

Constitutional Amendment and the Implied Bill of Rights

Dale Gibson *

One of the most original and provocative contributions ever made to Canadian constitutional law was the *dictum* of Chief Justice Sir Lyman Duff in the *Alberta Press* case¹ that the British North America Act impliedly prohibits abrogation by provincial legislatures of certain important civil liberties. He stated that since the British North America Act requires the establishment of "One Parliament" for Canada;² and since the term "Parliament" means, when interpreted in the light of the Preamble's reference to "a Constitution similar in Principle to that of the United Kingdom", a democratic legislative body elected and functioning in an atmosphere of free speech; legislation abrogating freedom of speech in a particular province would be an interference with the character of the federal Parliament, and therefore *ultra vires* of the provincial legislature.

That the Duff *dictum* logically involves a restriction of the powers of the federal Parliament as well was pointed out first by Mr. Justice Abbott in the *Padlock Law* case.³ He expressed the view that "Parliament itself could not abrogate this right of discussion and debate". Since the provisions of the British North America Act are as binding on Parliament as on the provincial legislatures, this does seem to follow from Chief Justice Duff's *dictum*.

This idea is sometimes described as an "implied bill of rights". This is perhaps a little exaggerated, since the theory does not affect all the matters normally included in a written bill of rights. It purports only to protect those communicative freedoms which are essential to the existence of a democratic Parliament. Moreover, while it would prohibit complete "abrogation" of those rights, its effect on less severe restrictions is not clear. However, if these qualifications are kept in mind, the term "implied bill of rights" can be useful.

So radical a concept was bound to be controversial. It has never been accepted by a majority of the members of the Supreme Court

* Associate Professor, Manitoba Law School.

¹ *Reference Re Alberta Statutes*, [1938] S.C.R. 100, at p. 132.

² 30 & 31 Vict., c. 3, s. 17.

³ *Switzman v. Elbling, et al.*, [1957] S.C.R. 285, at p. 328.

of Canada, or of any other court, for that matter. On the other hand, it has commanded the allegiance of an impressive number of Supreme Court judges, and it has never been decisively rejected. It was raised in argument before the Supreme Court on a couple of recent occasions, but most of the judges were careful to sidestep it.⁴ The scholars are equally divided.⁵ This is not an appropriate place to deal fully with the debate, but it is necessary to review some of the principal arguments briefly.

Some critics have attacked the idea on the ground that it is based on the Preamble, which does not have legislative force.⁶ This is fallacious, however. The basis of both the Duff and Abbott arguments is section 17 of the Act. They simply used the Preamble for the perfectly legitimate purpose of assisting them to interpret the word "Parliament" in that section.

The most frequent objection to the idea that a hidden bill of rights lurks in the language of the British North America Act is that it is not consistent with the doctrine of parliamentary sovereignty.⁷ It is said that if our constitution is really similar in principle to that of Great Britain, it must include the concept of legislative supremacy, which is the root principle of British constitutional law. Therefore, it is argued, no subject can be beyond the legislative competence of both Parliament and the provincial legislatures. This argument overlooks two facts. First, complete legislative supremacy is impossible in any system of federal government, because there must always be a constitutional document that distributes legislative jurisdiction and is immune from alteration by either level of legislature. Second, the British North America Act contains several provisions which restrict the sovereignty of both Parliament and the provincial legislatures, even within their own jurisdictions. For ex-

⁴ In *Oil, Chemical and Atomic Workers International Union v. Imperial Oil Ltd.* (1964) 41 D.L.R. 2d 1 (S.C.C.), Abbott, J., dissenting, reiterated his views in the *Padlock Law* case, and Martland, J., for the majority, held that the Duff *dictum* was distinguishable, while the rest of the Court avoided the issue altogether. In *McKay v. The Queen* (1966) 53 D.L.R. 2d 532 (S.C.C.) Martland, J., this time in dissent, was the only judge to deal with the Duff *dictum*, which he again distinguished.

⁵ Professor Scott supports the idea: *Civil Liberties and Canadian Federalism*, 1959, p. 18, ff., as does Professor Schmeiser; *Civil Liberties In Canada*, 1964, p. 198, ff. Professor (now Mr. Justice) Laskin seems to oppose it (or at least the Abbott extension): "An Inquiry Into the Diefenbaker Bill of Rights", (1959) 37 Can. Bar Rev. 77, at p. 100, ff.

⁶ Laskin, *Canadian Constitutional Law*, 2nd ed., 1960, p. 940.

⁷ Laskin, "An Inquiry Into the Diefenbaker Bill of Rights", (1959) 37 Can. Bar Rev. 77, at p. 102.

ample, section 133 guarantees the right to use either the English or French language in Parliament and in any federal court, section 20 provides for an annual session of Parliament, and section 92(1) prohibits interference with the office of Lieutenant-Governor. Unlike the British Parliament, our legislatures are all bound by these and other provisions of our written constitution. The Duff and Abbott *dicta* do not, therefore, involve any radical departure; they merely seek to subject Parliament and the provincial legislatures to implied as well as to express constitutional restrictions.

Another objection is that the drafters of the British North America Act almost certainly had no intention of including the type of protection from legislative excesses that Chief Justice Duff and Mr. Justice Abbott have "discovered" in it.⁸ This is true, but irrelevant. If there is one thing that most constitutional authorities agree upon, it is that the courts must be allowed to exercise a substantial degree of creativity in interpreting the constitution.

A somewhat more plausible argument is that the Duff and Abbott *dicta* exceeded the limits of permissible judicial creativity; that a decision to place new restrictions on legislative powers is so important that it should be made by legislators, not judges. This is one of those questions of degree, about which there can be a wide range of opinion. My view is that where an issue as vital as the protection of civil liberties is concerned, and where the legislators have demonstrated their inability to provide adequate safeguards, the courts are entirely justified (perhaps even morally obliged) in employing all the ingenuity and imagination at their command to preserve individual rights.

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The purpose of this note is to examine how the implied bill of rights would be affected by the Fulton-Favreau proposal for constitutional amendment.

The existing amendment powers of Parliament and the provincial legislatures present no challenge to the concept. The provincial amending provision, section 92(1), obviously has no bearing on it, since it can not justify any interference with Parliament, a federal institution. It might be argued that the federal amendment power, bestowed in 1949 by section 91(1), endangers the implied bill of rights by enabling Parliament to change any of the federal features of the constitution, including the meaning of "Parliament" in section 17. It is unlikely that an express amendment, declaring Parliament to be no longer democratic, would ever be passed, but could not an

⁸ *Ibid.*

oppressive Act of Parliament simply be treated as an implied amendment of section 17? If so, the Duff *dictum* lost its force in 1949. Fortunately, there are several exceptions to the federal amending power, two of which, it is submitted, shield the implied bill of rights from amendment.

The more obvious of these is the stipulation that Parliament may not amend the constitution "as regards the requirements that there shall be a session of the Parliament of Canada at least once each year . . ." If the word "Parliament" is given the same interpretation here that Chief Justice Duff gave it in section 17, this provision clearly entrenches the implied bill of rights.

The other relevant exception to the federal amendment power relates to "rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province." It could be argued that this also prevents any federal amendment that would abrogate freedom of speech. If "Parliament" means a representative body working under the influence of free public opinion, as Chief Justice Duff asserted, the same meaning must certainly be ascribed to the words "Legislature" and "Legislative Assembly", by which the British North America Act refers to the provincial law-making bodies.⁹ Therefore, if it is unconstitutional for the provincial legislatures to destroy the atmosphere of free speech that is essential to the existence of "Parliament", the converse is also true. Or, to put it another way, abrogation of free speech by Parliament would be an improper interference with the "right", granted to provincial legislatures by use of the term "Legislature" in the British North America Act, to function in an environment of freedom, and would therefore be beyond Parliament's powers.

What would be the fate of the implied bill of rights if the Fulton-Favreau formula were adopted? This depends on how the exceptions to the rule of amendment by unanimity are interpreted. Section 2 of the formula provides that a constitutional amendment affecting "... the rights or privileges granted or secured by the Constitution of Canada to the legislature or the government of a province..." may only be made with the unanimous consent of Parliament and the provincial legislatures. So if the preceding paragraph is correct in regarding freedom of speech as such a provincial "right", the implied bill of rights would be about as firmly entrenched under the proposed scheme as at present.

⁹ An example is section 69: "There shall be a Legislature for Ontario consisting of the Lieutenant-Governor and of one House, styled the Legislative Assembly of Ontario".

However, the combined effect of sections 5, 6 and 8 of the Fulton-Favreau proposal is that amendment of "the requirements of the Constitution of Canada respecting a yearly session of Parliament" may be accomplished by Parliament and the legislatures of two-thirds of the provinces, representing fifty percent of the Canadian population. If this were regarded as the only constitutional safeguard of free speech, the implied bill of rights would be somewhat more vulnerable to attack by federal amendment than it is now.¹⁰

Let me summarize by means of an example. If the federal Parliament were to pass an Act making it a serious criminal offense to publish statements in support of some unpopular ideology, such as communism, I believe that as our constitution now stands the courts could declare the Act *ultra vires* on the basis of the Duff-Abbott doctrine. If the courts took such a step, it could only be nullified by a constitutional amendment, which in my view would require an Act of the British Parliament. If the Fulton-Favreau scheme were in operation, the result would be the same, except that the Act would have the effect of a constitutional amendment if ratified by the legislatures of either all or two-thirds (depending on the factors discussed above) of the provinces.

So while the Fulton-Favreau formula might confuse the issue a bit, it would not present a serious obstacle to a court determined to invoke the implied bill of rights. Whether the courts will display such determination is, of course, another question.

¹⁰ [As section 91: 1 of the B.N.A. Act would be repealed by s. 12 of the *Formula*, s. 17, foundation of the Duff dictum, would be as much excluded from amendment by simple federal statute as it was before the B.N.A. Act, 1949 put section 17 at the mercy of a simple federal Act. The new federal power given in compensation is narrower, a federal statute being now restricted to dealing with only the *branches*: i.e., Executive government, *Senate*, *Commons*. The difference may be material to the implied Bill of Rights, since s. 17, its foundation, refers also to *Parliament*. But *semble* s. 17 is amendable, like the yearly session rule, by the two-thirds procedure, as the author suggests.— Editor]