

*The Constitution*

There is no doubt that many people view the Bill of Rights on one level as a great success because it did codify the essential beliefs which Canadians have. But on another level, and this is something that one probably does not see except maybe hear from law school professors or in decisions of the court, the Bill of Rights in some ways has not been successful. That is the fault of Parliament, and it was the fault of Parliament at the time it was passed. What members of Parliament did not do was state clearly, as was their duty, what implication follows as a result of a violation of one of those rights, what consequences will flow in circumstances where there has been a denial of some of these rights.

In particular, I would like to address my attention to that question in the context of certain examples. I think it is very important, in terms of the legal consequences that may flow, that before we choose a preference—and that is what we are doing here—we understand exactly what those results are.

Let me give this illustration. Under a charter of rights there can be no doubt, certainly on the basis of the speech which has just been given by the Minister of State for Multiculturalism, nor on the basis of the paper which the Right Hon. Prime Minister (Mr. Trudeau) gave when he was attorney general of Canada in 1966 with respect to codification and a charter of human rights—I have that document, which is public; nor can there be any doubt that they wish an American type of system. What are the ramifications of such, and are they desirable?

First of all, if we had a system in which the primacy is given to the Bill of Rights or to certain legal implications arising from these rights, what happens in circumstances where a man is charged with possession of stolen goods and a police officer makes a technical mistake in a search warrant? A raid occurs with respect to certain premises where, let us say, ten pounds of cocaine are found. The search warrant is defective, the search and seizure are unlawful and, under the charter of rights, because there was an unlawful invasion of rights which we wish to entrench, that man will go free.

What were the circumstances of common law? The circumstances of common law were that even though the search warrant may have been technically invalid, that evidence of finding the cocaine does not become inadmissible; it does not in any way exonerate the offender. The choice we have to make is do we give primacy to these types of rights? Do we understand these types of matters? Say, for example, in a case where a man is charged with an offence and gives a voluntary statement acknowledging the commission of the offence but he is not accorded by the police officer at the first reasonable opportunity his right to counsel—should a man be able to walk the streets and to be exonerated in those circumstances because a police officer has neglected to give that warning, which is a person's constitutional right under the charters of rights?

These are very difficult choices, because there are two rights and there always have been two rights. We have had to balance them. We have had to balance the right of liberty and the expectation that a person's rights are going to be afforded to him on the one hand, and the right certainly that a guilty

man should not necessarily go free because the constable blundered. Those are the choices that we have.

There are certain rights that I expect will be entrenched with respect to questions on freedom of religion and freedom of conscience. It may well be that those rights ought to be entrenched. But there are other rights which are contained in these resolutions which cause me a great deal of alarm. I heard mention made of Premier Lyon. I happened to be in attendance on the day when he gave his exposition of his point of view with respect to it. I was very impressed by the reality and the practicality of the submissions he made at the first ministers' conference. Let us make no mistake about it, there will be a major shift out of this House and into our courts. It will be the courts that will be deciding social policy. In this regard, maybe our leading constitutional expert, certainly in the twentieth century, Mr. W. P. Kennedy, in terms of how the British North America Act was interpreted by the courts, said: "Seldom have statesmen more deliberately striven to write their purposes into law, and seldom have they more singularly failed before judicial technique of statute interpretation."

If we are going to entrench rights, if we are going to entrench legal rights, let us at least have the courage to give the courts a proper sense of direction. Let us tell them within the charter of rights what we expect when there is a violation of those rights. We did not do that adequately in the Bill of Rights, unfortunately. This charter of rights is absolutely silent on the point. Certainly the courts have the right to expect that we will give them a sense of direction. If they are to have judicial review with respect to these matters, do we not have the duty to tell them, to argue among ourselves and to vote on whether they are in the circumstances, for example, legal rights?

• (1730)

Are they to take the primacy of those legal rights and knock out the whole tradition of common law, that evidence which is relevant to the commission of a crime may very well be inadmissible on the ground of a violation of some of these legal rights? These are difficult questions, but they absolutely must be addressed.

Resolutions have been put forward without any discussion so far of the implications. This is dangerous. We must at least say what we expect to come out of these resolutions. I find them totally inadequate in that regard.

When talking about the constitution, I would feel personally remiss if I did not state some expectations that I have with respect to this country and some of my personal feelings, because I believe the policy of this House is motivated by one's philosophy. I believe there is an historic rhythm to almost everything in life. I believe there will always be times of prosperity and times when we are not so prosperous. For example, when confederation took place, as a result of my reading of the confederation debates I feel that there was a great expectation that the west would not be annexed by the United States, but would grow and be a place of great opportunity for people in Canada.