THE CANADIAN BILL OF RIGHTS AND THE LAVELL CASE:[1] A POSSIBLE SOLUTION

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The Bill of Rights in effect enjoins the Courts to presume that Parliament did not intend by any of its laws to discriminate between persons by reason of race, national origin, colour, religion or sex.

But any legislation "in relation to" Indians is necessarily discriminatory by reason of race because the law for Indians will always differ from the law for non-Indians.

Is the Canadian Bill of Rights, therefore, in effect an assurance by Parliament that unless a prescribed formula is used it will not exercise its jurisdiction under head 24 of section 91 of the B.N.A. Act?

The answer depends on the meaning of the word "discrimination" in the Bill of Rights.

If Parliament, for example, acting under head 12, Sea Coast and Inland Fisheries, enacted that no Canadian citizen of Icelandic origin should fish in Canadian waters there would be discrimination between classes of people in Canada by reason of race or national origin. But would this law be responsible for that discrimination, or would the discrimination arise out of the absence of the same law for all others? Would Parliament have discriminated by enacting the law, or by failing to enact the same law for others, which it has jurisdiction to do?

Again, if Parliament enacts a law of intestate succession for Indians there is discrimination in the sense that there is one law for Indians and other laws (provincial) for non-Indians. If the discrimination arises out of the existence of this law then Parliament has discriminated by enacting it. But if the discrimination arises out of the failure to enact the same law for all others then Parliament has not discriminated because it has not the power to extend such a law to non-Indians; there can therefore be no failure to do so.

Is it not arguable that there is no discrimination within the meaning of the Bill of Rights if Parliament extends a law equally to all persons over whom it has jurisdiction? Or that the discrimination about which the Bill of Rights speaks must be discrimination within the area of Parliament's jurisdiction?

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[1] *Re* Lavell and Attorney-General of Canada, 38 D.L.R.3d 481 (1973). For Comment, *see* p. [ ] *infra.*

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Accepting this argument, it would follow that Parliament has not by the Bill of Rights enjoined the courts to presume that it will henceforth not exercise its jurisdiction under head 24 of section 92, but has only required the courts to presume that any laws made in relation to the subject of Indians does not discriminate as between Indians, since "non-Indians" is not a subject of Parliament's jurisdiction.

On this line of reasoning the Supreme Court could have held that the Indian Act does not discriminate between Indians and non-Indians by reason of race, within the meaning of the Bill of Rights, but section 11 does discriminate between Indians by reason of sex.

This situation cannot arise on any subject other than Indians (race) or possibly also aliens (national origin), because under all the other heads of jurisdiction Parliament could enact the same law for everybody.

As for the *Drybones* case,[2] although one law was the Indian Act and the other law was an Ordinance of the Northwest Territories, Parliament does have jurisdiction under section 4 of the British North America Act, 1871, to enact the same laws for everybody in the Northwest Territories.

[2] Regina v. Drybones, [1970] Sup. Ct. 282, 9 D.L.R.3d 473, 71 W.W.R. 161.