BILL OF RIGHTS—FAILURE OF COURTS TO APPLY SUBSTANTIVE "DUE PROCESS"—*REGINA* v. *GONZALES*

When the Canadian Bill of Rights 1960 (Can.) c. 44 was introduced three short years ago there was, amid the high hopes expressed, a note of caution sounded in some quarters which has subsequently been justified. The recent decision of the Supreme Court of British Columbia in the case of *Regina* v. *Gonzales*[1] serves as an example. The Court there upheld the conviction of an Indian for unlawful possession of an intoxicant off a reserve contrary to s. 94(a) of the Indian Act.[2] The appellant had submitted that s. 94(a) could not stand in the face of the preamble and ss. 1(a), 1(b) and 2 of the Bill of Rights:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely:
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> (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
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> (b) the right of the individual to equality before the law and the protection of the law;
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> 2. Every law in Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedom herein recognized and declared and in particular, no law of Canada shall be construed or applied so as to . . .

The Court was thus faced with the problem of determining whether the Bill of Rights takes precedence over other substantive legislation. It was decided that it did not. In so doing, the B.C. court followed a trend which has been established in Canadian Courts since the passage of the Bill of Rights; recognition is given to the intent and purpose of the Bill, but it is then interpreted in such a way that effect is given only to its form or procedure while its substantive content is disregarded.

In the *Gonzales* case, Mr. Justice Davey was of the opinion that the function of s. 2 of the Bill was merely to provide a canon or rule of interpretation for other legislation. All legislation should be construed and applied so as not to abrogate freedoms recognized in the Bill of Rights, but if such could not be construed or applied sensibly without modifying other enactments, the effect of s. 2 is exhausted and the prior legislation must prevail according to its plain meaning. This is surely a far cry from the expectations expressed by the Hon. Ivan C. Rand, formerly Chief Justice of the Supreme Court of Canada, in his article *Except by Due Process of Law:*[3]

> They (the Courts) are to construe all such law as not infringing the rights; if the interpretation finds by the language used, an infringement in fact then to the extent of that infringement the language or fact of the law must be disregarded as if the offending provisions were omitted in the enactment of the law.

Mr. Justice Tysoe took the view there was no conflict as the Indian Act did not infringe on the liberties of the accused nor did it discriminate against him as an Indian. In point of fact, he felt the Indian Act was, rather, a favoring, protecting Act towards Indians in general and for the

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1 (1962) 37 C.R. (Can.) 56 (B.C.).
2 R.S.C. 1952, c. 149.
3 *Osgoode Hall Law Journal*, Vol. 2, April 1961, No. 2 at 172.

good of the population of Canada as a whole. These judgments stand well in line with the Canadian judicial approach towards the Bill of Rights.

From the beginning, there have been two fairly well-defined schools of thought. Both realize that the Bill operates under what must be considered a distinct handicap in that it does not have a constitutional foundation but is, rather, a Statute of the Parliament of Canada and thereby subject to amendment or repeal by that body. Also, as such, it can enforce its provisions only in the sphere of federal power; it has no effect on provincial enactments. These points are recognized by all, but one school of thought contends that the defects can be overcome and the spirit and intendment of the Bill applied. The opposing realm of thought looks upon the Bill perhaps a little more realistically, refusing to see it as a panacea for assorted ills. This group points to the United Nations-sponsored Universal Declaration of Human Rights[4] as an example of a declaration given lip service only and then disregarded, and equates the role of the Bill of Rights with this.

It is submitted that the latter contention is as impractical and undesirable as the more optimistic outlook. It is admitted by both sides that there are limitations to the freedoms under the Bill and that they could not, in our society, be given absolute recognition. Considerations of public needs and behaviour must necessarily limit and condition application of the enumerations. The Bill thus is not a cure-all, but at the same time it need not be a mere declaration incapable of enforcement. In the words of Paul W. Bruton[5]

> The delineation of the protected freedoms inevitably involves a balancing of interests, for the assertion of one person's freedom may mean the injury of another or the public generally. Such appraising and balancing of interests will lie at the heart of the judicial function of giving effect to the Bill of Rights; it must be made on a case to case basis and it is not foreign to the functions which Courts have traditionally performed.

Therein may lie the key to the problem. Rather than attempting an exposition through a blanket formula of the rights and liberties of Canadians, the task of the Courts should be to enforce the provisions of the Bill of Rights on the individual merits of each case. Such power in the Courts is, according to Mr. Bruton, a condition precedent to the proper application of the Bill of Rights.

> The successful operation of the Bill will depend in the first instance on the willingness of Parliament to permit the Courts to give full effect to the Bill unimpaired by suspending clauses in subsequent legislation or inserted by amendment in prior legislation.
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> . . . The success of the Bill will depend on how it is interpreted by the Courts. They have two very important interpretive functions to perform; one to give effect to the Bill as basic and controlling legislation so long as it is not expressly repealed or amended; and the other to refine the meaning, on a case to case basis, of the fundamental rights and freedoms protected.[6]

He further contends that although the Bill is declaratory it does set out the limits and gives the Court some measure to determine whether there has been any encroachment of any rights under the Bill. This would probably provide protection from the "greatest threat to civil

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4 *The Supreme Court and the Bill of Rights—The Lessons of Comparative Jurisprudence*—E. McWhinney (1959) 37 Can. Bar Rev. 16, 17.

5 The Canadian Bill of Rights—Some American observations, *McGill Law Journal*, Vol. 8, No. 2, 1962 at 119-20.

6 *Id.* at 111.

liberty", the erosion of liberty through indirect infringement, by bringing such infringement where it can be seen by all.

This depends on the Courts fulfilling their function. On a case by case method, they would have to consider the facts and determine if there was a right being infringed. If so, it should be corrected, be the source of such infringement an Act of Parliament or the act of an individual. Mere compliance with the procedure for denying a freedom, as laid out by the statute, should not cause the Court to hesitate in remedying the situation.

A glance at the most recent cases in this area will show that emphasis has been placed on a procedural aspect of the words "due process of law" in s. 1(a) of the Bill of Rights. "Due process of law" has been accepted as meaning merely the "law of the land". This was the view of Mr. Justice Macdonald in *Regina* v. *Martin*.[7] It would seem that if there are existing liberties recognized by the Bill, they can be abrogated by proper procedure under the law of the land by the effect of s. 1(a). Such it is suggested, is not the intendment of the Bill of Rights and although the Bill may not be so drafted as to remedy this properly, it should be given effect, to prevent encroachment on rights in a substantive vein, even where there is no breach of procedure.

The American Supreme Court has long recognized the existence of substantive as well as procedural due process under their 5th and 14th amendments.[8] Not only must proper and legal procedures be followed before a person may be deprived of his rights. In addition, the American Constitution substantively provides that there are certain rights which may not be abrogated regardless of the procedure; substantive due process. Thus, neither federal nor state legislative bodies may deprive a negro of the right to sit on a jury[9] nor force a man to have his stomach pumped.[10]

Canadian courts have not recognized this substantive aspect of "due process". It was certainly not in the minds of the Courts when they discussed the Bill in the triumvirate of cases *Regina* v. *Leonard*,[11] *Regina* v. *Jenson*,[12] and *Re Spence*.[13] It may well be that there actually was no encroachment of recognized rights in these cases, but the Court did not even turn their attention to that consideration; they were content to hold that *procedurally* the accused in each case had been convicted according to "due process of law". In two cases where the Bill was given effect, *Re Cray*[14] and *Re Sommerville*,[15] it was the finding that the accused had been deprived of his rights in a procedural vein that gave him relief.

An opportunity was afforded the Supreme Court of Canada to consider the substantive problem in the celebrated case of *Rebrin* v. *Bird and the Minister of Citizenship and Immigration*,[16] but the issue of civil liberty was summarily dealt with by a simple statement that the appellant was not deprived of her liberty except by "due process of law".

7 (1962) 35 W.W.R. 385, 398 (Alta.).
8 See *West Coast Hotel Co.* v. *Parrish* 300 U.S. 379 (1937), 578.
9 *Norris* v. *Alabama* 294 U.S. 587 (1935) 545.
10 *Rochin* v. *California* 342 U.S. 165 (1952), 537-540.
11 (1962) 38 W.W.R. 300 (Alta.).
12 (1962) 39 W.W.R. 321 (B.C.).
13 (1962) 37 W.W.R. 481 (Man.).
14 (1962) 132 C.C.C. 337 (B.C.).
15 (1962) 38 W.W.R. (Sask.).
16 [1961] S.C.R. 376.

It is not the writer's intention to take issue with the actual result in the cases so much as the failure to establish a substantive standard of compliance for statutory enactments. Indeed, even if such a substantive test had been applied in the *Gonzales* case it is suggested that the court would have reached the same conclusion. Thus, having regard to the standards of our society there was not a substantive encroachment of the Bill of Rights s. 1(b) by s. 94(a) of the Indian Act. The same problem was considered in *Attorney-General for B.C.* v. *McDonald*[17] where Morrow, Co. Ct. J. commented:

> As regards s. 1(a) it is clearly stated that while any individual (including an Indian) has the rights to life, liberty, security of the person and enjoyment of property, he may be deprived of any of these by due process of law. If therefore the right to have liquor off a reserve, in a manner similar to other people, can be considered the right to enjoy property, he may legally be deprived of this right by s. 94(a) of the Indian Act. There has been no suggestion in the Bill of Rights that the Indian Act was abrogated in any way. Then, as regards s. 1(b) which is the subsection argued so strongly in favor of the respondent I would say that it is my view that the respondent has the right to equality with other Indians before the law and the protection of the law. Equality, it should be noticed, goes along with protection. The Indian Act was obviously passed for the protection of the Indians and the Bill of Rights makes it abundantly clear that he shall always enjoy that protection. Had there been any intention of doing away with the protection afforded the Indians, Parliament undoubtedly would have repealed the section.

This point of view receives support from the body of American Law where the rights and freedoms here under discussion are enshrined in the United States Constitution and substantive encroachment is guarded against diligently. The point is summarized in *Corpus Juris Secundum.*[18]

> The guarantee of 'due process of law' or 'law of the land' has often been considered in connection with class legislation, it generally being held that the guarantee does not prohibit classification for the purposes of legislation, provided there is a natural and reasonable, or fair basis therefore and it is not arbitrary or capricious and is based on a real, material or substantial difference, or distinction, between those to whom it applies and those to whom it does not apply. Also, the classification must be based on differences reasonably related to the subject matter of the legislation or considerations of policy, or fairly related to the public purpose to be served; the classification must reasonably relate to a legitimate legislative purpose and the law must be so framed as to extend to and embrace equally all persons who are or may be in the like situation and circumstances.

But, although the *Gonzales* case appears to have been decided rightly and the judgments do contain traces of thought in the right direction, it has fallen into the stereotype of the cases which have gone before it. This trend must be changed. The Courts must begin to take diligent notice of the Bill of Rights not only in a procedural but also a substantive direction.

Until the Courts are willing to consider the effect of the provisions of the Bill of Rights as aimed at preventing an encroachment of these stated rights by another substantive Act of Parliament, the Bill will remain in a weak state and will be continuosly subjected to criticism. The only reasonable alternative may come with the establishment of the Bill of Rights as part of the Constitution of Canada, thus removing direct, immediate control of it from the hands of Parliament.

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17 (1961) 131 C.C.C. 126 (B.C.).

18 C.J.S. s. 569(5) at 585.