CIVIL LIBERTIES AND CANADIAN FEDERALISM

by F. R. Scott

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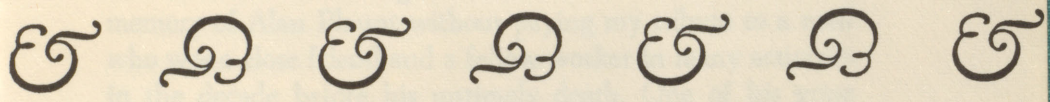

I

I would not like to begin this second series of lectures in memory of Alan Plaunt without paying my tribute to a man who was a close friend and a fellow worker in many activities in the decade before his untimely death. One of his great contributions to Canada was the way in which, with Graham Spry and others, he promoted the idea that radio broadcasting must be the responsibility of the state because of its vast importance to national unity and public enlightenment, but this achievement was only part of a wider plan of work for Canada on which he had set his heart. His life was inspired by a deep faith in his country and in its contribution to the democratic cause. He foresaw the great changes, both political, economic and social, that were necessary if the Canadian people were to create a vital national life out of their prevailing indecisions and sectional conflicts. He sought to express this faith and to assist these changes in everything to which he gave his support. He was a nationalist in the sense that he put Canada first in his thought and believed that, within this country, there were to be found the spiritual and material resources needed to build a free and progressive society. But there was nothing narrowly political or racial in his

nationalism. Not only did he accept fully the concept of equal partnership between French- and English-speaking Canadians —he made it a part of his basic faith in democracy. All else was secondary. He trusted in the people, and welcomed every movement that enlarged their opportunities and organized their strength. His interest in international affairs, as well as his dislike of imperialism, sprang from the same source. Moreover he combined an appreciation of music and painting with his social outlook. In contemporary Canadian painting he was particularly interested, for he saw in it the finest expression of our national sentiment. His love of art, and his recognition of the creative power of the individual, were the counterpart of his belief in progressive legislation and in the creative power of the group. In him the rare gifts of social vision and social imagination were developed to a high degree.

Now let me tell you what these two lectures will be about. They will discuss the relationship between civil liberties and the Canadian constitution, in the light of the steps now being taken to write a Bill of Rights into the law. But I want to enter upon this discussion from a much wider point of view than that suggested by present political alternatives or by the necessity of taking sides when it comes to a vote on a particular bill. I doubt whether anything I have to say will help any Member of Parliament to make up his mind on Mr. Diefenbaker's Bill C-60—assuming, of course, that our party system permits any such daring assertion of the individual will. What I am primarily concerned with is the growth of the constitution, and with our current interest in civil liberties and human rights as evidence of that growth.

I shall talk about civil liberties, but civil liberties as part of a never ceasing constitutional evolution.

We sometimes forget that Canada has one of the oldest constitutions in existence. So rapidly is the whole world moving forward into new relationships, so swiftly does technological change compel readjustments in the internal structures of contemporary societies, that nations are few which have been able to adapt themselves peacefully and gradually to constitutional inevitabilities. Revolution has been the order of our day. Peaslee's *Constitutions of Nations* lists 72 countries with constitutions younger than our own. England is, of course, the prime example of a major power which has maintained an unbroken rule of law over the centuries—nearly three centuries now, dating from the glorious revolution of 1688—while undergoing changes in social and political structure that may properly be called revolutionary. At crucial times that have strained and might have broken her legal order—1832, the first Reform Bill; 1911, the first Parliament Act; 1931, the Statute of Westminster; 1945, the first socialist government—major shifts of political power have been accomplished within and under the constitutional framework, which continues after the great events to look remarkably like what it was before them though in fact nothing can ever be quite the same again. Truly it has been said that the English change everything but the name, whereas in many other countries revolutions change nothing but the name. Canada has now enjoyed close on a century of unbroken constitutional evolution with a constitution that in outward appearance has altered remarkably little despite the transformation from the agricultural to the industrial base, from colony to nation, from horse-and-buggy to aeroplane, and from four provinces to ten. Since 1867 we have steadily developed our processes

of government under this constitution, strengthening some parts of the state machinery, allowing others to sink into virtual disuse, and generally putting Canadian flesh on the dry bones of the legal skeleton.

Looking back on our history with the eye of the constitutional lawyer I would single out four main lines of constitutional growth as being the chief measure of our achievement. The first was the consolidation of the vast British North American territories into a single state. Confederation at first included only Ontario, Quebec, Nova Scotia and New Brunswick, and of these Nova Scotia was a very reluctant partner. There was as yet no Dominion stretching from sea to sea. Negotiations with the British government resulted in the passing of the Rupert's Land Act in 1868 and the purchase of the rights of the Hudson's Bay Company. Canada then had title to enormous tracts of empty land in which the forms and processes of federal government had to be introduced. Manitoba, a federal creation, became the first post-Confederation province. British Columbia joined in 1871, and Prince Edward Island was brought in, or more accurately, bought in, by 1873. Sir John Macdonald had then achieved the first great part of his nation-building task, and the writ of the Canadian government ran across the continent. The northern frontier was still formless and vague, but in a simple one-page document called the Order-in-Council of 31st July 1880, the significance of which we can appreciate more fully today, the Imperial government transferred to us "all British Territories and Possessions in North America, and the Islands adjacent to such Territories and Possessions which are not already included in the Dominion of Canada" with the exception of the Colony of Newfoundland. Thus we had claim to Arctic regions at whose extent and value we could

only guess. When in 1949 Newfoundland was at last added to the Canadian family the dream of 1867 had become a reality, for we must not forget that delegates from Newfoundland attended the Quebec Conference in 1864 and voted in favour of the proposed federation.

The second marked evidence of our constitutional growth since 1867 lies in the definition of the status of provinces within the federal structure. Here opinions may well differ as to whether what happened was what was intended to happen by the Fathers, but the end result is clear. In the two leading cases of *Hodge* v. *The Queen* and *The Liquidators of the Maritime Bank* v. *The Receiver General of New Brunswick* a legal basis was laid for the notion of provincial autonomy which has come to be accepted as an inherent part of our federalism. *Hodge*'s case held that sovereignty existed in the provincial legislatures as fully as the Imperial Parliament possessed and could bestow it. Not only did this mean that provinces could therefore delegate their legislative powers to subordinate administrative bodies—and without such a rule it is difficult to see how government could have been carried on—but it also means—and this is relevant to any discussion of civil liberties—that provincial legislatures acting within their spheres of jurisdiction may enlarge or contract civil liberties and human rights as much as they please. They are curtailed only by what may be found in the British North America Act, and as we shall see, such restrictions are few. The *Liquidators* case held that the royal prerogative flowed into provinces for all purposes of provincial government, thus ending forever any notion that they were nothing more than glorified municipalities. When we add to these two cases the many others which greatly enlarged the content of specific words in section 92 of the B.N.A. Act listing pro-

vincial powers, the resulting growth in status of provincial governments is obvious.

Apart from judicial interpretation, we now perceive that section 109 of the constitution, which declares that the provinces should continue to have jurisdiction over their lands and minerals, was one of the most important powers which they possessed, for this has given provincial governments a major responsibility for the development of our natural resources. I doubt if the results were contemplated by the framers of the constitution. The main economic activities of Canadians in 1867 were agriculture, fishing, and trade and commerce, and these were all named as exclusive or concurrent federal heads of jurisdiction; all three have received so restrictive an interpretation in the courts as to discourage attempts at economic regulation in time of peace. This has fitted in remarkably well with our dominant philosophy of individualism, for it has meant that any government planning must operate within a relatively restricted area, the provinces being too small, and the federal government too circumscribed (at least outside the Northwest Territories) to control even if they wished the vast aggregations of capital which still operate under the label of free enterprise. It is surely obvious today that there are some corporations within the country more powerful than several of the provinces. The prairie provinces have not even the power to tax the Canadian Pacific Railway; the sovereignty of three Canadian governments, representing nearly three million people, is subordinated to the interest of one private corporation.

The growth in the status and power of provinces has had a special significance for Canada in the evolution of our concept of dual cultures. For while provincial autonomy and minority rights are by no means the same thing, as the whole

history of our separate school cases clearly shows, it is a fact that most French Canadians live in Quebec and that over wide areas of the social life of the province, though by no means over all, the legislature has exclusive jurisdiction, so that provincial autonomy and cultural particularism become largely synonymous. I do not propose to elaborate on a theme so familiar to this audience. Like so many other aspects of our national life, the heart of the matter is social rather than constitutional; with the important exception of the use of two languages in provincial courts and laws, and the inability of the Quebec legislature to delegate its powers to Parliament under section 94 of the B.N.A. Act (which no other province has ever used anyway), there is no difference between the constitutional position or powers of Quebec and that of the other original federating provinces. While the Quebec Royal Commission of Inquiry on Constitutional Problems, commonly known as the Tremblay Commission, evolved in its Report of 1956 some novel, not to say revolutionary, concepts of Canadian federalism, so far these ideas have had no effect on the evolution of our constitutional law.

A third striking growth in our constitution is evidenced by the development of Canada since 1867 from the position of colony to that of an independent nation state within the Commonwealth. This change, with its concomitants of the definition of Canadian citizenship in 1946 and the abolition of appeals to the Privy Council in 1949, seen in the long perspective of history, is but the completion of the struggle for responsible government which was perhaps the greatest single constitutional development prior to Confederation. So gradual and prolonged was the process that we are left at the end not knowing exactly when the magical transformation took place; indeed I still meet Canadians who feel it is not

quite nice to say that we are an independent country. Yet as one who took some part in the movement for various constitutional reforms prior to World War II, I cannot help finding satisfaction in the statement in the third edition of Halsbury's *Laws of England* that "With the decline of the concept of common allegiance, manifested by the creation of separate citizenships and the increasing evidence of the divisibility of the Crown afforded by the new form of the royal styles and titles, the theory of automatic belligerency can be regarded as outmoded." Shades of our great debate in the 1930's! Similarly satisfactory to me is the further statement in the same volume that "By this time [1947] the terms 'Dominion' and 'Dominion status' had come to be thought to convey a misleading impression of the constitutional and international status of the countries concerned, if not to imply subordination to the United Kingdom. The terms have therefor ceased to be used for official purposes, and the designation of the Secretary of State for the Dominions has been changed to Secretary of State for Commonwealth Relations." This radical transformation of colony into nation state, it should be noted, has occurred without so much as the change of a comma in the B.N.A. Act. It was climaxed by the new Letters Patent constituting the office of Governor General of Canada, effective October 1, 1947, which transferred "all powers and authorities" lawfully belonging to the Crown in England in respect of Canada to our Governor General. I emphasize that little word "all." If I had to choose our independence day, it would be this date. Incidentally, October 1 is a good time of the year on which to have a holiday.

Lastly in this list of striking changes since 1867 I would mention the enormous growth of governmental activity on all levels, federal, provincial and municipal. Collectivism is

creeping upon us with every increase of population and automation, and its coming is reflected in the almost total covering of our society by group activity, be it public or private. We are all civil servants or organization men today. The farmer, last stronghold of individualism, is steadily being brought into the system through integration, floor prices, bulk sales and other devices. Most noticeable among the enlarged federal activities are defence, social welfare and fiscal policy, using that term to include all measures intended to maintain economic stability. These new responsibilities of Parliament have produced the only two changes in the distribution of legislative powers that have been made since 1867, namely the unemployment insurance amendment of 1940 and the old age pensions amendment of 1951. Consequent upon the growth of state power has come the necessity of finding new financial relations between federal and provincial governments, for the original concept of provincial powers and functions, needing only direct taxation and subsidies to finance them, has broken down before the increasing demands of the welfare state and the requirements of fiscal policy. The courts have also developed in the law of the constitution the theory of emergency powers to enable Ottawa to deal in an unhampered way with the heavy responsibilities of wartime. This last power, the emergency power, raises technical legal problems I will not go into here, but we must keep it in mind when thinking of civil liberties and their protection, since it is commonly, and in my view erroneously, assumed that there is no place for the assertion of fundamental freedoms in wartime. Mr. Diefenbaker's Bill of Rights specifically provides that nothing done under the War Measures Act shall be deemed to be an infringement of the liberties proclaimed in the statute, thus giving a dangerous parliamentary approval,

if the Bill passes in this form, to the notion that in a war fought for democracy there are no limits to what the state may do to the citizen in an effort to achieve victory. There is need, I suggest, for a greater clarification of the limits of emergency powers and of the conditions under which, if at all, traditional protections for the individual, such as habeas corpus, may be suspended. Surely our behaviour during the spy scare of 1945 is a warning that we may easily exceed the measures reasonably necessary for our internal security.

It is against this background of a stable, well-tested and maturing constitution that I want to discuss the question of civil liberties and human rights. Only in recent years have we begun to concern ourselves with the place of civil liberties in our system of government; it was minority rights that first received attention. We have had many cases involving rights of citizens brought into the courts from time to time, but we have dealt with them as they arose and have not generalized from them any broad principles of freedom. It has been traditionally said among us that we were like the British in this as in so many other ways, and that any declaration of rights was incompatible with our kind of constitution. Does not the preamble of the B.N.A. Act say that we are to have a constitution similar in principle to that of Great Britain? And does not this mean that we leave the protection of our freedoms to the ordinary courts of law?

Most of us in the law schools are reared in the Diceyan gospel that with us—and I quote:

> every official from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punish-

ment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person.

These are noble words, and express the legal content of what we call the rule of law. The statement about the liability of a Prime Minister, incidentally, has no footnote reference to any authority in Dicey, such as is given for the colonial governor, the secretary of state and the military officer; I am happy to note that our Supreme Court in *Roncarelli* v. *Duplessis* has recently supplied such an authority, the first in the history of the Commonwealth. With Magna Carta in the background, and Dicey's rule of law in the foreground, we have not seemed to need any further safeguard for civil liberties. And in truth when we look at other constitutions with Bills of Rights in their written texts, not excepting the American constitution, and compare the rights of citizens under them with what has commonly prevailed in Canada, we have not felt that we were under any particular disadvantage.

Unfortunately we are missing several weaknesses in this idyllic picture. So simple a method of protecting human rights as the English use depends upon basic assumptions on which we cannot wholly rely in Canada. It depends upon three things: parliamentary restraint in legislation, bureaucratic restraint in administration, and a strong and live tradition of personal freedom among the citizens generally. We have some of all these factors, but not in any permanent or reliable degree. We have eleven legislatures to watch, and not just one, and the eleven possess almost unlimited sovereignty within their spheres. We have enormously expanded the

administrative authority of the state, for reasons I have just explained, and this means we have delegated state authority to thousands of officials not all of whom can be expected to be models of deference in the exercise of their multitudinous powers. Even in England this administrative growth has raised fears of a "New Despotism," or "administrative lawlessness," and other supposedly un-British characteristics. And we have in Canada a very mixed population, drawn from many different European and Asiatic societies, which has not yet been brought to a common understanding of the processes of parliamentary democracy by centuries of shared struggle and lively history. We are, moreover, embarked upon a governmental task which the English have never had to face—that of working out the terms and conditions of the co-existence of two cultures with very different concepts of the relationship of the individual and the church to the state. All these factors make the Canadian experiment in democracy unlike the British in easily discernible ways. We are now realizing that magnificent though our legal and constitutional inheritance may be, it may not suffice for our present purposes. We would do well to take stock of our position and to devise more precise methods for the strengthening of those principles of democratic government without which the creation of modern Canada would hardly seem justified.

Moreover when we stop to think of our own history we realize that we have in fact not relied upon tradition as sufficient. If we go back to our constitutional roots in English history we find several notable formulations of rights and liberties, from Magna Carta in 1215 down to the Bill of Rights of 1689, and on to the Balfour Declaration of 1926 and the Statute of Westminster of 1931. The theoretical sovereignty of the British Parliament has tended to blind us

to the reality of the limitations upon that sovereignty residing in the theory of government these documents proclaim. The kings and queens of England knew they ruled on the terms of a contract with their subjects, a contract to observe the laws and customs of the realm and to safeguard the rights and liberties of the people. When James II fled he was said to have broken this contract. We know that the United Kingdom Parliament has the theoretical power to repeal the Statute of Westminster, but we also know, to use the words of Lord Sankey in the *British Coal Corporation* case, that "that is theory and has no relation to realities." The realities are that Parliament is restrained in England by certain principles of government almost as effectively as if they were written into a binding constitution.

If we look into our own Canadian history we can find similar examples of the outstanding constitutional document. From the earliest days of British rule in Canada we have found it necessary to formulate, with increasing clarity, certain declarations of particular rights. The first of these had to do with those rights which pressed most early upon us. The Treaty of Utrecht in 1713, the Treaty of Paris of 1763, and the Quebec Act of 1774, laid the basis for the bicultural character of Canada by legalizing the practice of the Roman Catholic religion in Nova Scotia and Quebec respectively; the Quebec Act also restored the French civil law on all matters of property and civil rights, and altered the oath of allegiance so that Catholics might with good conscience hold public office. No future constitution could ignore these basic Canadian facts. Habeas corpus was introduced into Quebec by special ordinance in 1785; religious and civic equality for the Jews was provided in a Lower Canada statute of 1831. Jews sat in Parliament in this country before they

could take a seat at Westminster. Then in 1851 the old Province of Canada adopted the Freedom of Worship Act, which proclaimed in section 2:

> 2. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, provided the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, are by the constitution and laws of this Province allowed to all his Majestey's subjects living within the same.

This statute has continued in Quebec, appearing today as chapter 307 of the Revised Statutes, 1941. Ontario however ceased to reprint it after 1897 though it has never been repealed in that province. It is my view that this pre-Confederation statute is not only in force today throughout Quebec and Ontario, but cannot be repealed or amended by the provincial legislatures since the subject matter of section 2 falls within federal jurisdiction under the criminal law power. If this be the true view it means that Mr. Duplessis' recent amendments to the statute, designed to curb the activities of the Jehovah's Witnesses, are ultra vires (a matter now before the courts of Quebec) and that our two largest provinces are under a religious Bill of Rights. They cannot change it, and the Parliament of Canada, while able to, is certainly unlikely to change it. Hence we seem to find ourselves endowed by history with a peculiarly untouchable statute.

Our pre-Confederation history thus provides us with indications of the need to formulate civil liberties in Canada, not as a comprehensive and broad declaration of rights but as specific solutions to practical problems. The growth of the concepts was cumulative: positions gained at one stage lasted through any constitutional changes that came after. Take the question of the two official languages: neither the Treaty of

Paris of 1763 nor the Quebec Act of 1774 nor the Constitutional Act of 1792 protected the use of French, yet from the moment the first legislature in Lower Canada met it published its statutes in the two languages, side by side in the same volume. Durham's rather naïve faith that French Canada would gradually become British in language and institutions, and the strong feelings aroused by the rebellions of 1837–8, led to the prohibition of the publication of the laws in French in the Act of Union of 1841, but by 1848 an amendment reintroduced French as an official language. This settled the matter for Quebec, and the language provision in the B.N.A. Act, section 133, was the result. Carrying the story forward, we know that the federal Parliament wrote the two languages into the Manitoba constitution and into the Northwest Territories law, only to have both these extensions of bilingualism later removed by local action and pressure. The French network of the Canadian Broadcasting Corporation has produced a practical extension of French over large sections of the West in a manner more meaningful than a simple printing of statutes would achieve, but the situation from Quebec's point of view is still unequal and unsatisfactory. Yet what an enormous national asset it is to possess as our two official languages the two working languages of the United Nations! It is probably too much to expect that we shall all be bilingual, but it is not too much to hope that bilingualism may be increased in English Canada where it is least developed. This would have international as well as national advantages. Last summer at the International Congress of Comparative Law in Brussels delegates from 34 countries, including some from behind the Iron Curtain, used French as the language of communication; those who could only speak English had to have everything they said translated into French.

The pre-Confederation era saw other ideas vital to civil liberties emerge into constitutional form. Responsible government is an obvious example; its winning marked the first great Canadian achievement of the principle contained in article 21 of the Universal Declaration of Human Rights, which states: "21(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives." Briefly, responsible government meant that for all domestic purposes we had nationalized the Crown. At the same time the establishment of an independent judiciary, excluded from the executive and legislative branches of government, came slowly through statutory changes; it was not something we inherited from England at the start, but had to be fought for all over again in the colonies despite the well-known rule in the Act of Succession of 1701. So too the extension of the franchise, the payment of members of Parliament, and the completing of parliamentary processes generally represented a steady growth in the democratic idea and the placing of self-government on a firm basis of law and convention.

In the light of this historical survey we can appreciate better the degree to which the text of the B.N.A. Act of 1867 formulated or took for granted certain principles of civil liberty and human rights. It is true the Act did not contain a Bill of Rights of the type found in the American and other constitutions, but it is certainly not true that it contained no such rights at all. The reference in the preamble to the United Kingdom constitution as the model to be followed is itself indicative of the intentions of the framers: the United Kingdom at that time was a parliamentary democracy headed by a constitutional monarch who reigned but did not govern; it had a long tradition of civil liberties, and the rule of law was

firmly established. True, the doctrine of parliamentary sovereignty was a basic principle of English law, and to be "similar" to this concept our legislatures, even though limited in the area of their jurisdiction, had to possess the same kind of sovereignty within their spheres. This seems to argue us away from any notion of superior law restraining legislative action, but there is a counter-argument, first enunciated by Chief Justice Duff in the Alberta Press case in 1938, where he said (Davis J. concurring):

> The statute [B.N.A. Act] contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. This is signally true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives.

Mr. Justice Cannon expressed similar views. Not unnaturally this new line of argument opened a wide door to the discovery within the text of the Act of an inherent limitation on Canadian legislatures, both federal and provincial, deducible from the meaning the courts must give to words like "Parliament" and "Legislature." "There shall be one Parliament for Canada . . . ," says section 17: does not this mean, in the light of the preamble, that there shall be one freely elected Parliament for Canada, chosen after a free discussion of the party programmes in the press and on the hustings? The Alberta Press case went no further than to suggest that provincial legislatures could not take away basic freedoms. Mr. Justice Abbott

has extended the principle; he said in an *obiter dictum* in the Padlock Act case:

> Although it is not necessary, of course, to determine this question for the purpose of the present appeal, the Canadian constitution being declared to be similar in principle to that of the United Kingdom, I am also of the opinion that as our constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate.

There was also a remark of Chief Justice Rinfret in the case of the *Alliance des Professeurs catholiques* suggesting a similar restriction on provincial legislatures: he said that a legislature, even if it wished, could not enact the absurdity that a court acting without jurisdiction could be protected from writs of prohibition. And in the *Chabot* case, which upheld the right of a parent, a Witness of Jehovah, to require exemption for his children at school from Catholic religious instruction, Mr. Justice Casey went so far as to suggest that Canadian legislatures might be restrained by natural law. He quotes:

> But for natural law there would probably have been no American and no French revolution; nor would the great ideals of freedom and equality have found their way into the law-books after having found it into the hearts of men.

And then adds:

> On this point there can be no doubt for if these rights find their source in positive law they can be taken away. But if, as they do, they find their existence in the very nature of man, then they cannot be taken away and they must prevail should they conflict with the provisions of positive law.

While I personally think this statement goes beyond the limits of possible interpretation of the B.N.A. Act—for it is not re-

lated, as was Chief Justice Duff's approach, to the specific word "Parliament" in the text of the Act—it is indicative of a tendency to find limits to the notion of parliamentary sovereignty, and limits precisely designed to protect human rights and fundamental freedoms. This all goes to show the creative role the courts can and, I suggest, should play in the growth of the constitution.

More important than the preamble to the Act, because part of its enacting clauses, are certain provisions which are intended to guarantee liberties. Section 11 provides for a Privy Council to aid and advise the Governor General; this gives a statutory basis for responsible government. Responsible government was stipulated in the terms of admission of British Columbia. Section 20 states that there must be a session of Parliament once at least in every year, and section 50 says that every House of Commons shall last for five years and no longer; while this last term may be postponed by special vote in time of emergency under the 1949 amending power, the annual session cannot. These two provisions are a kind of Bill of Rights against prolonged government without popular consent, though we must remember that Mr. King showed us in 1940 that an annual session of Parliament might last only a few hours. We have lost the guaranteed right of provinces to representation in proportion to population that existed in the original constitution, since this matter is now subject to amendment by federal statute, but no one doubts that the principle is firmly fixed among us. There is even in the B.N.A. Act a special protection intended for the English-speaking minority in the Eastern Townships of Quebec; section 80 provides that no bill altering the electoral districts of that area can be passed unless a majority of their members have voted for it. Similarly each of the 24 Senators from Quebec must be

appointed for one of the 24 electoral divisions into which the Province was divided in 1867; this is a recognition of the right of both the French and English communities in Quebec to representation in the Canadian Senate. These provisions have lost some of their validity owing to the spread of the French-speaking population into the Townships, but they serve to remind us, along with the protection for Protestant schools and the English language, that the Province of Quebec in constitutional terms is not French or Catholic, but both bilingual and bicultural. It is indeed the only province in Canada of which this can truly be said, and to discuss Quebec's special claims under the constitution as though she spoke for French Canada only is to do violence to the Confederation agreement.

Minority rights to separate schools and the two languages are set out in sections 93 and 133; these operate as limitations upon the sovereignty of provincial and federal legislatures. Minority rights were matters peculiar to Canada and not part of our British inheritance. We saw how they formed a basic part of the pre-Confederation arrangements, so it is not surprising to see them entrenched in the fundamental law. What is perhaps strange is that no guarantee of religious freedom accompanied them into the B.N.A. Act; apart from the reference to separate and dissentient schools for Protestants and Roman Catholics which existed at the time of the Union or might be established afterwards, the Act is silent upon the subject of religious toleration. This is a matter we should do well to remember when we come to write our own Canadian constitution, since it may well be that laws affecting religious observance, and presumably therefore laws prohibiting or restricting any religion, fall within the federal criminal law power over which Parliament may be found to possess dangerously wide if not unlimited sovereignty. Such at least would

seem to be a conclusion that follows from the *Birks* case, about which more will be said in my second lecture.

An essential part of the 1867 arrangement was the federal power of disallowance of provincial laws. This was intended to be used to prevent interference with minority rights or discriminatory legislation injurious to Dominion interests. In the Confederation Debates Georges Etienne Cartier, in reply to a question from Hon. John Rose of Montreal as to what would happen if the French majority in Quebec tried to gerrymander the electoral districts so that no English-speaking member could be returned to the Legislature, replied that the veto power might be used. Hon. Mr. Holton asked "Would you advise it?" and he answered "Yes, I would recommend it myself in case of injustice." Disallowance, as we know, is an uncertain weapon, easier to use against small provinces than large ones, and was not resorted to in such striking examples of interference with minority rights and civil liberties as the Manitoba Acts of 1890 abolishing the separate school system and the use of the French language, or the Quebec Padlock Act of 1937. Yet the threat of it may have induced Prince Edward Island to repeal the worst features of its violently anti-labour Trade Union Act of 1948; and Mr. Smallwood's even more extreme interference with freedom of association as expressed in his recent legislation against the International Woodworkers Association and the Teamsters Union has again confronted the federal government with the necessity of deciding whether or not to use the power. Surely if disallowance can be used to save us from Social Credit legislation, as it was, it can be used to protect us from laws striking at fundamental freedoms. Are not trade unions a "minority" that needs protection? At the Constitutional Conference in 1950 every provincial Premier expressed himself as opposed

to the veto power, but I suggest that we should be chary of removing it, until we have at least a Bill of Rights written into the constitution itself and binding on provincial legislatures as well as on Parliament.

There is an important provision in the Act of 1867 which has caused and still causes much confusion with respect to the all-important problem of which of the two levels of government, federal or provincial, has the principal jurisdiction over civil liberties. This is the well-known head 13 of section 92 giving to provincial legislatures jurisdiction over "Property and Civil Rights in the Province." The phrase "civil rights" is the one currently used in the United States to cover the basic freedoms of religion, of speech, of the press, and so on, which we tend to describe as civil liberties or fundamental freedoms. Several judicial pronouncements have indicated that the words include the same freedoms in section 92, which would mean that the provinces would become the chief guardians of our traditional liberties. The alternative view, however, has been receiving strong support in some of the recent cases in our Supreme Court, notably the *Saumur*, the *Birks* and the Padlock Act cases. I have no doubt myself that this view is correct, and that the words "civil rights" were intended to refer only to private law rights between individuals, and not to those public rights, such as freedom of religion, of speech, of the press, of association and of the person, which are really attributes of citizenship and the limits of which are set in the criminal law. The late Mr. Justice Mignault has made the distinction between civil rights, political rights and public rights very clearly in a passage of the first volume of his treatise which Mr. Justice Kellock, I think, was the first to read into a Supreme Court judgment in the *Saumur* case in 1953. There is, however, a difficulty of interpretation here which

will require more Supreme Court decisions before it can be fully resolved, for there are undoubtedly some aspects of our civil liberties which fall within provincial jurisdiction if we include in the term such matters as defamation, trade union certification in provincial employments, voting rights in provincial elections, the status of married women, and so on.

The B.N.A. Act provided us with a written constitution of strict law, embedded in a context of constitutional convention and tradition. From that moment the growth of our ideas about civil liberties and human rights took place inside and under that constitution. The formative influences were the courts, in their interpretations, and the legislatures, in their enactment of laws. The courts in theory can only protect those rights, like the right to separate schools and to the use of the two languages, which are entrenched in the law. For the rest, they are confined to saying whether a particular law is or is not within the jurisdiction of the legislature which enacted it. With the justice of the law, with its policy and philosophy, once it has been found valid, they are not supposed to be concerned. The sovereignty of Parliament must be allowed to operate. As Mr. Justice Riddell once put it, "The prohibition 'Thou shalt not steal' has no legal force upon the sovereign body." Hence the role of the courts in the development of our constitutional freedoms operates within defined limits. It is their duty to declare the law as it is, and the legislatures make the law.

In fact, however, even under a written constitution without a Bill of Rights of a comprehensive sort the judicial role is extremely important. The discretion of the judge, particularly in constitutional cases, is very wide. There are two ways in which judges may in their interpretations lean to the side of liberty.

First, there is the established rule that all statutes should be strictly interpreted if they limit or reduce the rights of the citizen. Parliament must always be presumed to have intended the least interference with our freedom, not the most. Hence if two views of what a statute means are possible, that one will be preferred which leaves the larger freedom to the individual. Since words are clumsy things at best, and seldom convey a precise, invariable meaning, it is seldom that a statute does not allow of some alternative reading. This explains how in the same case a judge may be found to declare that there is only one possible view of what the law means and a court of appeal will equally firmly, and more authoritatively, declare that it means something else. A strong tradition of freedom in the judiciary thus acts as a corrective to illiberal tendencies that may exist in the legislature, whether it is that of a province or Parliament itself.

Secondly, the courts must say of any challenged statute whether or not it is within the powers of the enacting legislature. This judgment is a very complicated and difficult one, requiring a nice balance of legal skill, respect for established rules, and plain common sense. It is not and never can be an exact science. Law and statesmanship are inextricably intermingled in the interpretation of constitutions. When the Privy Council first had to decide whether a province in Canada could tax the banks, which are federal creatures, the argument was used that if they could they might abuse the power and make banking impossible. Their lordships said that the fact a power might be abused was no proof it did not exist, and the tax was upheld. Later when the Privy Council was met with the precise situation of a tax on banks, imposed by the Social Credit government of Alberta, which was so severe as to put the banks out of business if upheld, their lordships found that

the tax was not a true tax at all but an invasion of the field of banking legislation. The abuse was checked. There are so many ways of drawing the line between what is and what is not constitutional, that it is not difficult to find some reason why a particular piece of legislation is invalid if the judges are so inclined. Thus even without a Bill of Rights there is a certain degree of freedom in the courts to protect us against legislative tyranny. For by saying that a particular statute exceeds the jurisdiction of Parliament or legislature, the courts remove the statute from the books and liberties it destroyed are restored. For the time being at least our rights are saved. The great value of constitutional guarantees is that the courts can use them to check tides of opinion that can easily produce statutory infringements of our freedoms. In so far as we can achieve it, we place the courts above the political ferments of the day. I do not say that they always exhibit an Olympian detachment, or that they are not themselves moved by the same feelings and emotions as other men in the society about them. What I do say is that it is their function and duty to act as guardians of our rights whether we have a Bill of Rights or not, and that the more we understand and respect this role the more adequately will they fulfil it. I will end this lecture with a definition given by Percy Corbett, formerly Dean of the McGill Faculty of Law: "Law is our collective name for what is perhaps the most important set of institutions by which man has sought to reinforce his reason against his passions."

2

I was speaking in my first lecture of the growth of our constitution since 1867 in its various aspects, and of our awakening concern over civil liberties and fundamental freedoms. I concluded with an analysis of the role of the judges in the protection of our basic rights against legislative or bureaucratic infringement. This judicial function is so important that I intend to open this lecture with an examination of some typical cases that have arisen in the past, in order to show just what attitude the courts have taken in the face of concrete situations. We shall be in a far better position to judge of the necessity and nature of a Bill of Rights if we have some knowledge of these facts of our constitutional history. We need particularly to know about the leading civil liberties cases that have come before the Supreme Court of Canada in the past decade. In no other period of our history have so many important questions of this kind arisen. I shall not confine myself, however, to recent history, but shall include a selection of older cases that illustrate both the nature of our constitution and the kinds of behaviour of Canadians in different provinces which gives rise to court battles over civil liberties.

Before explaining these cases I must be a little more specific

as to what I mean by civil liberties and human rights. It seems to me that in Canada we must think of human rights and fundamental freedoms as comprising at least four main types of rights. I think we must include our minority rights among them. The United Nations Declaration does not contain minority or group rights, but in our history they have been of the first importance, and I would say without question that they rank ahead of nearly all other rights in the minds of most people in Quebec. I think that if the English were an equally surrounded minority they would feel the same way. At any rate the notion of minority rights guaranteed in the constitution is so fundamental to us and so closely related to the idea of a Bill of Rights that we should include them in our thinking on human rights. This does not mean, however, that they must be rewritten in the new Bill of Rights, if it is adopted; their place in the present constitution is fully entrenched and need not be changed.

A second group of rights are more usually called civil liberties or fundamental freedoms. They include freedom of religion, of the press, of speech and association. With these I would put freedom of the person—the right to move about unmolested, to be free from arbitrary arrest or unlawful detention, and the right to live where one chooses. Here too I would put the right to participate in one's government: the right to vote and to stand as candidate for legislative bodies. And I think academic freedom belongs among the civil liberties, as one aspect of freedom of speech and of conscience. A third kind of right is concerned with protecting the equality of status of citizens against discrimination due to race or religion: I would include here the types of statute we call Fair Employment Practices Acts and Fair Accommodation Practices Acts, and the Equal Pay for Equal Work Acts. These categories of

rights I mention can never be exact; somewhere in this second or third group we should have to place not only the right to a fair trial in criminal cases but also a right to a fair hearing and to be treated in accordance with the principles of natural justice before all administrative boards and tribunals. Fourthly there is a vaguely defined group of economic and cultural rights. The right to own property and not to be deprived of it without compensation is well recognized, but we must think today of many other and even more basic rights such as the right to work and to protection against unemployment, the right to health and education and social security, and so on. These are spelled out more fully in articles 22–27 of the Universal Declaration of Human Rights. While these rights may not lend themselves so readily to legal protection in constitutions, they are as vital a part of a free society today as the older civil liberties. We have learned from bitter experience that the satisfaction of basic human needs is essential for the survival of any form of orderly government, and in a highly industrialized society the state cannot leave this task to unregulated private enterprise.

Taking this wide area of law and rights as our field of enquiry, let us look then at some of the judicial decisions that have illuminated this part of the law of our constitution. I must be highly selective, but I shall choose some examples from the earlier days before coming to the important cases that have crowded upon us in the last few years. The interpretation of the minority rights clauses in the B.N.A. Act was the first problem to be judicially resolved in the field of human rights after Confederation. In 1871 the Privy Council held that, whatever separate schools may have existed in practice at the Union in New Brunswick, none existed by law, and therefore the Common Schools Act adopted by the province in 1871

was constitutional. At the creation of Manitoba, the rights to separate schools existing either by law or by practice were guaranteed, and in consequence our Supreme Court held ultra vires the 1890 legislation which destroyed the separate school system set up in 1871; by a unanimous judgment our judges felt that rights enjoyed in practice at the Union were prejudicially affected. The Privy Council overruled, and added fuel to the great fire that died down, but was not extinguished, by the election of Laurier in 1896. Provincial autonomy had won over minority rights.

The same autonomy prevailed in the Ontario language dispute occasioned by Regulation 17 of the year 1913; it was found that the class of persons whose rights were protected under section 93 of the B.N.A. Act was a class formed by religion and not by language, and hence the province was not prevented by the constitution from requiring instruction to be carried on in the schools in the language of its regulations. We can see the Privy Council in these cases showing the same favourable view of provincial legislative authority as their lordships disclosed in other questions involving provincial jurisdiction. The right to appeal to the federal government for remedial legislation was upheld, and Ontario was checked in certain measures taken to enforce Regulation 17, but I think we can say that the result of judicial interpretation was to confine the school rights of the B.N.A. Act within sharply defined limits. Other separate school cases since then have turned more on the interpretation of provincial laws than the B.N.A. Act itself, and so do not directly concern our topic of tonight, but I would refer again to the very interesting judgment of the Quebec Court of Appeal in the *Chabot* case in 1957 where the right of the parent to choose the kind of religious instruction to be given to the children was firmly

upheld. This is a right spelled out in article 26 of the United Nations Declaration.

Turning to the language provisions of the B.N.A. Act, and dealing only with the legal questions that have arisen, I have already noted how it was held that the right to use a particular language in the schools was not protected in the constitution. Strangely enough the validity of Manitoba's statute of 1890 abolishing French as an official language in that province was never tested in the courts; had it been, I personally do not see how it could be upheld. It has always seemed to me that Manitoba was placed on the same footing as Quebec, and that if the Manitoba law of 1890 establishing English as the sole official language was valid, then there is no security for the English language in my province. The abolition of the use of French in the Territories was on a different footing since it occurred before the creation of provincial governments in Saskatchewan and Alberta.

An interesting language question arose on the interpretation of a federal statute in 1935 when it was found that there was a difference between the English and French texts of the law; our Supreme Court held that since both texts were equally authoritative that version was to be preferred which best expressed the intention of the legislature, which in that instance was clearest in the French. It was held, partly because of the French text, that a government car on a road could not be a "public work." I like to point out to English-speaking practitioners in provinces other than Quebec that in order to practise law with the utmost skill they must always compare the two texts of the federal statutes if they want to make sure that they are giving their clients the full protection of the law. Appropriately enough, the cause of action in this case arose in a locality called Britannia. It was on the same

principle of equal authority of the two languages that Mr. Duplessis was induced to repeal a statute that the legislature of Quebec had passed in 1937 which purported to make the French text of the Civil Code prevail over the English in all cases of conflict.

Questions of racial discrimination, both in employment and in exercising the right to vote, gave rise to a number of cases from the turn of the century onward, particularly in the province of British Columbia. The power of disallowance was also used to set aside several of the provincial statutes aimed at the Asians on the ground that they affected Imperial relations with Japan. Among these cases I would single out *Cunningham* v. *Tomey Homma* in 1903 as having established a very important principle. It held that a British Columbia law barring Chinese, Japanese and Indians, whether naturalized or not, from the provincial franchise was a valid exercise of the province's power to amend its own constitution. British Columbia has of course removed these discriminations since then, but the case remains as a reminder that the possession of Canadian citizenship is no guarantee of the equal protection of the right to vote. Once again provincial autonomy stands as a potential threat to equal status before the law. This case did much to overrule the earlier case of *Union Colliery* v. *Bryden* which had held that a British Columbia statute which prohibited Chinamen from working underground in coal mines was an invasion of the federal power over "naturalization and aliens." There are still some aspects of the law of citizenship which have not been fully worked out, and it may be that the status of Canadian citizen may come to mean more than it seems to now, but we have to take the cases as we find them and racial discrimination in electoral laws seems clearly within provincial powers. No purely federal Bill of Rights could

change this fact. With regard to employment, we have a Supreme Court of Canada decision of 1914 holding that a Saskatchewan law prohibiting white girls from working in Chinese restaurants and places of business was valid. Fair Employment Practices Acts are now taking care of this situation; we now have a federal statute and six provincial statutes of this type. Something else we can see looming on the judicial horizon is the question of the validity of the Alberta legislation limiting the right of the Hutterites to purchase land near the existing brotherhoods. Are we to make forms of Christian communism a legal offence? Is the right to own property to be restricted to those who use it in a capitalistic manner?

Two other examples of discrimination will illustrate the wide area of provincial law covering this aspect of human rights. The problem of the restrictive covenant in leases and sales has received attention in the well-known cases of *In re Drummond Wren*, and *Noble* v. *Wolf*. The question is whether a vendor or landlord can attach a condition to the premises excluding their purchase or lease by persons of a particular race or religion. Here we see the right of private contract, and the right of a man to do what he likes with his own property, coming in conflict with the notion that no person should be discriminated against on grounds of race, religion or colour. Mr. Justice Mackay's courageous judgment in the *Drummond Wren* case invoking the Universal Declaration of Human Rights as evidence that such a condition was contrary to public policy will be perhaps more remembered outside than inside the law courts, for the decision in the *Noble* v. *Wolf* case went on less humane grounds. I may quote part of what his Lordship said:

> In my opinion, nothing could be more calculated to create or deepen divisions between existing religious and ethnic groups in

this province, or in this country, than the sanction of a method of land transfer which would permit the segregation and confinement of particular groups to particular business or residential areas. . . .

Ontario and Canada, too, may well be termed a province, and a country, of minorities in regard to the religious and ethnic groups which live therein. It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity. The common law courts have, by their actions over the years, obviated the need for rigid constitutional guarantees in our policy by their wide use of the doctrine of public policy as an active agent in the promotion of the public weal.

. . . If the common law of treason encompasses the stirring up of hatred between different classes of His Majesty's subjects, the common law of public policy is surely adequate to void the restrictive covenant which is here attacked.

As Mr. Smout said in commenting on these cases in the *Canadian Bar Review*:

The courts did not wait for education to convince the gamblers of the moral impropriety of gambling, but meanwhile held the gambling contract unenforceable. There would seem to be no reason why the courts should wait for the intolerant to become tolerant before holding the discrimination covenant to be also unenforceable.

Unfortunately we have not arrived at that point either, it seems, in the law of Quebec or in the common law provinces. The courts have it in their power to come to the aid of racial equality, but unless the proposed Bill of Rights be taken by future judges as having clearly defined Canadian public policy more surely than has the Universal Declaration it will not affect provincial law.

Besides restrictive covenants, we have had cases of racial discrimination in the refusal of restaurant keepers and others

to serve customers on grounds of race and colour. The Fair Accommodation Practices Acts are designed to make this an offence. It is indeed encouraging that Ontario and Saskatchewan have adopted such Bills and that one is being contemplated in Nova Scotia. In Quebec the law seems to be fixed by the *Christie* case which went to the Supreme Court of Canada in 1941; there damages were denied to a negro who had been refused a glass of beer because of his colour, in the York Tavern, though tavernkeepers can only operate under provincial licence and might reasonably be considered as acting under public authority. Freedom of commerce prevailed over racial equality, the tavern not being held to be a restaurant or hotel which by Quebec law are obliged to serve all comers. In choosing the particular result in this case, the majority of the judges exercised a discretion that could as well have gone the other way; once again we see the important role the judges must play in selecting which of two alternative views they will adopt.

I do not propose to go into the special problem of civil liberties in wartime, or to recount the various forms of censorship imposed under the Defence of Canada Regulations. It was said by Mr. Justice Stuart in a sedition case in 1916: "There have been more prosecutions for seditious words in Alberta in the past two years than in all the history of England for over 100 years, and England has had numerous and critical wars in that time." We can hardly expect normal rules to apply in times of such stress, yet we must I think be as vigilant in wartime as we should be in peacetime to see that the bounds of reasonable limitation are not exceeded. Because the freedoms may have to be less does not mean that they should cease to exist. In particular we are left with a legacy from World War II that I think should be discarded. The

Privy Council, going a little further than our Supreme Court, upheld in full the Orders-in-Council of 1945 providing for deportation of the Canadian Japanese. Surely this interpretation of our constitution is as frightening as the policy of deportation was reprehensible. For it means that even Canadian-born citizens can be deported by Order-in-Council under the War Measures Act—assuming of course that a country can be found willing to receive them. I fail to see on what conceivable ground such a power can be felt to be necessary in the hands of our federal government. As citizens have we not the right to pay whatever penalty the law may require of us for breach of the law, and then to return to our own community after release from prison? In the case of the Japanese, of course, they had committed no crime whatsoever. I notice that the proposed Bill of Rights does not save us from this power in any future emergency. I suggest that the War Measures Act should be amended at least to prevent the federal executive from possessing this authority. To take it away from Parliament itself would seem to require an amendment to the B.N.A. Act.

Now I wish to look at the cases which have recently come before our Supreme Court and which have so sharply focussed our attention upon questions of fundamental freedoms. The first I wish to mention is that of *Boucher* v. *The King*, decided in 1951. This was a charge of seditious libel taken against Boucher, a Witness of Jehovah, for having distributed the pamphlet known as "Quebec's Burning Hate" to several persons in the district of Beauce, Quebec. The pamphlet was written in protest against the numerous arrests of members of the sect which had been going on in Quebec for some years, and against what was alleged to be the mob violence used on various occasions. It undoubtedly contained strong language

directed to the conduct of officials in church and state; the question was, was it seditious? This involved the court in defining closely the Canadian law of sedition, particularly in the light of certain recent amendments to the Criminal Code. The lower courts agreed that the pamphlet was seditious, but the Supreme Court by a majority found otherwise. The decision is of the greatest importance to the law on freedom of speech, in my view, since it removed a rather vague idea that merely saying or writing something that might stir up feelings of ill-will between different classes of subjects constituted sedition in itself, whether or not there was an intention to incite to violence. Such an intention to promote violence or resistance or defiance for the purpose of disturbing constituted authority is now essential to the crime. As Mr. Justice Rand observed:

> There is no modern authority which holds that mere effect of tending to create discontent or disaffection among His Majesty's subjects or ill-will or hostility between groups of them, but not tending to issue in illegal conduct, constitutes the crime, and this for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality. A superficial examination of the word shows its insufficiency: what is the degree necessary to criminality? Can it ever, as mere subjective condition, be so? Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in morals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability. Similarly in discontent, affection and hostility:

as subjective incidents of controversy, they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in the clarification of thought and, as we believe, in the search for the constitution and truth of things generally.

This case provides an excellent example of how in the definition of terms the area of freedom can be broadened or restricted. But I would point out that this was simply an interpretation of the present criminal law; if Parliament chose to tighten the law it could do so by amending the code, and no Bill of Rights short of an amendment to the B.N.A. Act would save us.

I take next the case of the *Alliance des Professeurs catholiques*, decided in 1953. The Alliance was an association of Catholic school teachers which had been certified as a bargaining agent for the Catholic schools of Montreal by the Quebec Labour Relations Board. The Alliance was never popular with the School Commission, to say the least, and a request for decertification was made to the Board. The request came from Montreal, but it was accorded on the same day by the Board sitting in Quebec and the Alliance was notified by telegram immediately without having been summoned for a hearing and before even the written document containing the request had reached the Board. As Chief Justice Rinfret aptly remarked, "Voilà une justice expéditive." The decertification was held invalid on the ground that one of the principles of natural justice, *audi alteram partem*, had not been followed. The case fully supports this great principle of administrative law; unfortunately in the outcome the Alliance lost its suit because by the time it reached the Privy Council the Quebec legislature had amended the Labour Relations Act retroactively. Provincial autonomy won over the power of judicial interpretation, and this will ever be the case in all matters

falling within provincial jurisdiction if we do not have a true Bill of Rights in the constitution.

In the same year as the *Alliance* case came a somewhat similar trade union case from Nova Scotia, and again our Supreme Court, this time upholding the courts below, took a liberal view of the law. The Nova Scotia Labour Relations Board had refused to certify a union because it found that its secretary-treasurer was a communist. No justification for this refusal was found in the law. Again quoting Mr. Justice Rand:

> There is no law in this country against holding such [i.e. communist] views. This man is eligible for election or appointment to the highest political offices in the province: on what ground can it be said that the legislature of which he might be a member has empowered the Board, in effect, to exclude him from a labour union?

Here the court drew the distinction, so necessary for us to maintain in times of strong controversy, between unpopularity and illegality. How much more fair and reasonable this approach is than that of the British Columbia Court of Appeal which upheld the Bar of the province in refusing permission to practice law to a law graduate believed to be a communist. It is not difficult to make out an argument that no man with a loyalty outside Canada should hold public office, but in that case why bar only communists? Why not Catholics and others who may conscientiously place religious obligation above their duty to the state?

I pass now to a case that is not easy to analyse because of the variety of judicial opinion it contains, but which raises a question of the utmost importance to civil liberties—the *Saumur* case. Saumur was a Witness of Jehovah in Quebec who attacked the validity of a city by-law forbidding the distribution

in the streets of the city of any book, pamphlet, circular or tract whatever without permission of the Chief of Police. Let us pause a moment to reflect upon the thoroughly menacing nature of this type of by-law, which any Quebec municipalities may adopt under a special statute enacted in 1947 by the legislature. It means that freedom of the press is placed under the censorship of the police. In Montreal at one time even federal election literature could not be distributed from door to door without the approval of the city executive, so that the operation of the federal election act was subject to municipal control. A man walking down the street would commit an offence if he pulled a pamphlet out of his pocket and gave it to his friend beside him. One zealous Quebec municipality went so far as to prohibit the distribution of literature inside private houses. This form of violation of civil liberties is not peculiar to Quebec; similar by-laws have been enacted in the United States and have been held unconstitutional by the American Supreme Court, though I know of no other province of Canada which has adopted them. Aimed at the Witnesses, communists and, very probably, trade unions, such by-laws take away the rights of all of us.

Now the holding in the *Saumur* case was satisfactory in that the Quebec City by-law was found not to prohibit the Witnesses from distributing in the streets, principally because of the Quebec Freedom of Worship Act. But the by-law itself was not held invalid, and it would seem that a majority of the Supreme Court at that time considered that a city might properly exercise such control over literature distributed in the streets. If this decision stands, a more damaging blow at our traditional electoral practices and at freedom of the press and of speech and of association can hardly be imagined. For a circular announcing a public meeting would require police

approval, so that the ability of the citizens to meet together and to hear public speakers discuss the issues of the day is struck at by the simple process of controlling this means of communication. While there are other ways of announcing meetings, for those who can afford to pay for them, these too are liable to be under other forms of censorship and control from private persons. There was a time when the Montreal Star would not take a paid advertisement calling a C.C.F. meeting. The City of Montreal by-law dealing with distribution of literature has been held unconstitutional by the Superior Court, but we are left in a somewhat uncertain state as to the general right of municipalities to affect fundamental freedoms under their authority to regulate what goes on in the streets.

I shall refer now to two cases which illustrate the danger to civil liberties from illegal police behaviour. These are the *Chaput* and the *Lamb* cases, decided in the Supreme Court in 1955 and 1959. Both involved Jehovah's Witnesses; in both the police were condemned to pay personal damages to the persons whose rights were violated. In the *Chaput* case the police, on orders from a superior officer, broke up an admittedly orderly religious meeting being conducted in a private house. Religious books and pamphlets were seized, and the officiating minister was forced to leave the premises. No charge of any kind was laid against anybody. In a unanimous judgment, overruling the Quebec courts, Chaput was awarded damages. The case brings out several important rules of our constitutional and administrative law. On the constitutional side, Mr. Justice Taschereau enunciated with great clarity the doctrine that in Canada there is complete equality among the various religious beliefs. He said:

Dans notre pays, il n'exist pas de religion d'Etat. Personne n'est tenu d'adhérer à une croyance quelconque. Toutes les religions

sont sur un pied d'égalité, et tous les catholiques comme d'ailleurs tous les protestants, les juifs, ou les autres adhérents des diverses dénominations religieuses, ont la plus entière liberté de penser comme ils le désirent. La conscience de chacun est une affaire personnelle, et l'affaire de nul autre. It serait désolant de penser qu'une majorité puisse imposer ses vues religieuses à une minorité. Ce serait une erreur fâcheuse de croire qu'on sert son pays ou sa religion, en refusant dans une province, à une minorité, les mêmes droits que l'on revendique soi-même avec raison, dans une autre province.

On the administrative law side, the case illustrates the well-known rule that orders from a superior officer are no defence. The lesser official in the governmental hierarchy is not protected in wrong-doing because the superior officer tells him to do something; the illegal order merely makes the superior officer liable too. This rule is essential to the preservation of the rule of law as we have inherited it; it makes each and every public officer personally responsible for right behaviour, and unable to hide behind some cloak of authority. In this case the police were actually committing a crime, that of disturbing a religious ceremony. How can orders to commit a crime make the crime lawful? This is the expression in our domestic law of the rule we wish to write firmly into international law, so that those who commit crimes against humanity may be brought to book, as at Nuremberg, without being able to plead superior orders.

Another aspect of this, as of some similar cases, deserves comment. Sociologists may explain how it is that even in our supposedly civilized societies we seem capable of developing the concept of the outlaw. The outlaw is—outside the law; he has no rights of any kind, and therefore no one can do wrong in attacking, defaming, arresting or assaulting him, or even in destroying his property. It seems that the Witnesses of Jehovah were placed in that category in some parts of Quebec.

Because one of their pamphlets was once held to be seditious, it was assumed by some officials that not only were all their other pamphlets seditious but that every member of the sect belonged to a seditious conspiracy though no court had ever held this and no such charge was ever laid. Roncarelli, for instance, was accused of fomenting sedition and had his private business deliberately destroyed when all he had ever done, besides being a member of the Witnesses, was give lawful bail in a lawful court with the lawful approval of the presiding judge. So too it seemed at one time as though every person called a communist was immediately outlawed. The outlawry of certain trade unions in Newfoundland has been attempted by more formal means, but the intention is the same. There is no more dangerous concept than this to the cause of civil liberties. Civil liberties are always needed most by unpopular people. Even the worst criminals after conviction have rights, and of course before conviction they are presumed innocent. It is the function of the law, and of the independent judges who apply it as well as of the independent barristers who practise it on behalf of all clients who need their help, to uphold the notion of legality against the pressures of angry opinion. Should the lawyers be afraid to take unpopular clients, and the judges afraid to give unpopular decisions, all the principles of the law would be worthless.

The *Lamb* case is merely another example of police illegality, but it is part of the dismal picture that has too often been exposed in Quebec in recent years. Miss Lamb, another Jehovah's Witness, was illegally arrested, held over the weekend in the cells without any charge being laid against her, not allowed to telephone a lawyer, and then offered her freedom on condition she signed a document releasing the police from all responsibility for the way they had treated her. When

reading such a story one wonders how many other innocent victims have been similarly treated by the police but have not had the courage and the backing to pursue the matter through to final victory—in this instance 12½ years after the arrest had taken place. We should be grateful that we have in this country some victims of state oppression who stand up for their rights. Their victory is the victory of all of us.

It will be noted that both these police cases from Quebec involve a defence of civil liberties by the normal process of the action in damages against the officials who have violated them. We see here the civil law of Quebec being brought into operation exactly as is the common law in similar cases. The rule of law of Dicey, whether based on civil law or common law, operates in very much the same way. It is probable however that the protection afforded by the civil law is somewhat wider than that given by the common law, for the reason that the civil law of delict is more fully evolved than the common law of tort. There is a universal principle of delict and quasi-delict, whereas there are only specific torts. Hence it is easier to bring a new situation under the law of delictual responsibility than it is to bring it under the ancient torts. This is theory, however; all will depend upon judicial willingness in interpretation, and unfortunately in almost every case coming from Quebec recently the provincial courts have not seen their way to protect civil liberties whereas the Supreme Court of Canada has. Technicalities seem to loom more largely in the minds of the Quebec Judges, whereas the Supreme Court appears to find more ways of securing that substantial justice shall be done.

Let me refer now to two cases which involved interpretations of the B.N.A. Act, namely the *Birks* case and the Padlock Act case. In the *Birks* case a Montreal by-law, passed

in virtue of a provincial statute, required that storekeepers should close their stores on the six Catholic holy days. Question: is this a law providing more holidays for employees, or is it a law for compulsory observance of the religious practices of one religion upon all people whether belonging to that religion or not? By a unanimous judgment the Supreme Court, overruling the Quebec Court of Appeal, found that religious observance was the pith and substance of the law, since, among other reasons, no additional holiday was provided for the employees of the stores if one of these holy days happened to fall on a Sunday. But in so holding the wider rule was laid down that laws affecting religious observance belonged within the field of criminal law and hence were exclusively within federal jurisdiction. This is therefore a leading case on the meaning of the B.N.A. Act, and will have future consequences much more important than those decisions which, like the *Chaput* and *Lamb* cases, turned primarily upon provincial law which the legislature could amend if it wished.

The same results follow from the Padlock Act case. This was a statute which purported to make illegal the preaching of communism or bolshevism in houses in Quebec, and the printing and distribution of literature propagating or tending to propagate these ideologies anywhere in the province. The Attorney-General of Quebec, upon any evidence that seemed to himself adequate, could order the padlocking of houses where the offence was committed, and the seizure of all such literature, without trial or conviction of any sort. Outside of the Defence of Canada Regulations in wartime, I know of no other equivalent attempt at thought control in the history of Canada. The Act had been upheld in earlier judgments in the Quebec courts, the late Chief Justice Greenshields

having once remarked from the bench: "I fail to find in the statute any interference with freedom of speech." Fortunately this judicial blindness did not affect the Supreme Court, which held that the subject matter of the Act fell under the criminal law power. Had the opposite view prevailed, we would have had the extraordinary situation in Canada that while the federal Elections Act would decide who could be a candidate for Parliament, a province might have barred the use of any public hall or building to members of any particular party. We would have been left with what I call the "open-field" theory of democracy; freedom of speech would have existed only in the open air. As Mr. Justice Rand said:

> Parliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves; and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles. Under that government, 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.

And he added: " . . . Legislatures and Parliament are permanent features of our constitutional structure, and the body of discussion is indivisible. . . ."

I come now to the last of the recent cases I wish to refer to —that of *Roncarelli* v. *Duplessis*. This case has many angles and lends itself to a variety of interpretations, but I think can be reduced to a very simple and reasonable proposition. When a public officer exceeds his authority, and thereby causes damage, he must pay for it personally. This is a basic rule of English constitutional and administrative law which Quebec inherited along with all other Canadian provinces. It is really what we mean when we say, as we can say with pride, that in our polity the state is under the law. For the

state is nothing but the people who compose it, arranged in various groupings called legislatures and courts and senates and crowns-in-council. Constitutional law prescribes the groupings and their functions; administrative law tells us what authority each official possesses and how he may exercise it. No public officer has any power beyond what the law confers upon him, and the courts say what the law is. Thus the law puts a definite boundary around each official beyond which he acts at his peril. I say this, in Ottawa, with all the emphasis at my command. Any citizen—and this is a crucial corollary to which there are few exceptions—can sue any official in the ordinary courts if that official has damaged him in a manner not permittd by law. No one is immune, not even a Prime Minister.

Now I am happy to note that no judge in any court in the *Roncarelli* case disagreed with this fundamental proposition. Where the disagreement came was on the facts of the case (for instance, did the Prime Minister actually cause the licence to be cancelled, or did he merely give advice that it could be cancelled?) or on the legal question as to whether the powers of an Attorney-General included that of ordering a cancellation under the circumstances of the case, or whether or not notice of action should have been given. No judge said a Prime Minister could not be sued. None said that he was free to exceed his powers.

I do not think there is any new law in this holding; it is really the same rule as was applied to the policemen in *Chaput* and *Lamb*. But it is always a triumph for the law to show that it is applied equally to all without fear or favour. This is what we mean when we say that all are equal before the law. The statement is by no means as true as it should be; Anatole France's quip that the law is the same for the rich as for the

poor, since both are allowed to sleep under bridges, has its counterpart in the statement that it is the same for both rich and poor since both are allowed to pay what it costs to carry their case to the Supreme Court of Canada. Yet the truth in the statement is, I suggest, even more important than the element of untruth, and woe betide any nation that loses sight of it.

Another reflection is appropriate upon the *Roncarelli* case. Our administrative services in Canada are carried on in the main by two methods: either through a government department, headed by a Cabinet minister, or through some public board or commission like the Canadian Broadcasting Corporation or the Quebec Liquor Commission. Some of these boards must be under close supervision of a Minister or even of the Cabinet, but some should be and are intended to be independent. Where they are independent, no politician has a right to interfere or to tell them how to behave. If he does, he exceeds his powers. This rule is essential for our protection against a too powerful state machine. When we distribute our powers, we want them to stay distributed, and here the courts can help as they did in *Roncarelli's* case. Politicians must learn that political power is not the same as legal authority.

Finally, the case is important in upholding the citizen's right to give bail. Bail is a great protection for civil liberties; it prevents the innocent from being punished by being held in prison pending trial, and every case starts with a presumption of innocence. To punish a man for giving bail is like punishing jurors for their verdicts or witnesses for their testimony. It is, or should be, in my view, a crime and not just an excess of authority. For it is interfering with a judicial process.

These are some of the civil liberties cases that have come

into the courts. Now let us see what we may hope from a Bill of Rights.

We must begin our thinking here by making some elementary distinctions.

The first is the distinction between a Declaration of Rights, which states principles but does not make law, and a Bill which is law in the strict sense and is provided with sanctions. It is the difference between the Universal Declaration of Human Rights on the one hand, and the American Bill of Rights on the other. Mr. Diefenbaker's Bill C-60 as drafted belongs in the category of Declaration, since the legal consequences which would flow from its enactment are at best extremely few if any. Opinions may differ about the value of a Declaration of Rights; in my thinking the educational effect of such Bills is far greater than might be supposed. The importance of Magna Carta in the history of England is not diminished by the fact that it could be set aside at any time by any later act of Parliament. The United Nations has taken few steps more influential than the adoption of its Declaration: to measure its effect upon ourselves only we have merely to note the very important changes we have made in our electoral and other laws since its proclamation ten years ago, most of which were undoubtedly stimulated by its provisions and our adherence to them. I understand that the celebration of the tenth anniversary of the Declaration in Halifax last December has already given rise to a Bill for Fair Accommodation Practices in that province. Two special committees of Parliament have already reviewed the Canadian situation in the light of the United Nations principles, and prepared the ground for the step we are now contemplating with our own federal Bill of Rights. If eternal vigilance be the price

of liberty, then a Declaration of Rights helps to keep vigilance vigilant.

A second distinction we must make is that between a Bill which confines itself to enunciating the traditional civil liberties and freedoms, and one which is comprehensive enough to include modern concepts of economic and cultural rights. Shall the Bill speak only the language of the past, or shall it have a forward look and enunciate principles for the guidance of public policy into the future? Here I feel the answer may depend upon whether the Bill is merely declaratory or whether it makes strict law. If we are only going to state objectives of national policy, why not state more rather than fewer objectives? To raise living standards, to give equal opportunity to all to develop their talents to the best of their abilities, to recognize the duty of the state in safeguarding employment and social security, is surely in keeping with our modern view of a democratic society. These are the driving forces of our age, and I think a declaratory Bill should express them. Then all Canadians can find something in the Bill which relates to their needs and aspirations. But if the Bill is to be a true Bill of Rights in the sense that it limits the sovereignty of legislatures in order to guarantee individual freedoms, then it may well be confined to civil liberties of the traditional type. Even this true Bill of Rights, however, can contain an enunciation of social objectives, as is common enough in the more recently drafted constitutions of new states.

Other distinctions impose themselves. We have the choice of amending the B.N.A. Act and putting our desired freedoms alongside the entrenched minority rights, or doing what has already been done in Saskatchewan and is now proposed for

the federal Parliament—passing a statute which only purports to cover the particular area of provincial or federal jurisdiction. It will be remembered that Senator Roebuck's Committee of the Senate in 1950 preferred an amendment to the B.N.A. Act, though it did recommend a Declaration of Rights by the Canadian Parliament as an interim measure. This is pretty well the course the present government has followed. Mr. Diefenbaker has himself described his Bill as a first step. But I feel we should be very cautious about this first step.

It seems to be assumed that a first step is always a good thing. Presumably a first step is a good thing if it is taking us closer to a desired goal, and will be followed by a second step. But if the taking of the first step confuses the issue and discourages people from any further effort then it may not be a good thing. I am frankly afraid that that is the position we may be facing.

The reason for the hesitancy to attempt to amend the B.N.A. Act is said to be the need to consult the provinces and the improbability of their agreeing to the change. And it is true that attempts to secure other amendments, notably that made in 1950 to achieve an amending clause, have dismally failed. But does it follow that a proposal to adopt a Bill of Rights would also be rejected? Not all previous attempts to secure amendments have been opposed: the 1951 amendment for old age pensions was unanimously agreed upon, and the 1940 amendment on unemployment insurance received some kind of approval from all provincial governments or leaders. A Bill of Rights in theory should win acceptance more easily, since it does not disturb the balance of power between Ottawa and provinces. No centralization of power takes place; the authority of both federal and provincial legislatures over certain matters now within their jurisdiction would be equally

reduced. Might not a conference to discuss the proposal be worth the effort? If it succeeded, even over a modest Bill containing only the recognized civil liberties, a major victory would have been achieved; if it failed, the way would still be open for a purely federal statute. The educational value of such a conference would surely be great.

Other possibilities present themselves. The federal Parliament might itself seek an amendment guaranteeing certain rights against future federal legislation. This would amount to a retransfer of jurisdiction from Ottawa back to the United Kingdom Parliament, there to await the process of amendment by Joint Address in the future should it be desired. If Ottawa gave the lead, then provinces might be invited to adhere individually to the amendment so as to secure the rights against their own legislation as well. If it be pointed out that this might leave us with some provinces who might not agree being in possession of more power than others who did, then I point to the inability of the western provinces to tax the Canadian Pacific Railway as proof that we already have a difference between the provincial autonomies. Minority rights are not the same in all provinces. Political pressures would mount inside provinces that had not adopted the Bill to make them join the others. It would not be necessary on this method to have identical Bills of Rights in each province, though for purposes of uniformity of interpretation this would be desirable. There have always been and there probably always will be some differences in the rights of Canadians living in different regions. The voting ages are not the same in all provinces; racial discrimination is more prohibited in some than in others; the rights of trade unions vary considerably. On the basic civil liberties such as freedom of religion and of speech there can scarcely exist a wide diversity

of laws: "the body of discussion is indivisible," as Mr. Justice Rand has said. But there is room for some diversity in many aspects of human rights viewed in their larger sense. Hence it does not matter if some provinces have a Bill of Rights and some do not.

If we are not prepared to amend the B.N.A. Act all we can have are separate Bills of Rights for Parliament and for the provincial legislatures, of a more or less declaratory type. Mr. Diefenbaker's proposed Bill is of this sort. Let me describe its main provisions. First of all it declares that in Canada there have existed and shall continue to exist the following 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;
(b) the right of the individual to protection of the law without discrimination by reason of race, national origin, colour, religion or sex;
(c) freedom of religion;
(d) freedom of speech;
(e) freedom of assembly and association; and
(f) freedom of the press.

It then goes on to require that all past and future laws within federal competence shall be so construed and applied as not to abrogate or infringe any of these freedoms. In addition, it declares that no federal statute or regulation shall be construed so as to impose any cruel, inhuman or degrading punishment, or to deprive a person who is arrested of his right to know the reason for his arrest, to retain counsel without delay, and to the remedy of habeas corpus, or to deprive a person of a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

This is the essence of the Bill, and you will note that in so far as it commands anything it is merely an instruction to judges; it tells them to interpret all federal laws in a certain liberal way. This sounds impressive, but in fact the courts have already a duty to interpret statutes in a liberal way, and the Bill adds little to their present powers. There are no sanctions of any kind in it; it does not attempt to create any new crimes. An individual whose freedoms are interfered with by another will stand in much the same position after this Bill is enacted as he did before; that is, he will have to rely upon his action in damages against the offending party, or upon habeas corpus, injunction or other appropriate writ. No new machinery is created for the enforcement of rights, such as the Americans have set up with their Civil Rights Section of the Justice Department, and such as we are experimenting with under the Fair Employment Practices Act. Our Minister of Justice, it is true, is required by section 4 to examine all future laws to see that they fulfil the purposes of the Bill, but presumably he reports to Parliament only, and does not investigate any violations of rights in the country at large.

There are further limitations in the Bill. Because of the notion of parliamentary sovereignty I spoke of earlier, this Bill in my view cannot bind future Parliaments. The instruction to the judges to interpret all future laws in favour of these freedoms would have to give way before any later law that in fact clearly took away the freedoms. I think this is true whether the future law says it is amending the Bill of Rights or not. Hence the Bill does not put our liberties on a secure foundation. Doubtless no future Parliament would lightly contravene these principles; but then, even without the Bill it would not lightly do so. Provincial legislatures can abrogate human rights exactly as much after the Bill becomes law

as they may have done in the past, and Canadian history shows that provincial legislatures are more likely than the federal Parliament to violate minority rights and individual freedoms. Provinces are more easily swept by new doctrines that might endanger our traditional liberties.

I conclude therefore that this Bill has perhaps educational value; it will stand as a solemn affirmation of democratic beliefs; it spells out a number of specific rights in a detailed way. It is a Bill of Rights for all Canadians, yes, because all Canadians come under some federal law. But it is a very partial Bill, applicable only in peacetime, no stronger than the self-restraint of our federal members of Parliament at any given moment, and inapplicable to provincial legislatures. Moreover it is confined to political and personal freedoms; it makes no attempt to protect other human rights, like the right to non-discrimination in employment. Cultural and economic rights are also omitted. It is moreover drafted in technical legal jargon. If this is the best we can do, we are admitting that we are not really deeply concerned about civil liberties.

Ladies and gentlemen, let me remind you that quite apart from this Bill there is another great constitutional change coming some day in Canada. We like to think that our nationhood is complete, but from the point of view of constitutional law it is not complete. We are still in a partly colonial relationship to Britain, for we still have to return to the British source of our constitution for its major amendments. We failed in 1950, during the federal provincial conference, to agree upon a satisfactory method of amending the B.N.A. Act. This must some day be done. A new attempt will have to be made to complete Canada's legal sovereignty. We must eventually nationalize the constitution, as we have nationalized the Crown. We must get rid of one anomaly

called the British North America Act, replacing that obsolete title by the Constitution of Canada, and another anomaly called the Joint Address of the Senate and House of Commons which, on adoption at Ottawa, goes for approval to a distant legislature (in which no Canadian sits) every time we need an amendment. At the same time, we must clear away a lot of dead wood in the text of the Act. When we have reached this final point of maturity, when at last we shall take our fate in our hands, and the United Kingdom Parliament has renounced all authority over Canada as it has done over other nations of the Commonwealth, then at last we shall be a truly independent people, dual in culture but single in democratic statehood. That will be the proper time at which to entrench in the constitution those further fundamental freedoms and human rights which are inadequately protected by purely Canadian declarations.

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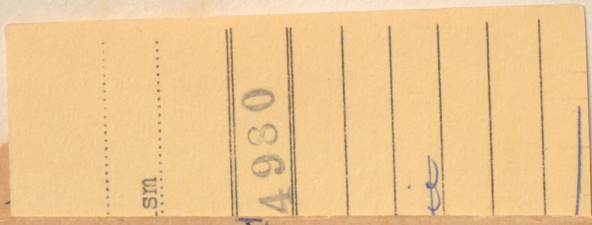

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