference to a new Bill of Rights, the wording that could be suggested is as follows: Any law of the Province of Manitoba, whether enacted in the past or in the future, shall be inoperative to the extent that it abrogates, abridges or infringes the rights and freedoms guaranteed by the Bill of Rights.

CHAPTER IV

CONTENT OR SCOPE OF A BILL OF RIGHTS

Bills of Rights vary considerably not only as to their constitutional position and intent, which was discussed in the previous Chapter, but also as to form and content. In this Chapter some of the alternative models that are already in existence, or are proposed, will be discussed.

1. Form

Bills of Rights vary greatly in length depending partly upon whether the enacting legislature chooses merely to proclaim the various rights and liberties in brief phrases, thereby relying upon the courts to give them scope and subsequent interpretation, or whether the legislature chooses to be more specific in its directions to the courts by defining the rights and liberties *in extenso* with detailed definitions and exceptions spelt out for guidance.

In the former category we find examples in the United States Bill of Rights and in s. 1 of the *Canadian Bill of Rights.* Thus, for example, the *First Amendment* to the American Bill of Rights provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Although there is some slight definition of freedom of religion, i.e., it includes the free exercise of religion, and prohibits the establishment of a particular religion, and the freedom of assembly is qualified as one to be exercised "peaceably", the United States Supreme Court has had full rein in defining the extent of these freedoms, and the limitations on them. Thus, without direction from the Bill of Rights itself, the United States Supreme Court has held that freedom of speech cannot be absolute, and that certain laws, such as those prohibiting obscenity, do not detract from freedom of speech. Similarly, the court has applied a "clear and present danger" test for free speech. Therefore, there can be some restrictions on freedom of speech and of the other freedoms, even though the *First Amendment* states that "Congress shall make no law" abridging any of these freedoms.

Similarly, in the *Canadian Bill of Rights*, s. 1 speaks of freedom of religion, freedom of speech, freedom of assembly and association, and freedom of the press, without any qualification except, possibly, the non-discrimination clause in the opening paragraph of s. 1. Also, perhaps, as Mr. Justice Ritchie has stated on behalf of the majority of the Supreme Court on at least three occasions,[1] the declaration in section 1 that these

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[1] *Robertson and Rosetanni v. The Queen* [1963] S.C.R. 651, 658; *Regina v. Drybones* [1970] S.C.R. 282, 295-6; *Attorney-General for Canada v. Lavell* (1973) 38 D.L.R. (3d) 481, 494; [1974] S.C.R. 1349, 1365.

freedoms "have existed and shall continue to exist" could result in the freedoms being given the meaning which they bore in Canada at the time when the *Bill of Rights* was enacted. Although this could prove to be an unfortunate limitation of the possible scope to be given to the rights and freedoms in s. 1 in the future,[2] the point here is that the opening paragraph of s. 1 does have two minor definitions or indications of the scope to be given to the otherwise seemingly unlimited freedoms listed in sub-sections (a) to (f). Even apart from these limitations, there are others. Thus, for example, one would not expect the Supreme Court of Canada to uphold the practice of polygamy as being a part of freedom of religion in Canada. Similarly, there is no doubt that the Supreme Court will uphold such limitations on freedom of speech as laws of sedition and obscenity.[3] Similarly, the Supreme Court, in the case of *Walter et al and Fletcher et al v. Attorney-General for Alberta*[4] held that "freedom of religion" means the profession and dissemination of religious faith and worship, but did not include practices of a religious group with respect to landholding. Therefore, the Supreme Court held, the Alberta *Communal Property Act*, although restricting Hutterite "colonies", did not involve infringement of freedom of religion.

A seemingly comprehensive and detailed Bill of Rights is the Quebec *Charter of Human Rights and Freedoms* which received Royal Assent June 27, 1975. Its detailed provisions seem intended to narrow the channels of judicial interpretation.

As illustrated above, even a seemingly unqualified proclamation of rights and freedoms will be interpreted by our courts as having certain limitations. It is just that in these instances the *Canadian Bill of Rights* gives no guidance, but rather leaves it up to the judiciary to establish the definitions and limitations. On the other hand, nearly all of the more recent Bills of Rights, many of them drafted by United Kingdom constitutional lawyers, and in some cases patterned on the European Convention of Human Rights, go into much greater detail. Thus, for example, Article 19(1) of the Constitution of India gives a more extensive definition of rights and freedoms, and thereby direction to the courts. Sub-clause (b) declares that "all citizens shall have the right to assemble peaceably and without arms". Therein some limitation is expressed in the very declaration of the freedom of assembly, i.e., it is a right to assemble "peaceably and without arms". Sub-section (3) goes further in specifying the limitations that the courts are to consider as being applicable to this freedom, in the following terms:

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[2] See the criticism of this in W.S. Tarnopolsky, *The Canadian Bill of Rights*, Toronto: Carswell, 1966, 112-114; Second Revised Edition McClelland & Stewart Limited, 1975, 170-174; and article: The Canadian Bill of Rights and the Supreme Court Decisions in Lavell and Bernshine: A Retreat from Drybones to Dicey? (1975) 7 Ottawa Law Review 1.

[3] See, for example, *Regina v. Prairie Schooner News Limited and Powers* (1970) 1 C.C.C. (2d) 251 (Man. C.A.).

[4] [1969] S.C.R. 383.

(3) Nothing in sub-clause (b) of clause (1) shall affect the operation of any existing law insofar as it imposes, or prevents the State from making any law imposing, in the interest of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

Similarly, sub-clause (a), which proclaims "freedom of speech and expression", has limitations imposed on it which are even more extensive:

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency and morality, or in relation to contempt of court, defamation or incitement to an offence.

The Nigerian Constitution is even more detailed. Article 23 provides:

(1) Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief and freedom, either alone or in a community with others, and in public or in private, to manifest and propagate his belief in worship, teaching practice and observance.

(2) No person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observances if such instruction, ceremony or observances relate to a religion other than his own.

(3) No religious community or denomination shall be prevented from providing religious instruction for peoples of that community or denomination in any place of education maintained wholly by that community or denomination.

(4) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society —

(a) in the interest of defence, public safety, public order, public morality or public health; or

(b) for the purpose of protecting the rights and freedoms of other persons, including the rights and freedom to observe and practice their religions without the unsolicited intervention of members of other religions.

It should be noted that during the constitutional debates which culminated in the Victoria Charter of June, 1971, the provinces and the federal government agreed to insert certain provisions protecting fundamental freedoms. These had a form of expanded definition, as well as specific exceptions. Thus, Article 1 provided:

It is hereby recognized and declared that in Canada every person has the following fundamental freedoms:

> Freedom of thought, conscience and religion,
> Freedom of opinion and expression, and
> Freedom of peaceful assembly and association;

and all laws shall be construed and applied so as not to abrogate or abridge any such freedom.

The limitations on these freedoms were set out in Article 3:

> Nothing in this Part shall be construed as preventing such limitations on the exercise of the fundamental freedoms as are reasonably justifiable in a democratic society in the interests of public safety, order, health or morals, of national security, or of the rights and freedoms of others, whether imposed by the Parliament of Canada or the legislature of a province, within the limits of their respective legislative powers, or by the construction or application of any law.

It should be noted that although Article 3 seems to permit a large number of restrictions on the fundamental freedoms proclaimed in Article 1, this is only a realistic assessment of the limitations the courts would put on these fundamental freedoms even if they were proclaimed in absolute terms. Moreover, it should not be overlooked that the words "reasonably justifiable in a democratic society" do give the courts the power to exercise review on a basis similar to the "reasonable man" test well known to the common law. Moreover, it is evident that restrictions for purposes other than those listed would not be valid.

In addition, one could provide, as does the Bill of Rights recently proposed in Australia (now lapsed with the dissolution of the Australian Parliament, November 11, 1975), for a form of extended definition and specification of limitations, but with a proviso that: "The burden of proving that a limitation referred to in subsection (4) [the limitation section] is reasonably necessary or constitutes a reasonable regulation as mentioned in that subsection lies upon the person asserting that the limitation is so necessary or constitutes such a regulation".

Therefore, it would seem preferable to adopt a Bill of Rights in the more modern form now appearing in the world, with somewhat expanded definitions, and possibly some limitations. Furthermore, the proposed Australian Bill of Rights tended to place the burden of proof on the government, which is where it should be.

A form similar to this ought to be considered, if for no other reason than that after many hours of deliberation during the period from 1968 to 1971, the representatives of the provinces and of the federal government came up with such an agreement. Hopefully, if provincial Bills of Rights are to be precursors of an eventual Bill of Rights in the Constitution of Canada binding both orders of government, some considerable labour could be saved if the provinces were to adopt formulations which were acceptable to them in the past.

2. Content

What is referred to here is which rights and freedoms should be included. If one takes the Laskin classification of civil liberties into the four categories of: political civil liberties, legal civil liberties, economic civil liberties, and egalitarian civil liberties, it is suggested that only the first two should be considered for inclusion in the operative part of a Bill of Rights.

As was argued earlier, economic civil liberties are largely incapable of enforcement in the regular courts. Such rights as a basic standard of living, or protection against unforeseen hazards, can only be effectuated with positive legislation of the legislature. It would be impossible for the courts to order the legislatures to act, and more particularly to give them directions as to what the details or minimum benefits and protections should be. It is quite possible, as in the case of the Constitution of India, where there are "Directive Principles of State Policy", to include in a preamble some fundamental principles which would have some rhetorical value in indicating the aims and objectives of that particular society. However, anything more would seem to be deceptive. It could also be noted that the Victoria Charter recognized the validity of this argument because although there was strong pressure from some of the provinces to recognize the reduction of economic disparities as an object of the country, and Article 46 proclaimed this, Article 47 went on to provide:

> The provisions of this Part shall not have the effect of altering the distribution of powers and shall not compel the Parliament of Canada or Legislatures of the Provinces to exercise their legislative powers.

Similarly, for reasons that are obvious when one considers the best methods of effectuating the egalitarian civil liberties, i.e., policies of non-discrimination, it will be evident that a penal approach, or a court enforcement on the basis of a Bill of Rights, is not sufficient.[5] It is now universally accepted in all the provinces, as well as at the federal level, that what is needed here are human rights codes with full-time commissions to administer them. Since Manitoba has both, the promotion of these civil liberties should involve strengthening of that legislation and not considering inclusion in a Bill of Rights.

In considering the political and legal civil liberties, what should be included?

One of the problems faced by draftsmen of Bills of Rights in Canada is that there is no clear demarcation of the jurisdiction of Parliament on the one hand, and provincial legislatures on the other, with respect to civil liberties. There have been decisions which seem to indicate that provincial interference with some of the fundamental freedoms is invalid, either because it would contravene the principles of the parliamentary system brought into Canada through the preamble to the *B.N.A. Act*, or because the

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[5] See W.S. Tarnopolsky, "The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada" (1968) 46 *Can. Bar Rev.* 565.

particular restrictions involved the criminal law power, which is within the jurisdiction of Parliament.[6] However, at no time has the Supreme Court held that the fundamental freedoms are wholly within the jurisdiction of Parliament. At most, because of the Supreme Court decisions referred to above, and because of Parliament's jurisdiction with respect to Sunday Observance,[7] at least two of the more recent decisions of the Supreme Court of Canada seem to indicate that freedom of religion is within federal jurisdiction.[8]

If one considers freedom of speech, and the possible restrictions on it, one can see that apart from laws of defamation, most other substantive restrictions on this freedom, such as laws prohibiting sedition, criminal libel, and obscenity, are within the Criminal Law power of Parliament. However, such provincial laws as those regulating provincial and municipal elections, business practices, advertising, obtaining of licences to operate and so on, obviously affect freedom of speech. In addition, provincial legislation which, in "pith and substance", is directed to enabling municipalities to regulate the use of streets, parks, and sidewalks, can affect at least the time and place where one may speak or worship. Therefore, because there is some provincial jurisdiction within the limits outlined above, and because even those limits have never been unequivocably stated, it is wise to include these freedoms in a provincial Bill of Rights. Not only would it ensure that there would be no lacuna in the protection of these fundamental freedoms, but it would obviate the difficulties of courts in trying to find the jurisdictional dividing line.

The freedoms of assembly and association must be considered as important for inclusion in a provincial Bill of Rights. Assemblies and associations, although different in nature in that the former are essentially temporary, while the latter are essentially of a more continuing nature, may be for either political, religious, social, or economic purposes. If an assembly or an association is for a political or religious purpose, then presumably it is within the jurisdiction of parliament, unless the political assembly relates to provincial or municipal elections. With respect to assemblies and associations

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[6] See e.g. *Reference re Alberta Statutes* (Alberta Press Bill case) [1938] S.C.R. 100, where three of the six judges held that the Alberta "Act to ensure the Publication of Accurate News and Information" was invalid; *Saumur v. Quebec and Attorney-General for Quebec* [1952] 2 S.C.R. 299, where four of the nine justices of the Supreme Court held that regulations regarding distribution of pamphlets in streets amounted to interference with freedom of religion, which was within the jurisdiction of Parliament; *Switzman v. Elbling and Attorney-General for Quebec* [1957] S.C.R. 285, where eight of the nine justices held the *Quebec Padlock Act* invalid.

[7] *Birks and Sons (Montreal) Ltd. v. City of Montreal* [1955] S.C.R. 799.

[8] *Robertson and Rosetanni v. The Queen* [1963] S.C.R. 651, wherein the majority decision referred to the judgment of Rand J. in the *Saumur* case as indicating the position of freedom of religion in Canada; *Walter et al and Fletcher et al v. Attorney-General for Alberta* [1969] S.C.R. 383, where a similar reference was made on behalf of the majority.

for economic and social purposes, the jurisdiction is much more evenly divided. Heads (13) and (16) of s. 92 of the *B.N.A. Act* give the provinces jurisdiction with respect to "Property and Civil Rights", and "Matters of a merely local or private nature". It is difficult to think of gatherings, whether temporary or continuing, for social purposes, which would not be within s. 92(13) and (16) of the *B.N.A. Act*. With respect to assemblages and associations for economic purposes, it is quite clear that the provinces have a vast jurisdiction with respect to trade unions, employer-employee relations, corporation, partnerships, trade or business associations, etc.[9] Therefore, the freedoms of assembly and association would need to be proclaimed because the jurisdiction of the province in these areas is very extensive.

However, in view of the division of legislative jurisdiction with respect to the fundamental freedoms, it may be that a qualifying clause such as the one in the Victoria Charter is too broad. It should be remembered that the Bill of Rights agreed upon for inclusion in the Victoria Charter was intended to apply to Parliament as well as the provincial legislatures. Therefore the qualifying clause referred to restrictions which were "reasonably justifiable in a democratic society *in the interests of public safety, order, health or morals, of national security, or of the rights and freedoms of others*". Some of these restrictions, e.g. national security, are clearly only within federal jurisdiction under the "Peace, Order and Good Government" clause. Therefore in order to avoid controversy, and because such specification is probably superfluous anyway, or tends to be ridiculed as leaving very little freedom, it could be argued that the words underlined should not be included in a provincial Bill of Rights.

In addition to the traditional fundamental freedoms which have been discussed above, and which are included in nearly all Bills of Rights, one should consider whether the suggestion of the Hon. Mr. James McRuer should be adopted.[10] In addition to the fundamental freedoms discussed above, he suggests the inclusion of the following:[11]

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[9] This is as a result of the decision in *Toronto Electric Commissioners v. Snider* [1925] A.C. 396, which held that employer-employee relations as such were within provincial jurisdiction, except for those which are within the jurisdiction of Parliament because the enterprise concerned is within s. 92(10) of the *B.N.A. Act*, or within such enumerated heads of s. 91, as (15) "Banking", and (13) — "Interprovincial or International Ferries", or within the "Peace, Order and Good Government" clause of s. 91, which includes such enterprises as broadcasting or aeronautics: *Reference re Validity of Industrial Relations and Disputes Investigation Act* (Eastern Canada Stevedoring Company case) [1955] S.C.R. 529. Also see the decision of the Supreme Court in *Oil, Chemical and Atomic Workers' International Union, Local 16-601 v. Imperial Oil Ltd.* [1963] S.C.R. 584.

[10] Report of the Royal Commission Inquiry into Civil Rights (Ontario), Report No. 2, Vol. IV.

[11] *Ibid.*, 1571.

The right of every adult citizen to vote, to be a candidate for election to elective public office, and to fair opportunity for appointment to appointive public office on the basis of proper personal qualifications.

It should be noted that the Victoria Charter took this suggestion, and added to it the provisions which now exist in the *B.N.A. Act* and such Acts as the *Manitoba Act*, requiring periodic elections, as well as annual sessions of the legislatures. Thus, all of these provisions are found in Articles 4 to 9 of the Victoria Charter:

Art. 4. The principles of universal suffrage and free democratic elections to the House of Commons and to the Legislative Assembly of each Province are hereby proclaimed to be fundamental principles of the Constitution.

Art. 5. No citizen shall, by reason of race, ethnic or national origin, colour, religion or sex, be denied the right to vote in an election of members to the House of Commons or the Legislative Assembly of a Province, or be disqualified from membership therein.

Art. 6. Every House of Commons shall continue for five years from the day of the return of the writs for choosing the House and no longer subject to being sooner dissolved by the Governor General, except that in time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by the Parliament of Canada if the continuation is not opposed by the votes of more than one-third of the members of the House.

Art. 7. Every Provincial Legislative Assembly shall continue for five years from the day of the return of the writs for the choosing of the Legislative Assembly, and no longer, subject to being sooner dissolved by the Lieutenant-Governor, except that when the Government of Canada declares that a state of real or apprehended war, invasion or insurrection exists, a Provincial Legislative Assembly may be continued if the continuation is not opposed by the votes of more than one-third of the members of the Legislative Assembly.

Art. 8. There shall be a session of the Parliament of Canada and of the Legislature of each Province at least once in every year, so that twelve months shall not intervene between the last sitting of the Parliament or Legislature in one session and its first sitting in the next session.

Art.9. Nothing in this part shall be deemed to confer any legislative power on the Parliament of Canada or the Legislature of any Province.

When one considers the legal civil liberties, there may be some question as to whether, since many are involved in the administration of criminal justice, there is need for detailing them in a provincial Bill of Rights. It would appear that even provincial quasi-criminal legislation such as may be

found in statutes dealing with liquor or operation of motor vehicles, is governed by the criminal procedures in the Criminal Code because of the relatively uniform norms adopted under the Summary Convictions Act of each province. There may be a question, therefore, whether one needs the details set out in s. 2 of the *Canadian Bill of Rights.* It should be noted that the 1972 *Alberta Bill of Rights* which reproduces s. 1 of the *Canadian Bill of Rights*, omits s. 2 thereof.

On the other hand, it should not be forgotten that with the proliferation of provincial administrative tribunals there is a vast area of adjudication which does affect the citizen, and with respect to which fair procedures should be required. Moreover, the administration and enforcement of the criminal law are provincial responsibilities. In his Report, Mr. McRuer recommended the inclusion of the following provision in a provincial Bill of Rights:[12]

> The right of every person to fair, effective and authoritative procedures, in accordance with principles of natural justice, for the determination of his rights and obligations under the law, and his liability to imprisonment or other penalty.

It should be considered whether such a provision would be sufficient, or whether a provincial Bill of Rights would go on to detail or even elaborate upon the particular provisions of s. 2 of the *Canadian Bill of Rights.* The latter course seems preferable.

If the latter course is chosen, it should be noted that at least two important protections which are available in the American Bill of Rights are not included in the Canadian one: unreasonable searches and seizures, and retroactive punishment. It should be noted that the federal government recommended inclusion of these in a new *Canadian Charter of Human Rights.*[13]

To this point no mention has been made of provisions with respect to "due process of law" and "equality before the law". There is no question but that both of these clauses, which are to be found in s. 1 of the *Canadian Bill of Rights*, and which are copied from the *Fourteenth Amendment* to the United States Constitution, are most difficult to define and apply. In the United States these clauses have given rise to more cases, articles and comments than all other parts of the Constitution combined. Without recounting the unfortunate history in the United States of the "economic" or "substantive" interpretation of the "due process" clause,[14] it is clear that this clause at least, gives rise to great difficulties, particularly if coupled with a proclamation of the "right to life, liberty and *property*".

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[12] *Ibid.*, 1571.

[13] *The Constitution and the People of Canada,* Policy Paper presented at the Constitutional Conference, February, 1969, 53-54.

[14] See W.S. Tarnopolsky, *The Canadian Bill of Rights,* Toronto: McClelland & Stewart; Second Revised Edition, 1975, c. 7, Part I, and the American cases and authorities therein, for this.

Nearly all of the Bills of Rights enacted in the world since World War II have avoided the "due process" clause. Some have tried to circumvent the American experience by separating "property" from "life and liberty". Thus, for example, the Constitution of India has one provision respecting the circumstances under which property may be taken, and another one, Article 21, which proclaims "no person shall be deprived of his life or personal liberty except according to procedure established by law". The Nigerian Bill of Rights has no such general clause, but rather details the various procedures by which life may be taken, or liberty may be deprived. There is a separate provision, Article 30, which provides that property may not be compulsorily taken away except with "payment of adequate compensation" and "a right of access" for the determination of one's interest in the property and the amount of compensation, to the High Court having jurisdiction in that part of Nigeria. Further, Article 30 goes on to exempt from the property provision laws relating to taxation; forfeiture upon conviction of an offence; obligations arising out of contracts; the vesting and administration of property in such instances as bankruptcy or insolvency, mental incompetency, or winding up of companies; the execution of judgments or orders of courts; the taking of property which is dangerous or injurious to health, or is enemy property, etc. The proposed Bill of Rights for Australia makes no reference to property at all. There is also no reference to a "right to life and liberty" although there are prescriptions for procedures with respect to deprivation of liberty.

Considering the alternatives, and keeping in mind the experience in the United States of a wide application of the "due process" clause, one must recommend at a minimum that if such clause be included it not refer to property, but only "life and liberty". One could adopt the recommendation of the federal government to the Constitutional Conference to include two new clauses in the proposed *Canadian Charter of Human Rights:*

> The right of an individual to life, and the liberty and security of the person, and the right not to be deprived thereof except by due process of law;
>
> The right of the individual to the enjoyment of property, and the right not to be deprived thereof except according to law.

On the other hand, it may be that rather than adopting the first clause, one should specify its essence as does s. 2 of the *Canadian Bill of Rights.* For the second clause one could recommend as an alternative the clause recommended by Mr. James McRuer, which was referred to earlier.

The "equality before the law" clause poses problems as well, although perhaps less so. Some of the questions it raises are: Is it confined to egalitarian rights of non-discrimination on grounds of race, colour, religion, sex, etc., or is it wider, including inequality because of economic circumstance? Does it exclude affirmative action programmes, or what might be called reverse or benign discrimination? Who do the courts compare with whom? Are there reasonable classifications which must be upheld? Perhaps only the courts can answer these questions on a case by case basis. In any

case, if the clause is to be included, then it should be phrased as "equal protection of the law" as this wording would seem to permit reasonable classification, and affirmative action programmes, more readily than the wording "equality before the law". In fact, such a definition recognizing the validity of affirmative action programmes could be included.

While contemplating an "equal protection" clause, and in the light of developments, at both federal and provincial levels, of policies to protect and promote multiculturalism, consideration should be given to inclusion of some protection for this. In a pluralistic society such as that of Manitoba, this will be extremely important.

A right, if not a veritable route of appeal is provided from most if not all court adjudications. Although it is time-consuming and may be expensive to exercise, the right of appeal cannot be seriously challenged as a means of correcting error or arbitrariness on the part of a tribunal of original jurisdiction. Although judicial review, together with the rights-enforcement powers proposed to be conferred on the Queen's Bench by the model Bill would be effective in their sphere, they would provide small solace to a person whose case had been lost by error of law or failure of the tribunal properly to weigh the evidence. The right of one appeal, at least, on the merits is provided to be considered in terms of its efficacy, practicality and ultimate necessity.

Finally, one should consider, for inclusion in a Bill of Rights, some mention of "the right to privacy", which has never been recognized by the common law, but which has been much discussed in recent years. Because of the absence of such a right at common law, the legislatures of Manitoba [15] and of British Columbia [16] have been moved to provide protections in this area. Also there is the new federal *Protection of Privacy Act.*[17] The proposed Australian Bill of Rights has a rather detailed provision on right to privacy which, in effect, summarizes the essence of the Manitoba, British Columbia and federal legislations. It could still be considered for inclusion on its merits, even though the proposal lapsed with the double dissolution of the Australian Parliament, in November, 1975.

A matter of no little concern to many in this era of extended state activities is that of access to information developed and stored in government files and data banks.

Freedom of information and governmental secrecy are clearly two competing policies, both of which have recently received considerable publicity in the media.[18]

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15 *"The Privacy Act"*, S.M. 1970, c. P125.

16 *"The Privacy Act"*, S.B.C. 1968, c. 39.

17 Bill C-176, Royal Assent January 14, 1974, S.C. 1973-74, Chap. 50 inserted into the *Criminal Code* new Part IV.1 entitled Invasion of Privacy.

18 Bill C-225 (An Act Respecting the Right of the Public to Information Concerning the Public Business) House of Commons, 1974; Bill 28 (An Act to Provide for the Freedom of Information) First Session 30th Ont. Leg. 1975; Bill 41 (The Manitoba Freedom of Information Act) Third Session, 30th Man. Leg. 1976; actual legislation is in force in the U.S.A., Sweden and Finland.

Freedom of information as used in this Report means simply the right of the public to obtain information held by public servants, elected office holders, and indeed all the authorities in and at the provincial and municipal levels of government in Manitoba. Often this information is essential public information but it is not always accessible or released to the public. Moreover this information is frequently required by citizen participants in democracy if they are to make informed decisions.

However, a conflict arises in the very notion of government. There must always exist the possibility that those who hold power from the people on a relatively short, but renewable, term may not always be openly forthcoming with what they know about the neglects or excesses of their own stewardship. Such natural reticence is inevitably based on the hope of receiving from the people once again, for another term, the gift of governmental power. Freedom of speech, itself the *sine qua non* of organized 'loyal' Opposition in democratic states, is freedom of criticism. But rational criticism requires solid information. This view is shared by one well known critic who must be presumed to know the subject as a result of his experience. Thus, Ralph Nader[19] has written:

> A well informed citizenry is the lifeblood of democracy; and in all arenas of government, information, particularly timely information, is the currency of power . . . . In our polity, where the ultimate power is said to rest with the people, a free and prompt flow of information from government people is essential to achieve the reality of citizen access to a more just government process.

It seems self-evident that the democratic process requires the ready availability of true and complete information. It also seems self-evident that the process transcends in importance the exigencies of day to day or even term to term partisan disputes. Regarded in this light, the question is resolved into crisp focus: Should the power to govern carry with it the power to withhold or suppress true and complete information about the very operations of government itself? In our "polity", where it is the people who delegate power to those who govern over them and it is the people who may terminate the delegation, the answer, too, seems clear: the public's right to information transcends even the power of government.

It should be recognized however that there will always be some kinds of information which should not be released to the public. This classification is not easy to define because it would require some care and subtlety in its identification. We are, however, of the opinion that the task is not impossible. The classification of the information and the circumstances of its retention or its release can surely be defined.

The Commission considers that the formulation of detailed recommendations for a freedom of information law should be the subject of a separate project. At this time we think it sufficient to recommend that the

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[19] R. Nader, Freedom from Information: The Act and the Agencies, 5 *Har. Civ. R.-Civ. Lib. L. Rev.* 1(1970).

principle of freedom of information be enunciated in the proposed model Bill of Rights appended to this Report. Of course, the declaratory principle would have to be more particularly devolved in subordinate legislation. It is toward this end that the Commission proposes to embark on a separate study. The principle which we now recommend is expressed as Section 8 in the proposed Manitoba Bill of Rights, which is Appendix A to this Report.

[Memorandum of Separate Statement of Francis C. Muldoon Regarding Educational Rights]

Although my colleagues, with the exception of Professor Gibson, are firmly opposed to the inclusion in this Report of the subject which is now to be discussed, I think that one cannot consider civil rights in Manitoba without thinking of education in general and schools in particular. The Manitoba Schools Question is a sorry chapter in the history of our province because it demonstrates the suppression of the solemnly covenanted rights of a minority, and their deprivation of what was constitutionally agreed to be theirs both in justice and in law.

Among the important purposes of constitutions and bills of rights is the providing to minorities of a legal shelter for their legitimate aspirations against the wrath or insensitivity of the majority. The aspiration here considered is the same as proclaimed in Article 26 of the Declaration of Human Rights: "that parents have the prior right to choose the kind of education that shall be given their children". The legitimacy of that aspiration is demonstrated not only by its manifest humanity and reasonableness, but also in our Canadian and Manitoban context by the provisions of Section 93 of *The British North America Act* and Section 22 of the *Manitoba Act*. This last mentioned Act, a constitutional statute of the Parliament of Canada, expressed the minority's rights more broadly (as italicized) than did *The B.N.A. Act*, and did so as follows:

> 22. (1) Nothing in any such law [made by the legislature in relation to education] shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law *or practice* in the province at the union.

A further provision of Section 22, drawn directly from a similar sub-section of Section 93 of the *B.N.A. Act* states:

> 22. (2) An appeal shall lie to the Governor-General in Council from any Act or decision of the Legislature of the Province [Manitoba], or of any provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

The provisions of sub-section (1) were tested, unsuccessfully, by both Catholics and Anglicans in the cases of *City of Winnipeg v. Barrett* and *City of Winnipeg v. Logan.*[20] The judicial testing of sub-section (2) turned out quite differently.

[20] 1892 Appeal Cases 445.

It must seem curious to present-day civil libertarians, that those who had become the minority by the 1890's won their case according to the rule of law, but nevertheless lost the practical exercise of their constitutionally entrenched rights in the end. In the case of *Brophy v. Attorney-General of Manitoba*,[21] the Judicial Committee of the Privy Council, which was then the ultimate appellate tribunal for Canadians, held:

> The sole question to be determined is whether a right or privilege which the Roman Catholic minority previously enjoyed has been affected by the [Manitoba] legislation of 1890. Their Lordships are unable to see how this question can receive any but an affirmative answer.

The rights of that minority remain prejudicially affected to this day in Manitoba, although such is not the case whether by law or practice in eight of the other nine provinces of Canada.

The issue was not put to rest by the dispositions made in the 1890's, and later, but has continued to engage the attention of Manitobans throughout the years. The Manitoba Schools Question surfaced again in May, 1972, when Premier E.R. Schreyer placed on the Legislative Assembly's order paper a resolution calling for a legislative committee to study the question of provincial aid to private and parochial schools. The debate on the resolution and the events of those days are of such recent memory to both the public and the participants that no useful purpose would be served by recounting them here. It is enough to record that at about 5:15 a.m. on Thursday, July 20th, 1972, the Premier's resolution failed to carry by a vote of 30 to 22 of the Legislative Assembly.

What, it is sometimes asked, is the prejudice to the minority's educational rights? Those parents are not forbidden to establish their alternate schools. They have the right to do so. This argument is confidently advanced by people who know better. It is advanced even by people who rightly condemn the notion of according to the rich rights which the poor cannot afford to exercise, which people of modest or 'middle' income can exercise, if at all, only under no little financial burden. Such rights then are translated into an expensive privilege for the wealthy and only an illusion of rights for the rest. The plight of the minority in this regard was aptly stated, without dissent, in 1959 by the members of the Manitoba Royal Commission on Education headed by Dr. R.O. MacFarlane. At pages 179-180 of their Report they noted, concerning the minority:

> To the extent that they have provided schools for their own children, they have reduced the total cost of public schools. The sum so subtracted from public schools in the Province increases substantially every year both because the cost per pupil and because the number of pupils of which the public schools are relieved increase each year. But while the relief redounding to the public school system from use of private and parochial schools

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[21] 1895 Appeal Cases 202 at 226.

> increases each year, those who provide this relief do so at ever-increasing cost to themselves, and, in addition, they must pay ever more in taxes to the very public school system they relieve.

In terms of perception of civil rights, Chapter XI of that unanimous Commission's Report is edifying. At page 180 of the Report it is stated:

> All things considered, the Commission agrees that some measure of public support should be extended to private and parochial schools which provide a satisfactory standard of education. We also agree that, in some though not in all school districts, this can be done without injury to the public school system, to unity, or to religious toleration. Indeed, it may benefit and give more worth to all these. In any case, practical application of the principles of democracy by which we try to live requires that whenever possible the majority be tolerant enough to provide for significant minorities the kind of education they want for their children.

The MacFarlane Commission recommended a formula according to which the minority would be entitled to apply some — but not all — of its tax-expropriated education-dollars to meet the cost of educating its own honest-to-goodness Manitoba children in alternate schools. As good citizens, the minority would still be required, under that formula, to contribute through taxation some support to the public school system, too.

Today, the composition of the minority — (more accurately, the minorities) — is no longer wholly Catholic and largely francophonic. The Manitoba Federation of Independent Schools, for example, represents not only concerned Catholic parents and educators, but also concerned Jewish, Anglican and Mennonite parents and educators, as well as others. The main concern of these people is expressed in the notion that education is a more comprehensive process than instruction alone. In our pluralistic province in which there is quite properly no state or *public* religion, a truly *public* school not only should not, but must not, provide any religious education. In this comprehensive sense of education then one could and should look even beyond the parental rights and aspirations of only religious minorities.

Parents surely have the right to require that the civic and moral values propounded and exemplified in the school should closely corroborate those of the home. Although the strictly constitutional rights declared in the *Manitoba Act* are accorded to religious minorities present in the province at the time of Manitoba's creation as a province, today one should be considering the aspirations of other significant minorities for whom the public school education is not satisfactory. They are, after all, not out to dismantle or destroy the public school system, but only to maintain educational values which cannot appropriately be imparted in the public school system. Minorities who could comply with the recommendations expressed in Chapter XI of the MacFarlane Commission Report should be accorded the real prior right to choose the kind of education which is given their children.

The place to declare such a right is in the Manitoba Bill of Rights, as a practical complement to the existing constitutional declarations. Minority educational rights should be expressed in clear principle, with the specific modalities provided in concurrent subordinate legislation. Such liberality by the majority would go a long way toward effectively securing the civil rights of all Manitobans who would, in addition, benefit from the general enhancement of educational values in our province.

I have had the privilege of reading the statement, which follows, of my colleague, Professor Gibson. I agree with Prof. Gibson that the kind of reform we both seek should be resolutely regarded as a proposal for the future. Certainly, proposals for a Bill of Rights should engage the *minds* of our people and not enflame the *emotions* over past controversies.

If the proposal which Prof. Gibson and I both espouse should become the subject of serious public consideration, it can hardly be imagined that the issue's previous history in our province would not also be discussed. Any recommendations for a Manitoba Bill of Rights, including those expressed in this Report, generate discussion of the past work of constitutional commissions, federal-provincial conferences, the impact of Bills of Rights over the years in other jurisdictions and of judicial decisions. This Report abounds with those references.

In considering the proposal for enactment of a provincial Bill of Rights, one will wish to consider if any similar rights have been entrenched in our constitution, whether they have been effective, and whether the minority intended to be benefitted by the declaration of right still asserts the right declared. All history tells of some past controversies or strife and I think that they bear either instructively or destructively on present and future conduct. Let us continue to hope that, since we cannot wish it out of existence, the past will be instructive in promoting future justice.

[Memorandum of Separate Statement of Dale Gibson Regarding Educational Rights]

I agree with my colleague Mr. Muldoon that a provincial Bill of Rights ought to include a guarantee that (subject to certain important safeguards) parents may choose the manner in which their children are to be educated. If Manitobans seriously value cultural pluralism (an assumption the Commission has accepted in Section 4 of the proposed Bill) they must be prepared to support diversity of milieu and approach in public education. An ethnic, linguistic or religious minority cannot expect to preserve its separate identity long if its children are subjected to the influence of the majority culture all day long in the classroom throughout their formative years.

As Mr. Muldoon has pointed out, the constitutions of both Canada and Manitoba recognize the importance of protecting certain minority educational rights. A provincial Bill of Rights should surely do no less than that. I think it should do more, for two reasons. First, judicial interpretation has restricted the constitutional protections to a narrower scope than I think was originally intended. Second, the constitutional protections apply only to

certain *religious* minorities, and I believe that other types of cultural diversity — ethnic, linguistic, and philosophical — are equally deserving of protection.

For these reasons, I would favour including in the proposed Manitoba Bill of Rights, immediately following Section 4 (or perhaps as part of Section 4) a provision similar to Article 26(3) of the Universal Declaration of Human Rights, which reads as follows:

> Parents have a prior right to choose the kind of education that shall be given to their children.

It would not be either practical or desirable to permit parents to have total control over the education of their children. For one thing, the state has a responsibility to ensure that all education meets certain minimum standards, both as to quantity and quality. For another, the cost and feasibility of providing minority educational facilities must always be kept in mind. There is no need to fear that inclusion of the provision suggested would prevent such reasonable restrictions, however; the provision would be subject to Section 5 of the proposed Bill which permits: "such limitations as are reasonably justifiable and humane in a democratic and pluralistic society".

While I support Mr. Muldoon's position to the extent indicated, I believe that other matters raised in his separate opinion are not germane to a discussion of the proposed provincial Bill of Rights. As it happens, I agree with him that the treatment accorded to separate denominational schools in the province has been unsatisfactory. But that, I submit, is beside the point in the present context. The sole question to which we are addressing ourselves at the moment is whether and how certain rights should be protected by a provincial Bill of Rights. The fact that such rights may or may not have been infringed in the past does not seem to me to require attention at this point. The Commission has chosen not to present any such historical review with respect to any of the other rights and freedoms included in the Bill, and I fear that to single out this particular right for special attention might, in view of the passionate views on the subject that prevail in some quarters, divert public attention from an important proposal for the future to an emotional and divisive controversy of the past. I can think of no more effective way to side-track public discussion of the need for a provincial Bill of Rights than to allow it to bog down in an acrimonious resurrection of the Manitoba School Question.

CHAPTER V

THE QUESTION OF ENFORCEABILITY

As mentioned earlier, some civil liberties are better promoted through means other than a written Bill of Rights. Thus, for example, Human Rights Commissions administering Human Rights Codes have proved more effective in Canada and the United States than Bills of Rights or quasi-criminal prohibitions of discrimination, in promoting a policy of equality of access and of opportunity. Similarly, whether a country or a province has a written Bill of Rights or not, some legal civil liberties require specific remedies such as prerogative writs, actions in tort, or such institutions as the Ombudsmen. This paper will not concern itself with any such remedies or institutions, except to indicate that they are not inconsistent with a Bill of Rights, but merely supplement, and in some cases implement, its aims and principles. Our purpose here is to discuss whether remedies should be specified in a written Bill of Rights itself for its enforcement, and if so what the nature of these remedies could be.

It should be noted that the traditional Bills of Rights such as those in the United States, and the *Canadian Bill of Rights*, seem to make no provision for enforcement. At most, the Courts are able to interpret these provisions as requiring them to hold invalid legislation which is contrary to the provisions of the Bill of Rights. That, in itself, may provide a remedy by way of a defence to a charge under a law which is found to contravene the Bill of Rights. However, if a contravention is not found in the legislation itself, but rather in its administration, then both the American and Canadian Bills of Rights are silent as to possible remedies. In the United States the courts have provided a remedy by developing what has come to be known as the "tainted fruit" doctrine, by which any evidence which is obtained by a procedure forbidden by the Bill of Rights is inadmissible in any court of law. In Canada, however, the rule is that any tangible evidence, regardless of how illegally obtained, is admissible if relevant.[1] Furthermore, despite the protections available to an accused to ensure that any confession is voluntary, an involuntary confession, even though illegally obtained, may be admissible to the extent that it is corroborated by physical evidence which may be submitted.[2] Therefore, in Canada, it would appear that at the moment the courts will not adopt an exclusionary rule, but rather speak in terms of some vague protections available through tort actions.[3]

In the light of the position taken by the Supreme Court of Canada against excluding illegally obtained evidence, a Bill of Rights should, as a minimum provide that evidence obtained in contravention of the Bill of Rights should be inadmissible. It should be noted that section 7 of "*The*

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[1] *Attorney-General for Quebec v. Bégin* [1955] 5 D.L.R. 394.

[2] *Regina v. Wray* (1970) 11 D.L.R. (3d) 673.

[3] *Regina v. Steeves* [1964] 1 C.C.C. 266.

Privacy Act" of Manitoba was the first such provision enacted anywhere in Canada. It provides that evidence obtained in contravention of that Act is inadmissible in civil proceedings. Such exclusion with regard to criminal proceedings now appears in the new *Right to Privacy Act* (Can.). Thus, the new federal Act adds section 178.16 to the Criminal Code providing that a private communication which was unlawfully intercepted, and evidence directly or indirectly obtained thereby, are inadmissible in evidence. Such a provision should be the minimum provided for in a written Bill of Rights as a protection against administrative infringement of its terms. It might even be that a provision for the acquittal of the accused in these circumstances should be considered. Although it is true that in some cases this could result in acquittal where there is sufficient evidence obtained in other ways to convict, the importance of a Bill of Rights and the need for effective measures to enforce it, require such a drastic remedy to be considered.

At least discretion should be given to the judge, depending upon the circumstances of the case as presented to him, to consider whether mere exclusion of the evidence is not sufficient, and that an acquittal should be entered.

It may be that such a provision is not sufficient, and certainly if one considers that many of the provisions of a provincial Bill of Rights would apply not only to the administration of criminal justice, but also to the work of administrative tribunals, a provision for exclusion of evidence might very well be insufficient. Therefore, consideration should be given to a specific provision authorizing the Superior Court of the Province to issue whatever remedy is necessary to enforce the Bill of Rights. Such a provision is to be found in Article 32 of the Indian Bill of Rights:

> (1) The right to move the Supreme Court by appropriate proceedings for enforcement of the rights conferred by this Part is guaranteed.
>
> (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate for the enforcement of any of the rights conferred by this Part.

A third possible alternative, more elaborate even than that available under the Indian Bill of Rights, is to establish a commission, on the model of the Manitoba Human Rights Commission, charged with administration and enforcement of the provisions of the Bill of Rights. In the alternative, the jurisdiction could be given to the Manitoba Ombudsman. The Commission, or the Ombudsman, could receive complaints regarding contravention of the Bill of Rights, could investigate and determine whether a non-legal remedy would be sufficient and acceptable to both sides, and if not, could have jurisdiction to bring an action before the Superior Court of the Province, on behalf of the complainant, to have the right enforced.

A Bill of Rights, if and when enacted, should be more than mere legislative window-dressing. It should therefore accord even the poorest, weakest and most socially deprived persons a ready access to the enforcement process.

This suggestion could be coupled with the second one above, giving the Superior Courts power to issue whatever remedy is necessary to redress the grievance. This latter approach, i.e. establishing a Commission charged with administration and enforcement of the civil liberties included in the Bill of Rights, has been adopted in the *European Convention of Human Rights* for the countries of Europe, and was included in the proposed Bill of Rights for Australia. It could well be considered in Canada.

Part III of the Model Bill of Rights appended to this Report does indeed make provision for an officer called the Manitoba Commissioner of Civil Liberties. Such a new office may not be seen to be necessary or advisable by some or many people who are, however, concerned with the effective maintenance and protection of civil rights in the province. The jurisdiction and duties of the proposed Commissioner could, perhaps, be conferred upon an already existing body such as the Human Rights Commission or its Chairman, or again, upon the provincial Ombudsman. Careful consideration should be accorded to these alternatives, as well as to the official designation of a rights protector in the first place.

CHAPTER VI

THE ATTORNEY-GENERAL'S CONCERNS ANSWERED

Despite the small number of responses to our Working Paper, the Commission is nevertheless both obliged and willing to conclude this study on a Bill of Rights with its formal recommendations to the Honourable the Attorney-General. Although our recommendations are developed in five Chapters of this Report and pointedly specified in Appendix A, we must formally discharge our duty by making direct answer to the questions posed to us in the letter of reference. We answer thus:

1. *Whether a Bill of Rights for Manitoba is desirable or needed and practical.*

A Bill of Rights for Manitoba is desirable in terms of securing the civil liberties of Manitobans in face of the constant and rapid expansion of law, government and the emanations of government which bear upon the life of each individual.

It is true that Manitobans have survived until now without a Bill of Rights. It does not follow, however, that such protection is unnecessary. The civil liberties of Manitobans have been bruised on past occasions, and the opportunities for such infringements increase every time government broadens its reach. The Manitoba Legislature has already enacted in recent years *"The Human Rights Act"* and *"The Ombudsman Act"* as evidence of a perceived need to secure individual dignity and rights against the erosive claims of constituted authority, both public and private, now, and in the future. A provincial Bill of Rights would be a consistent and highly desirable extension of the concern for individual freedoms into areas not covered by the previous legislation. Provincial Bills of Rights are now in place in Saskatchewan, Alberta and Quebec, the latter two having been quite recently enacted. In our view, Manitobans are no less deserving of protected civil liberties than the people of those other provinces.

We think that it would be practical to enact a Bill of Rights for Manitoba, just as it has been in the provinces mentioned above. We acknowledge that a Bill of Rights can be effective only if the judges be courageous in applying it, if the Legislature be sensitive to it in passing legislation, and if public opinion, that is the electorate, be prepared to take action in support of civil liberties.

2. *Whether or not a constitutionally entrenched Bill of Rights in Manitoba would be more or less desirable and needed, and more or less practical than a locally enacted Bill of Rights for Manitoba.*

We think that a Bill of Rights entrenched in and made part of the constitution of Canada would be most desirable. We think that such entrenchment is needed in terms of the integrity of the individual's rights and freedoms. Parliament and the Legislature each make laws in accordance with their respective divisions of constitutional powers, but the individual is subject to both the national and provincial laws. Human rights and freedoms in Canada should not be parcelled out and potentially disintegrated as between (for example) Section 91 and Section 92 of the *B.N.A. Act.* A constitutionally entrenched Bill of Rights would declare the rights of individuals throughout Canada and do so uniformly in relation to both federal and provincial laws and institutions. Until the time comes at which the governments in Canada will assent to a constitutionally entrenched Bill of Rights, we think that a provincial Bill of Rights should be in force in Manitoba.

3. *What kind of Bill of Rights encompassing which categories of civil liberties (e.g. political, economic, legal, religious or egalitarian) would be appropriate in Manitoba.*

The kind of Bill of Rights which appears as Appendix A to this Report would be appropriate in Manitoba. In it, the political, legal, religious and egalitarian civil liberties are emphasized precisely because they have, over the years, been less prominent in party platforms and electoral contests.

Economic civil liberties are not directly mentioned, although they may be peripherally inherent in some of the fundamental freedoms, in the prohibition against unreasonable search and seizure, and in the requirement that administrative bodies act fairly. Economic matters such as the incidence of unemployment, the rates of welfare assistance, the imposition of royalties and taxation on production and service industries and the scope of their activities seem everywhere in the world, not less in democratic regimes than in totalitarian ones, to be the subject of current governmental policies and partisan contestation. They are likely to continue to be matters of intense public awareness and participation especially in a democratic country.

Ultimately, economic questions must yield to considerations of what a nation or province is able or willing to afford. These pragmatic considerations may vary widely from time to time and, in a democracy, public opinion will exert considerable influence on government policy. To crystallize so-called economic civil liberties in one era could well be to have enacted an unworkable absurdity for a future era. Our view is that a Bill of Rights, dealing as it does with desirable constants of human freedom and dignity, ought not to be often amended. For these reasons, we concluded that the Manitoba Bill of Rights ought not to deal primarily with economic matters.

4. *Which restrictions, if any, ought to limit the most extensive expression and articulation of economic, religious, egalitarian and property rights in Manitoba.*

The unrestricted rights and freedoms of one person or group will inevitably become the exploitation and suppression of another person or group. Such is the history of our species. Therefore, there must be restrictions.

The expression and articulation of rights to the extent that they endanger the democratic institutions of Manitoba, or the administration of justice, or the security and welfare of our people should be restrained. It is no conflict of values to assert that a democratic society has an overriding right to protect its democratic and judicial institutions from being subversively disorganized or violently thwarted. The nice balance has to be effected in distinguishing robust, but reasonably tolerable, protest or other allegedly aberrant behaviour from behaviour which truly constitutes a menace to our people and our democratic institutions. After all, and not less often than every five years, our people have the means of changing the governmental policy makers. As we have mentioned, that span may be too long for a suffering individual whose case, in any event, may not be sufficiently well known or popular to motivate public opinion.

The apposition of liberty and restraint requires a nice balance of judgment to determine which is to prevail in particular circumstances. Such determination can be effectively made in a cool rational judicial atmosphere. The development and refinement of such determinations cannot be concluded easily, if at all, in precise statutory provisions. In regard, then, to restraints we recommend in the proposed Manitoba Bill of Rights that they be only such "as are prescribed by law and are reasonably justifiable and humane in a democratic and pluralistic society" and that "the burden of proving [such to be the case] lies upon the person asserting that such limitation was necessary".

An example of the judicial approach to such legislative language was, we think, aptly expressed by the Rt. Hon. Bora Laskin, Chief Justice of Canada, in his address to the symposium at the centenary of the Supreme Court. He said:

> The bulk of the Court's business is, and is likely to continue to be, the interpretation and application of statutes, some of which, as for example, parts of the Criminal Code and of the Quebec Civil Code, to take two illustrations, have long ago taken on what I may term a common law appearance. Two statutes, one, the British North American Act (and its amendments), only formally of that character (since it is Canada's chief written constitution), and the second, the Canadian Bill of Rights, a quasi-constitutional enactment are not, for interpretative purposes "statutes like other

statutes" (to adopt well known phraseology); and there is little doubt, certainly none in my mind, that the judicial approach to them, compelled by their character, has been different from that taken with respect to ordinary legislation. The generality of their language and their operative effect compel an approach from a wider perspective than is the case with ordinary legislation, especially legislation that is more precisely formulated.

In sum, we think that restrictions are necessary; that they should be judiciously and rationally determined; and that they should be determined according to a wide perspective of the individual in relation to the society in which the restrictions are asserted to be necessary.

5. *A consideration of the impact of a Bill of Rights on the continuing effectiveness of the Parliamentary process, and the administration of justice in the Province.*

Much of the material in this Report demonstrates our serious consideration of the impact of a Bill of Rights on the continuing effectiveness of the Parliamentary process and the administration of justice in Manitoba. We think that the great virtues of our parliamentary system are its resilience and responsiveness to the needs and wishes of the public. As indicated in the preceding Chapters, we know that ultimately the will of the Legislature must prevail in any clash with the policy enunciated in a provincial Bill of Rights. We say "ultimately" and not immediately or arbitrarily; we posit that the very process of adjudication, with its attendant publicity and debates, will be salutary in shaping public opinion and in resolving the conflict. There is, however, no doubt that the Legislature will remain sovereign. A recent expression of that view was voiced again by Chief Justice Laskin, at the Supreme Court centenary symposium, as follows:

> Legislation may however appear to be preclusive in some areas of civil liberties, and if interpreted with that result the judicial duty of fidelity to legislation as superior law must be acknowledged whatever be the consequences, although the acknowledgement may be accompanied by an expression of regret or even of remonstrance that the legislation went so far.

Upon the enactment of a Mantioba Bill of Rights one might reasonably predict that it would generate a slight upsurge of litigation in our courts in order to test it, but we could not regard that as any harmful impact on the continuing effectiveness of the administration of justice in Manitoba.

6. *A consideration of various models, proposals and drafts of Bills of Rights throughout Canada and the world.*

The preceding Chapters demonstrate our consideration of various models, proposals and drafts of Bills of Rights throughout Canada and the world. Attention has been given to, and inspiration derived from, proposals, models and drafts produced in Manitoba as well as from abroad.

7. *If a Manitoba Bill of Rights be concluded to be desirable, needed and practical, a proposed draft of same.*

We conclude that a Manitoba Bill of Rights is desirable, needed and practical, and our proposed draft is appended to this Report as Appendix A.

This is a Report pursuant to Section 5(3) of *"The Law Reform Commission Act"* dated this 19th day of May, 1976.

Francis C. Muldoon, Chairman

R. Dale Gibson, Commissioner

C. Myrna Bowman, Commissioner

Robert G. Smethurst, Commissioner

Val Werier, Commissioner

Sybil Shack, Commissioner

Kenneth R. Hanly, Commissioner

APPENDIX A

A PROPOSED BILL OF RIGHTS FOR MANITOBA

PART I

Sec. 1

It is hereby proclaimed that in Manitoba every person shall have the following fundamental freedoms:

(a) freedom of thought and opinion;
(b) freedom of conscience and religion;
(c) freedom of expression and communication;
(d) freedom of assembly;
(e) freedom of association.

Sec. 2

Every adult Canadian citizen who is resident in Manitoba shall have the right to vote, and to be a candidate for election to elective public office.

Sec. 3

(1) Every person shall be entitled to equality before the law and the equal protection of the law.

(2) Sub-section (1) shall not be so applied as to exclude affirmative action taken on behalf of disadvantaged persons or groups.

Sec. 4

Persons of ethnic or linguistic groups shall have the right to enjoy and promote their own culture, and to use their own language.

Sec. 5

(1) The freedoms and rights proclaimed in sections 1, 2, 3 and 4 may be subject only to such limitations as are prescribed by law and are reasonably justifiable and humane in a democratic and pluralistic society.

(2) The burden of proving that a limitation referred to in sub-section (1) is reasonably justifiable and humane lies upon the person asserting that such limitation was necessary.

Sec. 6

The Legislative Assembly of Manitoba shall not continue beyond five years from the day of the return of the writs for the choosing of the Legislative Assembly, subject to being dissolved sooner by the Lieutenant-Governor, or to a continuation, when the Governor-General in Council declares that a state of real or apprehended war, invasion or insurrection exists, if the continuation is not opposed by the votes of more than one-third of the members of the Legislative Assembly.

Sec. 7

There shall be a session of the Legislature of Manitoba at least once in every year so that twelve months shall not intervene between the last sitting of the Legislature in one session and its first sitting in the next session.

Sec. 8

Every person shall have the right of reasonable access to all public information in the possession of all departments, organs, agencies and representatives of the provincial, urban and municipal governments.

Sec. 9

(1) No person shall be subjected to unreasonable interference with her or his privacy.

(2) For the purposes of this section, a search, seizure or intentional interception of communications shall be deemed to be unreasonable interference unless lawfully made:

(a) in accordance with an order made by a court of competent jurisdiction;

(b) in accordance with a search warrant issued by a court of competent jurisdiction on reasonable grounds, supported by adequate information describing the purpose of the search and who or what is to be searched;

(c) in response to circumstances of such seriousness and urgency as to require and justify immediate action without the authority of such an order or warrant;

and in any event, every search, seizure or interception of communications shall be effected with no more force or interference with privacy than is necessary to carry out the provisions of the order or warrant or to meet the seriousness or urgency of the circumstances.

Sec. 10

(1) No person shall be deprived of liberty except on such grounds and in accordance with such procedures as have previously been established by law.

(2) No person shall be subjected to arbitrary arrest or detention.

(3) Every person who is deprived of liberty shall be treated with humanity and shall not be subjected to cruel and unusual treatment or punishment.

(4) Every person who is deprived of liberty has a right of recourse to *habeas corpus.*

(5) Every person who is arrested or detained shall be provided with:

(a) the reasons for the arrest or detention, and a clear statement of the charges against her or him;

(b) the opportunity to retain and instruct counsel without delay;

(c) information on the rights in paragraphs (a) and (b).

(6) No person arrested shall be detained in custody unless the detention is reasonably necessary to assure the appearance of the person detained at the hearing or hearings into the charges against that person or is otherwise necessary in the public interest.

(7) Every person charged with an offence shall be tried within a reasonable time.

(8) Every person charged with an offence shall be

(a) presumed innocent until proved guilty according to law; and

(b) entitled to refuse to testify or to refuse to confess guilt.

(9) No accused person shall be held guilty of an offence on account of any act or omission which, at the time of its commission, did not constitute a violation of the law.

Sec. 11

(1) All courts, quasi-judicial and administrative bodies must act fairly.

(2) Every person shall have a right to fair, effective and authoritative procedures, in accordance with the principles of fundamental justice, for the determination of that person's rights, privileges, liabilities and obligations under the law.

(3) In the determination by any court or by any quasi-judicial body, of any charge, allegation, application or proceeding which could result in a fine, imprisonment, penalty, punishment, the loss or denial or diminution of any opportunity or gain, or in the curtailment of the fundamental rights and freedoms proclaimed herein, every person shall be entitled:

(a) to adequate notice and a fair hearing by a competent, independent and impartial tribunal established by law;

(b) to be represented or defended by legal counsel of that person's own choosing;

(c) to present evidence and examine witnesses on her or his own behalf;

(d) to cross-examine witnesses against that person;

(e) to have the free assistance of an interpreter if the person cannot understand or speak the language used in court; and

(f) to be informed of the rights in paragraphs (a) to (e) inclusive.

(4) Every person who is party to any proceedings before

(i) any court or

(ii) other non-consensual tribunal or

(iii) any administrative board, commission or tribunal to which the parties or any party must by law resort or respond for any non-arbitral adjudication

is entitled to prosecute an appeal on the merits for error in law, or evidence, or the weight of evidence, within the time limitations prescribed by law to a designated appellate tribunal from a final judgment or disposition in such proceedings; and if no time limitations be prescribed or appellate tribunal be designated then an appeal shall lie to the Court of Queen's Bench within one month of pronouncement or signing of the judgment or disposition appealed from, whichever be the later.

PART II

Sec. 12

Any provision of a law of Manitoba, whether enacted before or after the coming into force of the *Manitoba Bill of Rights*, as well as any order, rule or regulation subject to being repealed, abolished or altered by the Legislative Assembly of Manitoba, which is inconsistent with any provision in Part I hereof shall, to the extent of any such inconsistency, be inoperative and of no effect.

Sec. 13

No evidence which has been obtained directly or indirectly as a result of an infringement of one of the fundamental rights and freedoms herein proclaimed, shall be admissible in any court, tribunal, board, commission, or other authority in the Province of Manitoba.

Sec. 14

Sections 12 and 13 do not apply in relation to a provision of a law of Manitoba as described therein, if any Act of the Legislature of Manitoba expressly declares that such provision shall operate notwithstanding the *Manitoba Bill of Rights.*

Sec. 15

The fundamental rights and freedoms herein proclaimed shall not be construed so as to exclude, limit, or diminish, any other rights and freedoms of the individual whether under the laws of Manitoba or of Canada.

Sec. 16

The Attorney-General shall, in accordance with such regulations as may be prescribed by the Lieutenant-Governor in Council, examine every proposed regulation submitted in draft form to the Registrar of Regulations pursuant to *"The Regulations Act"* and every Bill introduced in or presented to the Legislative Assembly, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the *Manitoba Bill of Rights* and he shall report any such inconsistency to the Legislative Assembly at the first convenient opportunity.

PART III

Sec. 17

There shall be a Manitoba Commissioner of Civil Liberties whose function is to investigate alleged contraventions or infringements of the fundamental rights and freedoms herein proclaimed, to attempt to achieve redress of infringements which the Commissioner finds unjustified and, if necessary, to institute proceedings in respect of such infringements.

Sec. 18

(1) Where pursuant to a complaint, or on her or his own initiative, the Commissioner believes that there may be contravention or infringement of a provision in Part I, the Commissioner shall investigate the alleged act.

(2) Unless the Commissioner determines that the subject matter of the complaint is trivial, frivolous or vexatious, or that some other remedy is reasonably available to the complainant, or the complaint is made more than twelve months after the doing of the act, the Commissioner shall investigate the complaint and determine whether there is probable cause for believing that contravention or infringement of Part I was occasioned.

(3) Should the Commissioner decide for any of the reasons in sub-section (2) not to continue the investigation or conduct of the complaint, the Commissioner shall then inform the complainant of the decision and the reasons for that decision.

Sec. 19

If the Commissioner decides that there is probable cause for believing that contravention or infringement of Part I was occasioned, the Commissioner shall attempt to effect a settlement between the parties, with adequate redress, including a satisfactory assurance from the person who has done an act in contravention of Part I against a repetition of the act.

Sec. 20

For the purposes of the investigation the Commissioner shall have all the powers available to the Manitoba Ombudsman.

Sec. 21

If the Commissioner is of the opinion that a person has committed an act which is in contravention or infringement of a provision in Part I, and is unable to obtain a satisfactory settlement of the matter, the Commissioner may institute a proceeding in the Court of Queen's Bench for such relief as may be granted pursuant to section 23, and the proceeding may be instituted and the relief granted without proof of damage or the loss of any economic opportunity or gain.

Sec. 22

Notwithstanding sections 17 to 21, any person who alleges that her or his right or freedom as proclaimed under this Act has been infringed may institute a proceeding in the Court of Queen's Bench for such relief as may be granted pursuant to section 23, and the proceeding may be instituted and the relief granted without proof of damage or the loss of any economic opportunity or gain.

Sec. 23

(1) The Court of Queen's Bench shall have power to issue such prerogative writs, equitable remedies, directions, orders, including orders for the payment of compensation, by way of special, general or punitive damages, as may be appropriate for the enforcement of any of the rights or freedoms conferred by Part I, and for the proper compensation of any one injured by contravention or infringement of such rights and freedoms.

(2) For the purposes of sub-section (1), where the contravention is committed in the course of employment, the employee shall be jointly and severally liable with his employer or employees.

Sec. 24

Notwithstanding the provisions of section 23, all courts, tribunals and public authorities in exercising any powers accorded by the Manitoba Legislature or under the laws of Manitoba shall, whenever it is pertinent to do so, give effect to the provisions of the *Manitoba Bill of Rights.*

Sec. 25

The Crown is bound by the provisions of the *Manitoba Bill of Rights.*