CIVIL LIBERTIES AND THE CANADIAN CONSTITUTION

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It is a commonplace to remark that England has no fundamental law in the sense of rules not amenable to change by ordinary legislative process. By contrast, the United States has such a system of fundamental law in the form of a written Constitution which grants to the Federal power and reserves to the various states certain areas over which each may legislate. In addition, neither Federal nor State governments may use their power to abridge certain civil liberties guaranteed from encroachment by either power by the Constitution itself. No such restriction exists in the British system where Parliament has, since the dawn of the modern era, reigned supreme.[1] The Canadian constitution is a hybrid, partaking of the nature of both the American and British Constitutions. It is fundamental in the sense that distribution of legislative powers between the Dominion and Provincial legislatures is fixed by a written document and not subject to change by ordinary legislative process; non-fundamental in the sense that outside this area, there is an equally large area of constitutional law where great change may be wrought by a normal Act of Parliament or the Legislature. The Canadian constitution has as its basis the *British North America Act* of 1867 which apportions between the Provinces and the Dominion government the totality of legislative power in Canada. Once given an area over which it may legislate, it is my submission that neither the Provincial nor the Federal powers are in any way restricted in the use of their powers; there is, I submit, no Bill of Rights in the American sense to limit those powers conferred.

It has been suggested, however, that implicit in the *British North America Act* there is a Bill of Rights guaranteeing certain freedoms to the people of Canada, notably freedom of speech and of religious worship.[2] The proponents of this theory advance two main arguments; first, that no legislature, whether Dominion or Provincial, may legislate in a manner prejudicial to these liberties[3], and second, and I submit more realistically, that in the realm of the two civil liberties mentioned, the Provincial legislatures lack the constitutional powers to legislate with respect to these liberties.[4]

It has been suggested by at least two writers, Mr. F. A. Brewin, Q.C., and Mr. Justice J. T. Thorson, President of the Exchequer Court, that neither Parliament nor legislature may trench upon certain civil liberties, particularly freedom of speech and of religion. This proposition is supported by *dicta* in some recent decisions, notably the decision of Abbott J. in the recent case of

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[1]See *Schwartz, American Constitutional Law*, Cambridge, 1955 at p. 7 *et seq.*

[2]See Brewin in 35 Can. Bar. Rev.; Thorson P. in Bulletin 7 of the *International Commission of Jurists;* Laskin, *Canadian Constitutional Law* at p. 663 *et. seq.*

[3]Brewin *loc. cit.;* Thorson P. *loc. cit.*

[4]*Supra,* footnote 2.

Switzman v. *Elbling;*[5] a case dealing with the right of a Provincial legislature to prevent the propagation of Communism by the ingenious device of padlocking houses in which communist meetings were being held. If Abbott J. actually meant to lay down such a proposition, then I respectfully suggest that his Lordship was seriously in error. The reason for this is the oft repeated and rarely understood theory of Parliamentary Sovereignty which forms the cornerstone of our constitutional theory. Taken from Britain, this doctrine was transported to Canada by the preamble to the *British North America Act* (1867) which states that the independant colonies of the Canadas, Nova Scotia and New Brunswick:

> Have expressed their desire 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 key principle of the British Constitution is that of the sovereignty of Parliament, that the legislative power of the Imperial Parliament knows no bounds in law.[6] The true meaning of this theory which has been described by Sir Ivor Jennings as a legal fiction is not that Parliament knows no bounds whatever, but rather that no law promulgated by Parliament will be held bad as being *ultra vires,* or as against natural law or right reason.[7] The true limitations on Parliament are based on practical politics and recognised conventions.[8] It has been well said that:[9]

> In speaking of the power of Parliament, we are dealing with legal principles, not with facts.

Lest this position seem unduly esoteric, it must be recognised that there is a substantial difference between the proposition that a constitution contains within itself certain guarantees, and the proposition that practical politics ensure them.

It is my impression that the theory of Parliamentary sovereignty has been accepted as being fully applicable in Canada. In only one case that I have been able to find has this doctrine ever seriously been questioned. That case was *R.* v. *Hess* (2);[10] a case in which the Crown claimed under the Criminal Code then in force to be able to detain a man who had been acquitted until the determination of an appeal against acquittal by the Crown. O'Halloran J.A. of the British Columbia Court of Appeal said:

> If Parliament has the constitutional power to direct a government functionary . . . to detain an acquitted man until the determination of an appeal which a Crown officer may take against such acquittal, it must also have the power to direct its functionary to detain the acquitted man for a much longer period, in fact . . . to detain people at will in a concentration camp. There may be people who think that Parliament has that power. I do not; I could not reach that viewpoint without blurring or rubbing out the dividing line between our constitutional democratic system and the totalitarian system in its various forms past and present.

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[5] *Switzman* v. *Elbling;* [1957] S.C.R. 285.

[6] *Salmond on Jurisprudence,* 11 edn. at p. 522. Those interested in the problem whether if Parliament cannot bind itself, it can be said to be omnipotent are referred to Anson, *The Government of Ireland Bill;* 2 L.Q.R.

[7] This was the view of Coke C.J. See *Bonham's Case* 8 Co. Rep. 118; See also Pollock; *A First Book of Jurisprudence* at p. 266.

[8] Dicey; *Law of the Constitution* ch. 1; Jennings, *Law and the Constitution* ch. 4. See Bagehot, *The English Constitution,* Worlds Classics edn. at pp. 205-7 for an interesting account of the extrinsic and intrinsic checks on Parliament.

[9] Jennings *op. cit.* at p. 140.

[10] *R.* v. *Hess* (2); [1949] 1 W.W.R. 586, 8 C.R. 52.

Yet the contrary position has been taken in Canada, particularly with respect to the Japanese who were deported from British Columbia after the last war, and in the *Japanese Reference* case[11] the ability of Parliament so to legislate provides the underlying assumption on which the case, ostensibly one on the validity of delegated legislation, turned. The position of Parliamentary sovereignty has been most ably expounded by Riddell J.A., sometime of the Ontario Court of Appeal. Writing in the *Minnesota Law Review*,[12] he said, after discussing the areas of legislation given to the Dominion and Provinces respectively:

> At the same time, a large sphere is left uncontrolled by the written law—and in that sphere, Parliament and legislature are wholly uncontrolled—they have the traditional rules, but they may legally disregard the rules—the courts there have no power, the electorate must judge of the propriety of acts in that sphere and reward or punish accordingly.

Reference might also be made to *Union Bank* v. *Boulter-Waugh*[13] in the Supreme Court of Canada in which Anglin J., as he then was, stated:

> The legislative purpose being clear we have no right to decline to carry it out . . . the Court would occupy a wholly indefensible position, one of usurpation of an authority, sovereign within its ambit, which it is its imperative duty to uphold.

Decisions to the like effect in lower courts have been legion[14] and one would hardly expect at this late date to find the doctrine of Parliamentary soverignty seriously called into question.

It must be confessed, however, that the doctrine has been called into question[15] and reliance has been placed upon a *dictum* of Abbott J. in *Switzman* v. *Elbling*[16] to which reference has already been made. What Abbott J. actually said was (after accepting the proposition that freedom of speech fell outside the Provincial sphere of legislative authority):

> I am also of opinion that as our constitutional act now stands, Parliament itself could not abrogate this right of discussion and debate. The power of Parliament to limit it is, in my view, restricted to such powers as may be exercisable under its exclusive jurisdiction with respect to criminal law and to make laws for the peace, order and good government of the nation.

It is probable that by this statement, Abbott J. meant to apply the ancillary theory; that Parliament may not legislate over civil liberties as such, but may only do so ancillary to the two well-recognised heads of legislation mentioned. Nevertheless, several other interesting and plausible explanations of this passage

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[11] *Reference re Japanese Canadians*, [1946] S.C.R. 248; aff'd [1947] A.C. 87.

[12] 4 *Minn. L. Rev.* 165 at p. 169.

[13] *Union Bank* v. *Boulter-Waugh*, (1918-19) 58 Can. S.C.R. 385 at p. 397.

[14] See *Green* v. *Livermore*, (1940) 74 C.C.C. 240 at p. 243 "The argument that the section is contrary to natural justice does not mean anything in view of the fact that the legislature of the Province within its own field has powers as plenary as those of the Imperial Parliament which created it."; *Plassco* v. *Montreal Transportation*, [1953] Que. S.C. 19; *Remis* v. *Fontaine*, (1951) 1 W.W.R. (N.S.) 604, [1951] 2 D.L.R. 461; *Smith* v. *London*, (1909) 20 O.L.R. 133; *Clark* v. *Jacques*, (1900) 9 Que. K.B.; *Quebec* v. *G.T.R.*, (1898) 8 Que. Q.B. 246, aff'd 30 Can. S.C.R. 73 "Within the limits prescribed by the Constitution, the authority of Parliament and of the Legislature is supreme"; *Cleveland* v. *Melbourne and Brompton-Gore*, (1881) 1 D.C.A. 353; 26 L.C. Jur. 1 per Ramsay J. "I do not think any legislature had the *right* to deprive a person of his property, but by the theory of the constitution it has the *power*. In a word it is assumed that the legislature is the judge of the morality of its own cause." Cf. Henderson J.A. in *Abitibi* v. *Montreal*, [1942] O.R. 183 at pp. 208-9. These by no means exhaust the list.

[15] By Brewin *loc. cit.* and Thorson P. *loc. cit.*

[16] *Supra* footnote 5.

could be put forward. It could be said that Abbott J. has confused the proposition that Parliament would not pass such legislation with the proposition that Parliament could not pass such legislation which, if the theory of Parliamentary sovereignty be valid in Canada, is false. In the alternative, Abbott J. may have meant to assert that the basis of the British constitution is not the theory of Parliamentary sovereignty, but that rather it is that in the normal case at any rate, no agency may interfere with the liberty of the subject and that therefore, by its preamble, the *British North America Act* must be construed accordingly. This approach is fraught with difficulty for there is no warrant in the English authorities for restricting the sweeping powers of Parliament to emergency situations simply.[17]

It could perhaps be argued that all Abbott J. meant was that, since freedom of speech finds no place under the enumerated heads of legislation in sections 91 and 92, it must of necessity fall within the legislative sphere given to the Parliament of the Dominion under the residual head of section 91 in its sphere of normal operation. The whole tenor of his Lordship's judgment, however, rebuts this view, for obviously it is meant to import some restriction on the power of Parliament to legislate over freedom of speech. It is my submission that yet another approach is open; that in order to arrive at this statement, Abbott J. proceded on a misconception of Lord Haldane's theories with respect to the division of legislative powers under the *British North America Act*. A short examination of Lord Haldane's approach to such problems therefore becomes necessary.[18]

In working out his interpretation of the opening words of section 91, Lord Haldane accepts certain premises. These are:—

(1) That in general, the *British North America Act* apportions the totality of legislative power in Canada between Parliament and the Provincial legislatures.[19]

(2) If power over a certain area be not found in the enumerated heads of subject matter in either section 91 or section 92, it may fall within section 92 (16) which thus acts as a residual head.

(3) If the subject matter of the legislation does not fall within one of the enumerated heads previously mentioned, and if it is clearly not apt to fall within the residual head of section 92, it will fall within the residual head of section 91 in the scope of its normal employment. The incorporation of companies with Dominion-wide objects is an example.[20]

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[17]No such limitation for example appears to have been contemplated in *R.* v. *Halliday*, [1917] A.C. 260 or in any of the standard works. See Dicey *op. cit.*, Keir and Lawson's *Cases on Constitutional Law* at pp. 1 - 12.

[18]See Lord Tomlin in the *Fish Canneries Case* from which this summary is derived.

[19]It is submitted that the remark of Lord Haldane in answer to counsel in the *Snider* Case, [1925] A.C. 396 was not intended to overrule *Bank of Toronto* v. *Lambe*, so far as exhaustive division of legislative powers is concerned. Lord Haldane left no theoretical gap in the division of legislative powers though practical problems have arisen because of watertight compartmentation. See Laskin, *Canadian Constitutional Law* at pp. 25 - 6, The O'Connor *Report to the Senate*, Appendix 1, p. 17 *et. seq.*

[20]See *Great West Saddlery Co.* v. *The King*, [1921] 2 A.C. 91.

(4) Apart from the restricted area of normal operation allotted to it, the residual head is an overriding power limited to operation where a national emergency exists.

It is barely possible that Abbott J. thought that his statement applied this doctrine, but in fact it does not. His Lordship would invert the problem in the following manner:—

(1) Abbott J. would look to the enumerated heads of sections 91 and 92 to see whether the subject matter of legislation finds a place there.

(2) If the subject matter cannot fit within one of the enumerated heads, Abbott J. would place it within the residual heads of power reserved to the Dominion, and would then, by implication, restrict the use of this power to times of emergency.

This last proposition would appear to be that of Lord Haldane, but it is unsupported by his premises. Instead of premising a total division of legislative power, Abbott J. would leave us with a hiatus. Instead of premising a general and usable *residuum* of power in the Provinces, Abbott J. would appear to give this *residuum* to the Dominion, and then forbid its use save in times of national emergency. Certainly his Lordship cannot have given this power to the Dominion residual head in the course of normal operation. Abbott J. may have meant that the sovereignty of the Dominion Parliament over freedom of speech can be exercised only in times of emergency, but this must proceed on a misconception of the theory of Parliamentary sovereignty as applied to the Imperial Parliament.[21] The logical difficulties in attempting to ascribe a theory other than that of exercise of ancillary powers to Abbott J. appear to be insurmountable and it may ultimately appear simply that Abbott J. proceeded in error.

It is my submission that, despite some judicial wavering, the theory of Parliamentary sovereignty has been accepted as fully in Canada as it has in the United Kingdom and, that being so, it follows that neither Dominion nor Provincial Parliaments are limited in their power to legislate over any civil liberty or indeed any subject falling within the area of legislation allotted to them by the *British North America Act*.

The second argument advanced by those who would find a Bill of Rights implicit in the *British North America Act* is that because only the Federal Parliament has the constitutional power to legislate over these liberties, there is a partial Bill of Rights inherent in the Act which precludes interference by the Provinces. The validity of this view of course depends upon whether, in law, the Provincial legislatures are precluded from such legislation and this may depend upon two factors; the nature of the subject matter and the ambit or aspect of it.[22] It cannot be said that as yet there has been any conclusive statement one way or the other deciding whether Parliament or legislature has the necessary (and *ex hypothesi* exclusive) power. Support for the "partial"

[21]See footnote 17 *supra*.

[22]This does not refer to the subject matter test as distinct from the ambit or aspect test as a means of interpreting section 91, but refers to a suggested distinction between civil rights and civil liberties to be discussed *ante*.

Bills of Rights view has, however, been found in *dicta* delivered by various judges in the Supreme Court of Canada.

The first strong statement of the view that Parliament alone may legislate over freedom of speech came from Duff C.J.C. in the *Reference Re Alberta Statutes*,[23] a reference to determine the constitutional validity of three bills, one of which was the *Accurate News Bill*. Duff C.J.C.'s actual decision proceeded on the ground that the Bill was dependent on the *Alberta Social Credit Act* which had already been held to be invalid. But his Lordship went on to deliver the following statement:[24]

> Any attempt to abrogate this right of public debate or to suppress the traditional forms of exercise of the right would in our opinion be incompetent to the legislatures of the provinces as repugnant to the provisions of the *British North America Act* . . . The subject matter of such legislation could not be described as a provincial matter purely; as in substance and exclusively a matter of civil rights within the province.

With this statement Davis J. concurred. Cannon J. delivered a libertarian statement, but preferred to rest it on the grounds that interference with freedom of speech came within the Dominion power over criminal law as dealing essentially with the offence of sedition.

The intrinsic value of this statement may be higher than some of its detractors would concede. Duff C.J.C. followed Lord Haldane in permitting a limited area of normal operation to the residual head of section 91 in case of a gap where no specific power was given either to the provinces or the Dominion under sections 91 and 92 and where the subject matter of the legislation could not aptly come within the *residuum* of power given to the Provinces. It is wholly consistent with this theory to be of opinion that freedom of speech is not apt to come within the power over Property and Civil Rights, or the power over Local and Private Matters within the Province. It may well be said that legislative power over freedom of speech and of religion is only aptly comprehended within the residual head of power vested in the Dominion. At any rate, whether consistent with his views on the division of legislative power in Canada or not, this view of Duff C.J.C. has formed the basis of several like statements in the Supreme Court.

It was to be another sixteen years before the Supreme Court again had an opportunity to say a few words on the subject. Then, in 1953, *Saumur* v. *City of Quebec and A.G. Quebec*[25] arose for decision. By an action in the Superior Court of Quebec, the appellant, a member of Jehovah's Witnesses, attacked the validity of a bylaw of the City of Quebec forbidding distribution on the streets of the city of printed matter without the permission of the Chief of Police. The case was ultimately appealed to the Supreme Court of Canada and it became apparent that the very sharpest difference of opinion existed among the members of the court. Rinfret C.J. and Kerwin J. were firmly of opinion that legislative power over freedom of religion is vested as a civil right in the Provincial legislatures. Rand J. felt that the proposition that

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[23]*Reference re Alberta Statutes*, [1938] S.C.R. 100.

[24][1938] S.C.R. 100 at p. 133.

[25]*Saumur* v. *City of Quebec and A.G. Quebec*, [1953] 2 S.C.R. 299 at p. 392.

legislation in relation to the free profession of religion can come only within the Dominion power was clear.

> The dimensions of this interest
> are nationwide: it is even today embodied in the highest level of the constitutionalism of Great Britain: it appertains to a boundless field of ideas, beliefs and faiths with the deepest roots of loyalties: a religious incident reverberates from one end of the country to the other, and there is nothing to which the 'body politic of the Dominion' is more sensitive.[26]

Rand J. then sought support by inference from section 93 of the *British North America Act* which gives freedom of religious education to Protestant and Catholic alike. His Lordship went on to support the view taken by Duff C.J. in the *Reference re Alberta Statutes,* with respect to freedom of speech. Kellock J. delivered a similar opinion and also adopted the view of Duff C.J. It must be noted that Rand and Kellock JJ. did not carry with them a majority of the Court, but two majority judges, Cartwright and Fauteux JJ. appear to be prepared to admit that legislative power over freedom of speech and of religion must be vested in the Dominion as a matter of national concern.

In 1957 we have once more had pronouncements by the Supreme Court on the matter. In *Switzman* v *Elbling,*[27] the Supreme Court again stood divided. A majority of the court expressly impugned the *Padlock Act* on the ground that essentially it dealt with a matter of Criminal law and hence purported to usurp an area of Dominion power. A concurring minority led by Rand J. held that the Act dealt prejudicially with freedom of speech, that legislative power over freedom of speech was vested in the Dominion, and that therefore the legislation was *ultra vires* the Province. In reaching their decision, the minority raised and answered some very interesting questions.

In *Saumur,*[28] Rand J. had stated that freedom of speech and of religion are essentially, in their broadest aspect, matters of national concern. His Lordship had also stated that a civil right is distinct from a civil liberty, so that emphasis appears to have been given by his lordship both to the question whether such legislation can be said to be restricted in its aspects to legislation "within the province" and also to what constitutes a civil right as distinct from a civil liberty. This line of reasoning was restated in the *Switzman* case. Rand J. distinguishes between civil rights and civil liberties on the basis that liberties are exercised, not because they are established by law, but because they are not circumscribed by law; in other words, that we enjoy a liberty within a periphery of circumscriptions, each of which gives rise to a civil right. A subject, to fall within the subject matter of a civil right, must affect another civil right or give rise to a civil remedy.[29] This is a novel approach to the problem of finding which authority has legislative power over freedom of speech and of religion, and raises, I submit, some area for speculation. The language of Rand J. is both interesting and forceful. The purpose of the Act is, he said,[30]

> To prevent what is considered a poisoning of men's minds, to shield the individual from exposure to dangerous ideas, to protect him, in short from his own thinking propensities. There is nothing of civil rights in this: it is to curtail or proscribe those freedoms which the majority so far consider to be the condition of social cohesion and its ultimate stabilising force.

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[26] *Supra* footnote 25 at pp. 352 - 6.
[27] *Supra* footnote 5.
[28] *Supra* footnote 25.
[29] *Supra* footnote 5 at p. 305.
[30] *Supra* footnote 29.

Whether this approach is philosophically correct or not is a matter for the individual: one must accept the theory that there is a difference between liberties and rights on the basis essentially of correlative duties. Whether it is legitimate to attempt this approach within the confines of the *British North America Act* is the true question. It is worth remarking that widespread recognition of the right — liberty approach was not achieved until the writings of Hohfeld, a modern American author. It is highly questionable that such a distinction could be imputed to the Imperial Parliament of 1867. Undoubtedly a constitution, unlike an ordinary statute, ought so to be interpreted as to meet the unforseen event,[31] but this is not such a case. The Imperial parliament may have intended to give to the Canadian Parliament or the Provincial legislatures legislative jurisdiction over freedom of speech and religion, but not on the basis of a Hohfeldian classification. If that be so, then Rand J.'s approach is not legitimate.

The main line of reasoning followed by Rand J. is, however, that freedom of speech and of religion is essentially a matter of Dominion concern. Under a Parliamentary system of government,[32]

> the freedom of discussion in Canada as a subject matter of legislation has a unity of interest and significance extending equally to every part of the Dominion. With such dimensions it is *ipso facto* excluded from head 16 as a local matter.

Kellock J. agreed with Rand J. and drew support by inference from section 93 of the *British North America Act* as Rand J. had done in *Saumur*.[33] Locke J. also agreed with Rand J. and based his opinion on that of Duff C.J. in the *Reference re Alberta Statutes*. Abbott J., as we have seen, also supported Rand J., but finally parted company with Rand J. and went on to hold that in the normal case, even Parliament was in some way restricted in dealing with the two freedoms discussed.

It must be remembered that in none of the cases referred to has the *locus* of legislative power over freedom of speech and of religion been decided. It will, I submit, depend on whether the Supreme Court feels that either the subject matter of freedom of speech and religion or the broad aspect of the subject matter is essentially a matter of Dominion-wide concern. It is my submission that in time this view will come to be generally held and indeed, under the stimulus of Cold War conditions endangering civil liberties, the view is gaining strength. Nevertheless, progress will of necessity be slow, and it is at the moment rather too early to rejoice.

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[31] See Lord Sankey in *Edwards* v. *A.G. Canada* [1930] A.C. 124 at p. 136, cf Laskin (1955) 61 Queen's Quarterly.

[32] *Supra* footnote 29.

[33] *Supra* footnote 5 at p. 380.