The Canadian Bill of Rights: An Emerging Tool in Constitutional Cases?

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Strictly speaking, the *Canadian Bill of Rights*[1] is a federal statute passed in 1960. However, under its provisions, federal legislation can be declared inoperative. Accordingly, it has been termed "quasi-constitutional" in nature.

The *Canadian Bill of Rights* provides, in s. 2, that unless a law provides that it shall operate nothwithstanding the *Bill*, it shall be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms.

The freedoms are set out in s. 1, which provides as follows:

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

Section 2 provides that no law shall be construed or applied so as to:

> (*a*) authorize or effect the arbitrary detention, imprisonment or exile of any person;

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[1] S.C. 1960, c. 44.

> (*b*) impose or authorize the imposition of cruel and unusual treatment or punishment;
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> (*c*) deprive a person who has been arrested or detained
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> (i) of the right to be informed promptly of the reason for his arrest or detention,
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> (ii) of the right to retain and instruct counsel without delay, or
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> (iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;
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> (*d*) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;
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> (*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;
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> (*f*) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or
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> (*g*) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

In the early days of the *Bill*, the Supreme Court did not give it teeth. In fact, before 1985, there was only one Supreme Court case where relief was granted under the *Bill*.[2]

The two most significant sections of the *Bill*, in terms of the number of cases and practical utility, are ss. 1(a) (the protection for "due process of law") and ss. 2(e) (the right to a fair hearing for the determination of "rights and obligations").

Section 1(a) – earlier developments

On its face, this is a broad protection that would seem to afford "due process" protection before rights to life, liberty, security of the person and property were infringed. The inclusion of

[2] *R. v. Drybones*, [1970] 2 S.C.R. 282.

"property" opened up the possibility for litigation concerning when property could be taken away or affected and, if so, the procedural protections that would have to apply.

However, in the early years of the *Bill* the courts interpreted this provision very narrowly. The requirement of "due process" was not seen as substantive. It was interpreted only as a requirement that decisions be made according to law.[3]

Section 1(a) – Recent cases

The most noteworthy recent case is *Authorson v. Canada (Attorney General)*.[4] This was a class action brought by disabled veterans to claim interest before 1990 on sums held in trust on their behalf by the federal government. The legislation removed the veterans' rights to sue the government for breach of fiduciary duty. The veterans argued that this provision infringed s. 1(a) because it was passed and took away the veterans' property without consulting them about it. This was said to be an extinguishment of their property without due process of law. The Ontario Superior Court of Justice and the Court of Appeal for Ontario agreed with the veterans and found s. 1(a) violations.[5]

The Supreme Court allowed the appeal. In the unanimous judgment of the Court (*per* Major J.), there was no duty of procedural fairness imposed on Parliament in enacting legislation interfering with the protected rights, no duty of procedural fairness when the legislation was applied automatically to bar all cases (rather than considering particular cases) and no substantive due process rights to prevent the expropriation of property, at least in the case of unambiguous legislation.

Although the judgment of the Court does affirm the fact that the section affords "procedural due process in the application of the law in an individualized adjudicative setting" where rights to life, liberty, security of the person and property are involved, the Court does seem to restrict the

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[3] See, e.g., *Appleby v. The Queen* (1976), 76 D.L.R. (3d) 110 (N.B.A.D.).
[4] [2003] 2 S.C.R. 40.
[5] (2000), 53 O.R. (3d) 221 (S.C.J.) and (2002), 58 O.R. (3d) 417 (C.A.).

scope of this right. It does so in a way that potentially restricts the application of the *Bill* in other settings as well. The Court states that the *Bill* "protects only rights that existed in 1960, prior to the passage of the *Bill of Rights*".[6] Older, restrictive authority is cited in support of the proposition.[7]

It would appear that, if this statement is interpreted literally, in assessing the content of *Bill* provisions we must examine what rights were protected in 1960. This, of course, will limit the use of the *Bill*. However, it remains open to a later court to regard the statement as an *obiter*, unnecessary to decide the case, or to apply cases such as *Singh*, which applies a more purposive approach to the content of *Bill* provisions.

Section 2(e) – earlier developments

In 1985, three of six judges in the Supreme Court case of *Singh v. Canada (Minister of Employment and Immigration)* held that the federal refugee determination procedures triggered the right to a fair hearing under s. 2(e) of the *Bill*.[8] The right to a fair hearing was said to be triggered whenever one's "rights and obligations" were at stake. These three judges found that the provisions infringed s. 2(e) because they did not provide refugee claimants with an in-person or oral hearing before the decision-maker.

A fair amount of jurisprudence exists concerning the issue whether "rights and obligations" are involved. It is clear that human rights processes under the federal *Human Rights Act* are engaged.[9] However, rate-setting regimes,[10] deportation hearings,[11] and parole revocations[12] do not trigger "rights and obligations" sufficient to trigger s. 2(e) of the *Bill*. The line being drawn

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[6] At para. 33.
[7] At para. 33, Major J. cites *Miller v. The Queen*, [1977] 2 S.C.R. 680 at 703-704 (s. 1(a) cannot be used to attack capital punishment because no absolute right to life existed in 1960).
[8] [1985] 1 S.C.R. 177 *per* Beetz J.
[9] *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 and *MacBain v. Lederman* (1985), 22 D.L.R. (4th) 119 (F.C.A.)
[10] *National Anti-Poverty Organization v. Canada (Attorney General)* (1990), 60 D.L.R. (4th) 712 (F.C.A.).
[11] *Prata v. Canada (Minister of Manpower and Immigration)*, [1976] 1 S.C.R. 376.
[12] *Mitchell v. The Queen*, [1976] 2 S.C.R. 570.

in this area is not clear and could benefit from redefinition arrived at by virtue of a more purposive approach. The difference between "rights and obligations" on the one hand and "privileges" that are insufficient to trigger the *Bill* on the other is also an anachronism from an earlier era in administrative law when the distinction was viewed as significant.

The requirement that "rights and obligations" be affected is one limitation associated with s. 2(e). Others include the fact that it is purely procedural in nature and has no substantive content,[13] and the possibility, discussed above in the context of s. 1(a) and *Authorson*, that it only protects rights that existed in 1960.

Section 2(e) – Recent cases

In *Bell Canada v. Canadian Telephone Employees' Association*[14] the Supreme Court reaffirmed that s. 2(e) of the *Bill* applies to human rights determinations and protects the independence and impartiality of adjudicators. It added that the section did not require the highest standard of independence but only a "relatively high standard", a standard co-extensive with the common law. The reasons of the Court are short on this point but the import may be that s. 2(e) of the *Bill* does not afford a standard of procedural fairness higher than that existing at common law. This means that federal legislative attempts to oust common law fairness standards can be attacked using s. 2(e) of the *Bill*.

The *Authorson* case, discussed above, also concerned s. 2(e) of the *Bill*. On behalf of the Supreme Court, Major J. held that s. 2(e) only applied to proceedings before a tribunal or administrative board "that determines individual rights and obligations", not legislative bodies like Parliament. The case seems to reaffirm the view that s. 2(e) applies only to purely adjudicative decisions of adjudicative bodies and that policy-making and legislative decisions are beyond the scope of the section.

[13] *Duke v. The Queen*, [1972] S.C.R. 917.
[14] [2003] 1 S.C.R. 884.

The most significant case decided in this area is *Air Canada v. Canada (Attorney General)*,[15] currently in the Supreme Court of Canada (leave granted).[16] In this case, s. 2(e) was applied to strike down a provision in the *Competition Act*[17] that permits the Commissioner of Competition to issue temporary orders. In this case, the Commissioner made an order under this provision prohibiting Air Canada from offering certain discount fares or any similar fares on certain routes.

Air Canada argued that the provision violated s. 2(e) in two ways, the right to an impartial hearing and the right to be heard because it permitted the Commissioner to make temporary orders without prior judicial authorization (the Commissioner is an investigator and prosecutor under the Act) and without allowing persons affected by the order to make representations.

The case allowed the s. 2(e) claim and declared the provision inoperative. It did so even though the applicant was a corporation. This is an unresolved issue in the s. 2(e) jurisprudence. The section uses the word "person", which could embrace both natural and artificial persons and the decision of the Quebec Court of Appeal seems to assume that corporations may avail themselves of this right.

The Court of Appeal held that one does not need to establish the breach of any fundamental right in order to gain the protection of s. 2(e). Instead, one need only show a violation of one's "rights and obligations".

In defining the content of the fairness protections under s. 2(e) of the *Bill*, the Court of Appeal borrowed heavily from the standards developed in administrative law. It examined the nature of the decision made and the process followed in reaching it, the nature of the statutory scheme and the terms of the statute under which the Commissioner operated, the importance of the decision to the party affected, the legitimate expectations of the party challenging the decision and any procedural choices made by the Commissioner himself/herself. Applying this test, the Court of Appeal found that when the Commissioner issues an order under the provision, he/she does so not in applying social and economic policy but in adjudicating rights as between parties with

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[15] (2003), 222 D.L.R. (4th) 385 (Que. C.A.).
[16] S.C.C. No. 29660.
[17] R.S.C. 1985, c. C-34, s. 104.1.

opposing interests. The Court of Appeal found that the procedural rights owed to Air Canada approximated those of a party in court proceedings. The provision did not afford those rights and thus infringed s. 2(e) of the *Bill*. Further, the role of the Commissioner as investigator/prosecutor under the Act, is placed in the position of a judge when deciding whether to issue a temporary order. This confusion of roles violated the requirement of independence / impartiality under s. 2(e) of the *Bill*.

Another interesting feature of the *Air Canada* case is the Court of Appeal's holding that it should in effect apply a s. 1 *Charter* justification test. The *Bill*, of course, does not contain provision for the government to justify infringements. Section 1 of the *Charter*, of course, applies only to violations of rights and freedoms in the *Charter*.

Remedies

The suggestion that a justification test, similar to the *Oakes*[18] test under s. 1 of the *Charter* may apply in the context of the *Bill* opens up another interesting question. What remedies exist for violations of the *Bill?* Section 24(1) of the *Charter*, discussed most recently in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*[19], applies only to violations of the *Charter*.

Recently the Supreme Court held, citing *Doucet-Boudreau*, that the enforcement of the quasi-constitutional *Quebec Charter*[20] "can lead to the imposition of affirmative or negative obligations designed to correct or bring an end to situations that are incompatible with the *Quebec Charter*"[21] but this ruling could be distinguished on the basis of the broad statutory jurisdiction in s. 50 of the *Quebec Charter* to grant appropriate remedies "where consistent with the public interest". The Supreme Court also held that any remedy must be fashioned in a manner consistent with public law principles, many of which have been developed in the

[18] [1986] 1 S.C.R. 103.
[19] [2003] 3 S.C.R. 3.
[20] *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12.
[21] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, *supra*, 2004 SCC 30,, at para. 26.

constitutional context.[22] This is a case that may be directly applicable to the *Bill* because the constitutional position of the *Quebec Charter* is the same as the *Bill*: it is a rights-bearing legislative document of quasi-constitutional force.

In the case of the *Bill*, s. 2 sets out a remedy: legislation is to "be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared". This suggests a remedial jurisdiction parallelling that of s. 52 of the *Constitution Act, 1982*. Is there scope for injunctive relief or mandatory orders based on the *Canadian Bill of Rights*? Do courts have any inherent jurisdiction or common law jurisdiction that can be invoked to enforce *Canadian Bill of Rights* standards? Or must there be a statutory grant of jurisdiction, similar to s. 50 of the *Quebec Charter*, to give broader forms of relief. These questions may assume greater importance in light of the *Air Canada* case in the Supreme Court, particularly if the Court upholds the s. 2(e) (fair hearing) claims in the case and broadens the application of the *Canadian Bill of Rights*.

[22] *Ibid.*, at para. 15: "the appropriate remedy for a violation cannot be chosen without taking into account the constitutional framework and principles governing the organization and practices of Canada's public institutions so that the relationships between the various components of the legal hierarchy applicable to the situation under Quebec law are articulated appropriately."