THE CANADIAN BILL OF RIGHTS AND THE SUPREME COURT DECISIONS IN *LAVELL* AND *BURNSHINE*: A RETREAT FROM DRYBONES TO DICEY?*

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I. INTRODUCTION

In the United States, it is the "due process of law" clause in the Fifth, and more particularly the Fourteenth, Amendments to the Constitution, which has received the greatest amount of judicial application, and academic comment. In Canada, it appears to be the "equality before the law" clause in section 1(*b*) of the Canadian Bill of Rights. This is obviously a result of the decision in *Regina v. Drybones.*[1] In this case the Supreme Court of Canada held, for the first time, that a provision in a federal statute is inoperative when it is construed as being in conflict with the Canadian Bill of Rights. The decisions of the Supreme Court in *Attorney-General of Canada v. Lavell,*[2] and *Regina v. Burnshine*[3] presage a new outpouring of academic and other comment.[4]

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[1] [1970] Sup. Ct. 282 (1969) (Appeal dismissed, per Fauteux, Martland, Judson, Ritchie, Hall, Spence, JJ.; Cartwright, C.J., Abbott & Pigeon, JJ., dissenting). The articles on the *Drybones* case are legion. Of the longer ones see: Bowker, *Comment—Regina v. Drybones*, 8 ALTA. L. REV. 409 (1970); Cavalluzzo, *Judicial Review and the Bill of Rights: Drybones and its Aftermath*, 9 OSGOODE HALL L.J. 511 (1971); Leigh, *The Indian Act, the Supremacy of Parliament and the Equal Protection of the Laws*, 16 MCGILL L.J. 389 (1970); Lysyk, *Equality Before the Law*, 46 CAN. B. REV. 141 (1968); Marx, *La déclaration Canadienne des droits et l'affaire Drybones: Perspectives nouvelles?* 5 THÉMIS 305 (1970); Sanders, *The Bill of Rights and Indian Status*, 7 U.B.C.L. REV. 81 (1972); Sinclair, *The Queen v. Drybones: The Supreme Court of Canada and the Canadian Bill of Rights*, 8 OSGOODE HALL L.J. 599 (1970); Smith, *Regina v. Drybones and Equality before the Law*, 49 CAN. B. REV. 163 (1971); Tarnopolsky, *The Canadian Bill of Rights from Diefenbaker to Drybones*, 17 MCGILL L.J. 437 (1971); Dias, Judicial Supremacy in Canada in Comparative Perspective: A Critical Analysis of Drybones (Unpublished paper presented at the Canadian Political Science Association Annual Meeting, 8 June, 1971).

[2] 38 D.L.R.3d 481 (1973) (per Fauteux, C.J.C., Ritchie, Martland, Abbott, Judson, JJ.; Laskin, Abbott, Hall & Spence JJ. dissenting).

[3] [1974] 4 W.W.R. 49 (per Fauteux, C.J.C., Martland, Abbott, Judson, Ritchie & Pigeon, JJ.; Laskin, Spence & Dickson JJ. dissenting).

[4] See the comment on the lower court decision by Coté, *Jurisdiction of the*

II. THE FACTS

A. The Lavell Case

In the *Lavell* case the Supreme Court was concerned with two appeals, heard together, from two judgments of lower courts holding that the provisions of section 12(1)(*b*) of the Indian Act[5] were rendered inoperative by section 1(*b*) of the Canadian Bill of Rights, because those provisions denied the two respondents equality before the law. Both female respondents were registered Indians and band members within the meaning of section 11(*b*) of the Indian Act when they married non-Indians. This made them subject to section 12(1)(*b*) which provides:

> 12 (1) The following persons are not entitled to be registered, namely,
> (b) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in s. 11.

It was alleged that this provision discriminated as between Indian men and women, and was therefore in conflict with section 1(*b*) of the Canadian Bill of Rights, and so should be rendered inoperative.

Although the issue was the same in the two cases, the facts were somewhat different. Mrs. Lavell, except for sporadic visits to her family, had not resided on any reserve for some nine years before her marriage to a non-Indian. Upon this marriage, her name was deleted from the Indian register by the Registrar pursuant to section 12(1)(*b*) of the Indian Act. The appeal taken from the Registrar's decision to His Honour Judge Grossberg, as *persona designata* under the Indian Act, was dismissed.[6] An appeal from his decision was allowed by the Federal Court of Appeal,[7] which held that section 12(1)(*b*) of the Indian Act offended the right of an Indian woman as an individual to equality before the law, and was therefore rendered inoperative by the Canadian Bill of Rights.

Mrs. Bedard was born of Indian parents on the Six Nations Indian Reserve and married a non-Indian with whom she resided off the reserve, and by whom she had two children. When she separated from her husband, she returned to the reserve to live in a house situated on property which had passed to her under her mother's will. The Council of the Six Nations passed a resolution giving her permission to reside for a period of six months,

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Federal Court, 50 CAN. B. REV. 519 (1972). For a brief, recent comment on the Supreme Court decision, see MacKinnon, *Booze, Religion, Indians and the Canadian Bill of Rights*, [1973] PUBLIC LAW 295. For recent articles on the Supreme Court decision, see Sanders, *The Indian Act and the Bill of Rights*, 6 OTTAWA L. REV. 397 (1974) and Hogg, *The Canadian Bill of Rights—Equality before the Law—A.G. Can. v. Lavell*, 52 CAN. B. REV. 263 (1974).

[5] CAN. REV. STAT. c. I-6 (1970).

[6] 22 D.L.R.3d 182 (Ont. County Ct. 1971) (per Grossberg, J.).

[7] 22 D.L.R.3d 188 (Federal Ct. 1971) (per Jackett, C.J., Thurlowe & Pratte, JJ.).

in which time she was to dispose of the property. Subsequently, this permission was extended for another eight months, without any further opportunity of renewal. The respondent then conveyed her interest in the property to her brother who was a registered member of the band, and her brother permitted her and her infant children to continue occupying the premises without rent. Thereupon, the Band Council passed a further resolution by which it was resolved that the District Supervisor should be requested to serve a quit notice upon the respondent. Mrs. Bedard applied to Mr. Justice Osler of the Supreme Court of Ontario for a declaration that the request of the Council, and any action taken by the supervisor pursuant to such request, discriminated against her by reason of her race and sex, and denied her equality before the law. Mr. Justice Osler based his decision [8] on that of the Federal Court of Appeal in the *Lavell* [9] case, and so held that section 12(1)(*b*) of the Indian Act was inoperative.

The contention, then, submitted by both respondents was that they had been denied equality before the law by reason of sex. The Supreme Court, in a five [10] to four [11] decision, dismissed both appeals and held that the Indian women involved were not denied equality before the law by operation of section 12(1)(*b*) of the Indian Act.

B. The Burnshine Case

At issue in the *Burnshine* case was section 150 of the Prisons and Reformatories Act. [12] By this provision a court in British Columbia may sentence anyone, who is apparently under the age of 22, and who is convicted of an offence against the laws of Canada punishable by imprisonment for three months or more, to a term of not less than three months, and for an indeterminate period thereafter of not more than two years less one day, to be served in a special correctional institution rather than the common gaol.

The respondent, who was then seventeen years of age, had been charged with a summary conviction offence for which the maximum punishment prescribed by the Criminal Code is six months. Although he was acquitted at first instance, a conviction was entered against him after an appeal and trial *de novo*. Following a pre-sentence report, he was sentenced to a term of three months definite and two years less one day indeterminate pursuant to section 150 of the Prisons and Reformatories Act.

His appeal to the British Columbia Court of Appeal was allowed by a majority. [13] Justices of Appeal Branca and Nemetz held that section 150 contravened section 1(*b*) of the Canadian Bill of Rights and so was inoperative. On a subsequent hearing the Court of Appeal varied the sentence by striking

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[8] 25 D.L.R.3d 551 (Ont. High Ct. 1971) (per Osler, J.).

[9] *Supra* note 7.

[10] Fauteux, C.J.C., Ritchie, Martland, Judson & Pigeon JJ.

[11] Abbott, Hall, Spence & Laskin, JJ.

[12] CAN. REV. STAT. c. P-21 (1970).

[13] 22 Can. Crim. (n.s.) 271 (B.C. 1973) (Branca & Nemetz, JJ. allow appeal; Maclean, J.A. dissenting).

out the indeterminate portion. However, this variation was not appealed by the Crown. The appeal before the Supreme Court of Canada concerned only the issue of the effect of the Canadian Bill of Rights on section 150 of the Prisons and Reformatories Act. On this point the Supreme Court allowed the appeal by a majority of six [14] to three. [15]

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In this paper greater emphasis will be given to a discussion of the *Lavell* case because, as will be shown, the majority judgment of Mr. Justice Ritchie, both with respect to the necessity of applying 1960 concepts in interpreting the Canadian Bill of Rights, and with respect to the meaning to be given to section 1(*b*) thereof, could result in a drastic and unjustifiable limitation on the effectiveness of the Bill of Rights. The majority judgment of Mr. Justice Martland in the *Burnshine* case, however, although apparently adopting Mr. Justice Ritchie's opinion as to 1960 concepts, in fact affirms the thesis of this paper, that is, that the Supreme Court cannot avoid using a "reasonably justifiable" test for the "equality before the law" clause in section 1(*b*) of the Canadian Bill of Rights.

III. The Interpretation of the Canadian Bill of Rights

The problem in discussing the *Lavell* case is that so great a part of the judgments of the majority is devoted to setting up shibboleths and then elaborately and repeatedly striking them down. Excessively broad declarations are made, sometimes far beyond the requirements of the case, and then dismissed or reinterpreted without concise and sufficiently detailed analysis. In one sense, the effect of the decision could be very narrowly confined without great and irrevocable damage to the Canadian Bill of Rights by distinguishing between those comments which bear directly on the issue before the Supreme Court, and the large number of *obiter dicta* which were not necessary for this determination.

These are serious allegations which are advanced with great sympathy for the difficulty faced in the first few years by our judiciary with this somewhat new and greatly-increased responsibility placed upon them by the Canadian Bill of Rights. As Mr. Justice Abbott observed in his final statement in this case:

> Ritchie J., said in his reasons for judgment in *Drybones* that the implementation of the *Bill of Rights* by the Courts can give rise to great difficulties and that statement has been borne out in subsequent litigation. Of one thing I am certain the Bill will continue to supply sample grist to the judicial mills for some time to come. [16]

The Supreme Court is venturing into new areas, and with a Bill of Rights

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[14] Fauteux, C.J.C., Abbott, Martland, Judson, Ritchie & Pigeon JJ.
[15] Spence, Laskin & Dickson JJ.
[16] *Supra* note 2, at 484.

which could have been more precisely drafted. The task of the judiciary in Canada could have been greatly eased had the legislative draftsmen considered at least a few of the "modern" Bills of Rights in which some expertise had been achieved by draftsmen in the United Kingdom, as well as in Europe and in the United Nations.

Moreover, one should not forget that our Bill of Rights had been in existence for just over thirteen years at the time of the *Lavell* case. In the United States it was not until some dozen years after the adoption of the American Bill of Rights that the United States Supreme Court decided, in *Marbury v. Madison,* [17] that it had the power of judicial review over legislation, and that the Constitution was supreme. It was not until after the Civil War, almost three-quarters of a century later, and some would say not until after World War II, that the American Supreme Court began to protect civil liberties through the medium of the Bill of Rights and the Fourteenth Amendment.

Nevertheless, a commentator cannot shrink from his responsibility of assessing the validity of reasoning in judicial decision-making. It is the duty of the Supreme Court to decide. It is the duty of an academic lawyer to suggest possible alternatives when they seem preferable.

With great respect, perhaps the most irrelevant argument raised before the Supreme Court in the *Lavell* case, and dealt with at some length in the majority decision, was that the Canadian Bill of Rights invalidated the whole Indian Act. To have replied to such an argument was both unnecessary and misleadingly prejudicial to a sensible construction of the pertinent subsection of one section of the Indian Act. This was *not* the issue in *Drybones, nor* was it the issue in *Lavell.* Each was concerned with only one subsection of one section of the Indian Act, although in each case it was a different one. Both decisions were explicitly stated to be, and must be, confined only to those particular sections.

Moreover, when Mr. Justice Ritchie, in the majority decision, referred to the dissenting judgment of Mr. Justice Pigeon, in *Drybones,* this was the only portion of the decision he adopted. Thus, he said:

> The contention that the *Bill of Rights* is to be construed as overriding all of the special legislation imposed by Parliament under the *Indian Act* is, in my view, fully answered by Pigeon, J., in his dissenting opinion in the *Drybones* case . . . . [18]

The passage from Mr. Justice Pigeon that he referred to and quoted was as follows:

> If one of the effects of the *Canadian Bill of Rights* is to render inoperative all legal provisions whereby Indians as such are not dealt with in the same way as the general public, the conclusion is inescapable that Parliament, by the enactment of the *Bill,* has not only fundamentally altered the status of the Indians in that indirect fashion but has also made any future use of federal legislative authority over them subject to the requirement of ex-

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[17] [1803] 1 Cranch. 137.
[18] *Supra* note 2, at 491.

> pressly declaring every time "that the law shall operate notwithstanding the *Canadian Bill of Rights.*" I find it very difficult to believe that Parliament so intended when enacting the *Bill.* If a virtual suppression of federal legislation over Indians as such was meant, one would have expected this important change to be made explicitly not surreptitiously so to speak.[19]

This was the *only* portion of Mr. Justice Pigeon's dissenting opinion in the *Drybones* case which was adopted by the majority in the *Lavell* case. However, the bulk of Mr. Justice Pigeon's dissent in the *Drybones* case was from the finding of the majority that the Bill of Rights was more than a mere interpretative statute whose terms would yield to a contrary intention. The majority in the *Drybones* case had found that the Bill of Rights had paramount force when a federal enactment conflicted with its terms, and that it was the incompatible federal enactment which had to give way. *This* was the issue upon which Mr. Justice Pigeon dissented in the *Drybones* case, but *that was not* the part of his dissent which was referred to and adopted by Mr. Justice Ritchie in the majority decision in *Lavell.* It is difficult to understand, then, how Mr. Justice Pigeon could amplify this reference by Mr. Justice Ritchie to *only this one portion* of his judgment (which did *not deal* with the main issue) as being an endorsement of his entire dissent in *Drybones.* It is also difficult to understand how Mr. Justice Pigeon, instead of recognizing that his judgment was clearly overridden by the majority in *Drybones,* could take the very limited affirmation of a purely *obiter* statement, unrelated directly to either case, as a justification for keeping to his original view. This view was rejected by the majority in the *Drybones* case. Even in the *Lavell* case, Mr. Justice Ritchie did not dissent from his *Drybones* ruling, but rather affirmed it, and made distinctions on other grounds which will be discussed later.

Having set up an excessively wide possible effect for the Canadian Bill of Rights, the majority were led to facing the next major hurdle, *i.e.*, that the Canadian Bill of Rights could not be applied so as to amend the B.N.A. Act.

If one gives any credence at all to the argument that the Canadian Bill of Rights amended the whole of the Indian Act, it is then easy to see why the majority gave so much attention to the question of whether the Canadian Bill of Rights could amend the B.N.A. Act. In any case, the majority concluded that it could not. Mr. Justice Ritchie stated: "There cannot, in my view, be any doubt that whatever may have been achieved by the *Bill of Rights,* it is not effective to amend or in any way alter the terms of the *British North America Act* . . . ."[20] But surely that is too broad a statement unless by the words "not effective" is meant "not intended" or "not directed to," because by section 91(1) of the B.N.A. Act it is declared that:

> The exclusive Legislative Authority of the Parliament of Canada extends

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[19] *Supra* note 1, at 304.
[20] *Supra* note 2, at 489.

> to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, —
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> (1) The amendment from time to time of the Constitution of Canada,

except with respect to certain excluded matters. The Canadian Bill of Rights, by section 5, and by the preamble, is restricted to matters within Parliament's constitutional authority. None of its provisions deal with any of the excepted matters. Why could the Canadian Bill of Rights not be construed as an amendment under section 91(1) of the B.N.A. Act? Nevertheless, that was not the issue: only one subsection of one section of the Indian Act was in issue before the Supreme Court. It is tautological, and can lead to misleading results, to make it appear as if there were any question about Mr. Justice Ritchie's statement that "the effect of the Bill of Rights on the Indian Act can only be considered in light of the provisions of section 91(24) of the B.N.A. Act." [21] Surely that must be obvious. The Bill of Rights has no application to legislation which is not "assigned exclusively to the legislative authority of the Parliament of Canada." [22]

Mr. Justice Ritchie's counter-assertion to an argument on which no time should have been wasted, led directly to what must be suggested to be the two major flaws in the majority judgment. One of these flaws involved the distinction drawn by the majority between section 95 of the Indian Act (it was section 94 at the time of the *Drybones* decision), and the rest of the Act. The second concerned the need for Parliament to define the status of "Indian." These will be dealt with in turn.

Section 91(24) of the B.N.A. Act gives Parliament legislative jurisdiction with respect to "Indians and lands reserved for Indians." Mr. Justice Ritchie placed repeated stress on the latter part of that power. Thus, he suggested:

> What is at issue here is whether the *Bill of Rights* is to be construed as rendering inoperative one of the conditions imposed by Parliament for the use and occupation of Crown lands reserved for Indians. These conditions were imposed as a necessary part of the structure created by Parliament for the internal administration of the life of Indians on reserves and their entitlement to the use and benefit of Crown lands situate thereon, they were thus imposed in discharge of Parliament's constitutional function under s. 91(24) . . . . [23]

Later on he spoke of the, "responsibility of the Parliament of Canada in relation to the international* administration of the life of Indians on reserves . . . ." [24] Later still he stated:

> [I]t should first be observed that by far the greater part of that Act is concerned with the internal regulation of the lives of Indians on reserves and that the exceptional provisions dealing with the conduct of Indians off

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[21] *Id.*

[22] *Id.* at 490.

[23] *Id.*

[24] *Id.* * "internal" is meant.

> reserves and their contracts* with other Canadian citizens fall into an entirely different category.[25]

No explanation was given as to why these other provisions fell into an entirely different category. After a survey of all the provisions of the Act he concluded:

> A careful reading of the Act discloses that s. 95 (formerly s. 94, R.S.C. 1952, c. 149) is the only provision therein made which creates an offence for any behaviour of an Indian *off* a reserve and it will be plain that there is a wide difference between legislation such as s. 12(1)(*b*) governing the civil rights of designated persons living on Indian reserves to the use and benefit of Crown lands, and criminal legislation such as s. 95 which creates an offence punishable at law for Indians to act in a certain fashion when *off* a reserve. The former legislation is enacted as a part of the plan devised by Parliament, under s. 91(24) for the regulation of the internal domestic life of Indians on reserves. The latter is criminal legislation exclusively concerned with behaviour of Indians *off* a reserve.[26]

It must be pointed out that Parliament's legislative authority in section 91(24) of the B.N.A. Act is stated to be "Indians *and* lands reserved for Indians" [italics mine]. The first part of this provision must be equally as valid a ground of jurisdiction as the second. One part does not rely on the other for its efficacy. They are related but not necessarily co-dependent. The clause does not read "Indians *on* lands reserved for Indians," nor "Indians *only in so far as they are entitled to* lands reserved for Indians," nor "Indian *rights and obligations with respect to* lands reserved for Indians." It is true that the Indian Act chooses to define an "Indian" for the purposes of the Act in relation to membership of a band on a reserve. Parliament did not have to so define them.

Therefore, it is irrelevant to make the distinction even if section 95 were the only provision dealing with conduct of Indians *off* a reserve, *and it is not.* Mr. Justice Ritchie himself makes reference to section 88 of the Indian Act which provides that laws of general application in any province are applicable to, and in respect of, Indians in the province except to the extent that such laws make provision for any matter for which provision is made by, or under, the Indian Act. He does state that this "in no way signifies a relinquishment of Parliament's exclusive legislative authority over Indians."[26a] Certainly section 88 contemplates the competence of Parliament to make laws in respect of Indians which could replace provincial laws of general application. Parliament has on occasion so legislated. Thus, in the Indian Act as it stood in 1906,[27] section 103 included the following: "Indians and non-treaty Indians shall have the right to sue for debts due to them, or in respect of any tort or wrong inflicted upon them, or to compel the performance of obligations contracted with them . . . ." Section 149 provided:

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[25] *Id.* at 495-96.
[26] *Id.* at 498. * "contacts" is meant.
[26a] *Id.* at 489-90.
[27] CAN. REV. STAT. c. 81 (1906).

> Every Indian or other person who engages in, or assists in celebrating or encourages either directly or indirectly another to celebrate any Indian festival, dance or other ceremony of which the giving away or paying or giving back of money, goods or articles of any sort forms a part, or is a feature, whether such gift of money, goods or articles takes place before, at, or after the celebration of the same, or who engages or assists in any celebration or dance of which the wounding or mutilation of the dead or living body of any human being or animal forms a part or is a feature, is guilty of an indictable offence and is liable to imprisonment for a term not exceeding six months and not less than two months: Provided that nothing in this section shall be construed to prevent the holding of any agricultural show or exhibition or the giving of prizes for exhibits thereat.

According to section 164:

> No Indian or non-treaty Indian resident in the province of Manitoba, Saskatchewan or Alberta, or the Territories, shall be held capable of having acquired or of acquiring a homestead or pre-emption right under any Act respecting Dominion lands, to a quarter-section, or any parcel of land in any surveyed or unsurveyed lands in the said provinces or territories, or the right to share in the distribution of any lands allotted to half-breeds . . . .

Sections 103 and 149 of the 1906 Revised Statutes were carried through to the Revised Statutes 1927.[25]

All of the above provisions affected Indians even when *off* a reserve. Similarly, the current provisions on testamentary disposition, sections 42 to 46, are broad enough to include chattels (moveable property) *off* a reserve. Furthermore, the Indian Act makes provision, in sections 114 and 115, for arrangements to be made with the Provinces, Territories, school boards, and religious organizations, for schools for Indian children, which schools are required to meet the regulations provided for by the Minister. Strict provisions are included in sections 116 to 120 for school attendance by Indian children, and for their supervision and discipline. All these sections are *not* confined to conduct on a reserve.

Moreover, section 95 [formerly 94] is not the only one regulating the use of intoxicants by Indians. Section 94 [formerly 93] prohibits an Indian from having intoxicants in his possession or being intoxicated *on* a reserve. All of this indicates that Parliament's concern was with the conduct of Indians both *on* and *off* reserves. Although it is true that nearly all the provisions in the Indian Act *now* deal with "lands reserved for Indians" and conduct of Indians *on* reserves, this by no means indicates that Parliament intended to make a special distinction between the sections dealing with intoxication and the others, or between those provisions dealing with the behaviour of Indians *on* reserves, as against those dealing with their behaviour *off* reserves.

The other basis for Mr. Justice Ritchie's distinction between section 95 (which was in issue in the *Drybones* case), and the rest of the Indian Act (which was not), is that section 95 is a penal provision. It is true that in

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[25] CAN. REV. STAT. c. 98 §§ 106 & 140 (1927).

the *Drybones* case Ritchie concluded his majority decision in the following terms:

> It appears to me to be desirable to make it plain that these reasons for judgment are limited to a situation in which, under the laws of Canada, it is made an offence punishable at law on account of race, for a person to do something which all Canadians who are not members of that race may do with impunity; in my opinion the same considerations do not by any means apply to all the provisions of the *Indian Act.*[29]

One would also have to agree with him, when he stated in the *Lavell* case: "I have difficulty in understanding how that case [*Drybones*] can be construed as having decided that any sections of the *Indian Act,* except s. 94(*b*), are rendered inoperative by the *Bill of Rights.*" [30] However, although it is obvious that the *Drybones* case cannot be authority for more than its facts and the provision with which it was concerned, this does not ipso facto mean that its reasoning could not be applied to other sections.

Moreover, there is nothing in the words of section 91(24) of the B.N.A. Act itself, or any subsequent decisions, to hold that Parliament's jurisdiction with respect to Indians is confined to criminal jurisdiction. The basis of the authority for the liquor provisions in the Indian Act must surely be section 91(24) and not section 91(27) of the B.N.A. Act. Besides, there is nothing in the words of the Canadian Bill of Rights which confines its terms merely to criminal statutes. The B.N.A. Act talks about the legislative authority of Canada, and must extend to that legislative authority even when it deals with property and civil rights issues which are otherwise within the jurisdiction of Parliament, including such as come within section 91(24) of the B.N.A. Act.

Finally, one has to deal with the other major portion of the judgment of Mr. Justice Ritchie, which was referred to earlier, where it was contended that Parliament could not exercise its jurisdiction under section 91(24) of the B.N.A. Act without being able to define what is an Indian. Clearly this is an indispensable precondition of Parliament legislating with respect to Indians and lands reserved for Indians. Obviously, if the effect of the Canadian Bill of Rights were to prevent Parliament from making any definition then, in effect, the Canadian Bill of Rights would have overridden the whole of the Indian Act, and that cannot be so. It would have been impractical for Parliament not to have excluded some people, even though they were partially of Indian descent. It is perhaps to some extent a failure of federal responsibility that greater obligations were not undertaken towards Métis, but on the other hand, considering the limited area on the "lands reserved for Indians," and in many cases the sheer uncultivability of these lands, it would have been grossly unfair if those Indians who did have some minimal benefit from them had to share those benefits with an equally large

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[29] *Supra* note 1, at 298.
[30] *Supra* note 2, at 499.

or perhaps much larger additional number. Therefore, some restriction had to be included, and some definition had to be put forth.

On the other hand, however, surely if Parliament had used its power under section 91(24) of the B.N.A. Act to so define Indians as to extend to anyone having some portion of Indian ancestry, then the courts would be moved to find this a "colourable" attempt to intrude into provincial legislation. In other words, Parliament's power to define an "Indian" cannot be unlimited. There must be some criteria by which the definition of the status could be tested on the basis of its reasonable relevance to the legislative power concerned. This will be suggested and discussed subsequently.

However, for the purposes of this part, it is necessary to refer to those portions of the Supreme Court judgments, regarding the interpretation of section 1(*b*)—"equality before the law"—which suggest the manner in which the Bill of Rights is to be construed and applied.

Ever since *Robertson and Rosetanni v. The Queen*,[31] the Supreme Court has been concerned with the question of how to define the scope of the rights and freedoms listed in the Canadian Bill of Rights.

In the *Robertson and Rosetanni* case, Mr. Justice Ritchie, who gave the majority judgement, was concerned with the "freedom of religion" guaranteed by section 1(*c*) of the Canadian Bill of Rights. In determining what that freedom was he stated:

> It is to be noted at the outset that the *Canadian Bill of Rights* is not concerned with "human rights and fundamental freedoms" in any abstract sense, but rather with such "rights and freedoms" as they existed in Canada immediately before the statute was enacted. (See also s. 5(1)). It is therefore the "religious freedom" then existing in this country that is safeguarded by the provisions of section 2 . . . .[32]

In the light of this statement, it seemed natural to ask:

> Did the Supreme Court really intend in its judgment that every court would have to refer to the magic date of August 10th, 1960, to see what is included in the political civil liberties "guaranteed" by the *Canadian Bill of Rights*?[33]

Certainly this position was commended by counsel for the Crown in the *Drybones* case who argued that "the rights and freedoms recognized and declared by the *Bill of Rights* must have reference to *and be circumscribed by* the laws of Canada as they existed on the 10th of August, 1960, when the Bill was passed."[34] However, Mr. Justice Ritchie explicitly rejected that contention and replied:

> I accordingly do not consider that case [*Robertson and Rosetanni*] to be any authority for the suggestion that the *Bill of Rights* is to be treated as

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[31] [1963] Sup. Ct. 651 (per Taschereau, Fauteux, Abbott & Ritchie JJ.; Cartwright, C.J.C. dissenting).

[32] *Id.* at 654.

[33] W. Tarnopolsky, THE CANADIAN BILL OF RIGHTS 113-14 (1966).

[34] *Supra* note 1, at 295.

> being subject to federal legislation existing at the time of its enactment . . . .[35]

In *Curr v. The Queen,*[36] Mr. Justice Laskin (as he then was), who delivered the majority judgment, assumed that the matter was closed and simply stated "two rather obvious propositions:"[37]

> [F]irst, the *Canadian Bill of Rights* did not freeze the federal statute book as of its effective date, which was August 10th, 1960; and, second, federal law enacted after the date of the *Canadian Bill of Rights* as well as pre-existing federal law may be found to run foul of the prescriptions of the *Canadian Bill of Rights.*[38]

In the *Lavell* case, Mr. Justice Ritchie returned once again to the issue and, without using the same terminology he had adopted in the *Robertson and Rosetanni* case, but without directly contradicting what Mr. Justice Laskin had said in the *Curr* case, made the following statement:

> In my view the meaning to be given to the language employed in the *Bill of Rights* is the meaning which it bore in Canada at the time when the Bill was enacted, and it follows that the phrase "equality before the law" is to be construed in light of the law existing in Canada at that time.[39]

If one tries to reconcile the above-quoted excerpts from Supreme Court decisions starting with *Robertson and Rosetanni* in 1963, up to and including *Lavell* in 1973, one might perhaps deduce that what Mr. Justice Ritchie had in mind was that although he was prepared to agree with Mr. Justice Laskin that the meaning of the terms of the Canadian Bill of Rights was not "frozen" by the federal statutes in force in 1960; nevertheless, the various phrases used, and the concepts they convey, are to be defined in terms of the laws as understood by jurists in academe, in practice, and on the bench in 1960. Presumably, since Parliament has the last or overriding power in determining what the law is to be, then the statutes could be consulted for definitions and concepts, although not explicitly for detailed provisions. However, in taking Mr. Justice Ritchie's last word on the subject, in the *Lavell* case, one could not help but fear that although the "frozen statute book theory" had been rejected, a "frozen" law and concepts theory had been adopted.

It is no wonder, then, that Mr. Justice Martland in delivering the majority opinion in the *Burnshine* case in effect did just that. In referring to section 1 of the Bill of Rights which declares that the six enumerated human rights and freedoms "have existed" and should "continue to exist," he asserted: "all of them had existed and were protected under the common law."[40] Therefore, he concluded that the Bill did not purport to define new rights and freedoms. What it did was to declare their existence in a statute, and, further, by section 2, to protect them from infringement by any federal

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[35] *Id.* at 296.
[36] [1972] Sup. Ct. 889.
[37] *Id.* at 893.
[38] *Id.*
[39] *Supra* note 2, at 494.
[40] *Supra* note 3, at 56.

statute. [41] He quoted the pertinent parts of Mr. Justice Ritchie's decision in the *Lavell* case and stated that in his opinion "the Bill of Rights . . . by its express wording . . . declared and continued existing rights and freedoms." [42] He went on to say that "section 2 did not create new rights. Its purpose was to prevent infringement of existing rights." [43]

We have in Mr. Justice Martland's judgment in the *Burnshine* case the conclusion that the Bill of Rights added nothing to our human rights and fundamental freedoms as they existed in 1960. At the very most, presumably, any subsequent subtraction from these human rights and fundamental freedoms might yet be considered an infringement of the Canadian Bill of Rights. However, if one were to take his opinion on this matter without considering what he went on to state as the basis of his decision, it would appear to be futile to argue that any federal law enacted or in existence before 1960 can possibly contravene the Canadian Bill of Rights. And yet this was done successfully in *Drybones*!

One suspects, therefore, that Mr. Justice Martland would not want his judgment to be so circumscribed. After all, he did go on to assess section 150 of the Prisons and Reformatories Act, not just on the basis that it was in existence in 1960, but rather in light of whether the provision before him contravened the "equality before the law" clause because it could not be justified rationally. What he did, in effect, was to apply the "reasonable classification" test, or the test of whether the impugned provision is "rationally related to a legitimate legislative purpose."

It should immediately be pointed out that Martland did not express himself in these terms, but it is obvious that this is the unarticulated test he used when he considered that "[t]he legislative purpose of section 150 was not to impose harsher punishment upon offenders in British Columbia in a particular age group than upon others," but rather "was to seek to reform and benefit persons within that younger age group." [44] He quoted from Mr. Justice Laskin in the *Curr* case to the effect that:

> compelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government, which underlie the discharge of legislative authority under the *British North America Act*. [45]

and then concluded:

> In my opinion, in order to succeed in the present case, it would be necessary for the respondent, at least, to satisfy this Court that, in enacting s. 150, Parliament was not seeking to achieve a valid federal objective. [46]

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[41] *Id.* at 58.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 60.
[45] *Supra* note 36, at 899.
[46] *Supra* note 3, at 60.

It must be clear that *this* is the *ratio* of Mr. Justice Martland's decision in the *Burnshine* case. Therefore, it was quite unnecessary for him to make his earlier statements that the Canadian Bill of Rights merely protected the rights and freedoms existing in 1960. Such an assertion was totally unnecessary for his finding, in effect, that section 150 of the Prisons and Reformatories Act could rationally be related to a legitimate legislative purpose, and that it would be necessary for the person challenging the provision to satisfy the Court that, "in enacting section 150 Parliament was not seeking to achieve a valid federal objective." [47]

It should be noted that Mr. Justice Laskin, who gave the dissenting opinion in the *Burnshine* case, did not find it necessary to discuss again the applicability of 1960 concepts, nor even to assess the justifiability of the policy chosen by Parliament in section 150 of the Prisons and Reformatories Act. Instead, he expressed his preference for a construction that would avoid a collision between the impugned provision and the Canadian Bill of Rights. He pointed out that "the Canadian Bill of Rights does not invariably command a declaration of inoperability of any federal legislation affected by its terms." [48] Rather, he suggested that the "primary injunction" of the Canadian Bill of Rights:

> is to determine whether a challenged measure is open to a compatible construction that would enable it to remain an effective enactment. If the process of construction in the light of the Bill yields this result, it is unnecessary and, indeed, it would be an abuse of judicial power to sterilize the federal measure. [49]

On this basis, he did not question Parliament's right to give its enactment special applications in terms of locality of operation or otherwise. In construing the impugned provision in the light of the Canadian Bill of Rights, he agreed with the majority of the Court of Appeal that the imposition on the accused of a greater punishment in British Columbia than elsewhere in Canada (other than Ontario) denied him equality before the law. However, he felt that the provision could be construed in conformity with the Bill of Rights if the combined fixed and indeterminate sentences were limited in their totality by the maximum term of imprisonment prescribed by the Criminal Code. "In this way," he suggested, "there is an umbrella of equality of permitted length of punishment and within that limit a scope for relaxing its stringency to accommodate a rehabilitative and correctional purpose." [50] This way, he felt, the age factor under section 150 would not amount to a punitive factor in that provision, but rather would redound to the advantage of an accused within that age group. [51] With this interpretation Laskin was able to construe and apply section 150 consistently with both the Criminal Code and the Canadian Bill of Rights.

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[47] *Id.* at 60.
[48] *Id.* at 65.
[49] *Id.*
[50] *Id.* at 68.
[51] *Id.*

Thus, he avoided the necessity of interpreting section 1(*b*) of the Canadian Bill of Rights in 1960 terms, or in absolute or dictionary terms, or even in terms of "reasonable classification." But at least he did recognize that:

> Whatever may be the end result of the invocation and consideration of the Canadian Bill of Rights in relation to a piece of federal legislation, undeniably it brings a new dimension to construction. The process of construction must be related to prescriptions and standards under the Canadian Bill of Rights which, apart from that statute, might or might not be seen as relevant matters, and, even seen as relevant, would lack the definition that they have as statutory directives. [52]

It is important to note that both the majority and the minority in the *Burnshine* case did not find it necessary, as did Mr. Justice Ritchie in the *Lavell* case, to try to give a definition of "equality before the law" in terms of 1960 concepts. Although Mr. Justice Martland quoted the relevant portion of Mr. Justice Ritchie's judgment, he did not explicitly accept it. For this we may some day be thankful because the *Lavell* case does indicate how the application of what has been referred to here as the "frozen law and concepts theory" leads to a very limited definition. Thus, in the *Lavell* case Mr. Justice Ritchie, in deducing the meaning which the "equality before the law" clause bore in Canada at the time when the Bill was enacted, rejected "the egalitarian concept exemplified by the Fourteenth Amendment of the United States Constitution," and turned instead, through the reference in the preamble of the Canadian Bill of Rights to "the rule of law." [53] By tracing his way through "Stephen's Commentaries on the Laws of England, 21st edition, volume III (1950)", he reached a definition of "the rule of law," and "equality before the law" as part of that doctrine, which was rendered by Dicey in the 19th century:

> "[E]quality before the law" as recognized by Dicey as a segment of the rule of law, carries the meaning of equal subjection of all classes to the ordinary law of the land *as administered by the ordinary Courts*, and in my opinion the phrase "equality before the law" as employed in s. 1(b) of the *Bill of Rights* is to be treated as meaning equality in the administration or application of the law by the law enforcement authorities and the ordinary Courts of the land. [54]

With the greatest respect, it must be pointed out that in the "Introduction" to the latest edition of Dicey's work on the LAW OF THE CONSTITUTION, written by the editor, Professor E. C. S. Wade, [55] it is shown that what Dicey had in mind in referring to the "application of the law by the law enforcement authorities and the ordinary Courts of the land" [56] was to distinguish the English common law with respect to government institutions exercising delegated power on the one hand, from the French system of a hierarchy

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[52] *Id.* at 65.
[53] *Supra* note 2, at 494.
[54] *Id.* at 495.
[55] A. DICEY, LAW OF THE CONSTITUTION at xcvi-cxiii, cxliv-cl (10th ed. 1961).
[56] *Supra* note 2, at 495.

of administrative tribunals culminating in the *conseil d'état,* on the other. Every English, Canadian and American scholar of Public Law recognizes that Dicey's definition became outdated very soon thereafter, if not even in his time, by the subsequent development of administrative tribunals in the United Kingdom itself. If a definition of the "rule of law" referred to in the preamble to the Canadian Bill of Rights was thought to be at all applicable, then surely at least one might have considered the most recent definitions agreed to by both Canadian and English jurists in the International Commission of Jurists, [57] which *do* make reference to modern egalitarian concepts.

Moreover, such an interpretation would have been in accordance with the decision of Lord Sankey in the case of *Edwards v. Attorney-General of Canada,* [58] where he stated that the B.N.A. Act was "a living tree capable of growth and expansion within its natural limits." [59] Similarly, the Canadian Bill of Rights cannot be frozen as of 1960; it must be "capable of growth and expansion within its natural limits."

In a way the conclusion of the majority in the *Lavell* case illustrates that a reference to 1960 definitions merely camouflages the fact that the judges of the Supreme Court are giving their own interpretations to the words used, instead of following the three principal rules of statutory construction to see *what Parliament intended.* In the *Lavell* case all three rules would have led to the same conclusion. If one follows the "dictionary" rule, *i.e.,* the plain meaning of the words used, one must include the non-discrimination clause in the opening paragraph of section 1 of the Canadian Bill of Rights as being an integral part of the definition. If one follows the "golden" rule of statutory construction, by which clauses should not be read in isolation from each other, but in the context of the whole, then one must consider the very direct relationship between a non-discrimination clause and an "equality before the law" clause. If one applies the "mischief" rule of statutory construction, by which the Court must look to see what "mischief" Parliament was concerned with overcoming in its legislation, then one cannot ignore the fact that from World War II to 1960, non-discrimination statutes in both employment and accommodation were being enacted by most of the provinces of Canada and by the Parliament of Canada. One cannot ignore the fact that Canada had participated in the work of the United Nations in preparing the Universal Declaration of Human Rights, as well as the subsequent Conventions that were being prepared at the time, even though signed later. The International Convention on the Elimination of all Forms of Racial Discrimination, and the International Convention on the Elimination of all Forms of Religious Discrimination were in the process of being drafted, with Canadian participation.

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[57] INTERNATIONAL COMMISSION OF JURISTS, THE RULE OF LAW IN A FREE SOCIETY (1959).

[58] [1930] A.C. 124 (P.C.).

[59] *Id.* at 126.

Regardless of the choice of interpretative rule, it is impossible to see how the "equality before the law" clause in section 1(*b*) could possibly have been construed without reference to the non-discrimination clause which refers not only to race, but to sex as well. This reference should have been made even if the majority chose to ignore "the egalitarian concepts exemplified by the 14th Amendment of the U.S. Constitution as interpreted by the Courts of that country." [60] Even without that comparison, by any of the three principal rules of statutory construction, it is impossible to ignore the non-discrimination clause, and to go instead to a definition of "the rule of law" given by Dicey almost ninety years ago, which definition is now considered outdated even by the followers of Dicey.

Even if all the above arguments are not accepted, it is impossible to understand by what process of reasoning Mr. Justice Ritchie reached the following conclusion:

> The fundamental distinction between the present case and that of *Drybones*, however, appears to me to be that the impugned section in the latter case could not be enforced without denying equality of treatment in the administration and enforcement of the law before the ordinary Courts of the land to a racial group, whereas no such inequality of treatment between Indian men and women flows as a necessary result of the application of s. 12(1)(b) of the *Indian Act*. [61]

Surely such a fundamental distinction requires some justification; yet, no explanation was given. How can it be denied that Indian women who marry non-Indians are not equally treated before the ordinary courts of the land, when in the administration and enforcement of the law the courts must deny them property rights, status, and access to their native territory because of a provision which applies to them and not to Indian men? Surely this is a greater inequality before the law, more fundamental and more drastic, than the relatively minor inequality dealt with in the *Drybones* case. Surely one would have expected Ritchie to have provided an answer to Mr. Justice Laskin when Laskin stated:

> It appears to me that the contention that a differentiation on the basis of sex is not offensive to the *Canadian Bill of Rights* where that differentiation operates only among Indians under the *Indian Act* is one that compounds racial inequality even beyond the point that the *Drybones* case found unacceptable. [62]

There is only one possible answer, and that is that the distinction made by Parliament between Indian men and Indian women, although creating

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[60] *Supra* note 2, at 494. One should note that no reasons were advanced by Mr. Justice Ritchie for that assertion other than a reference to Regina v. Smythe, [1971] Sup. Ct. 680 which did not make that rejection in blanket terms, but very specifically rejected the comparison only within the very limited terms of the discretion of the Attorney-General to elect to proceed by indictment being different from the situation in the United States, where a distinction is still made between a felony and a misdemeanor.

[61] *Id.* at 499.

[62] *Id.* at 508. The arguments apply with equal validity to the case of Re Froman, 33 D.L.R.3d 676 (Ont. County Ct. 1973) (per Fanjoy, J.).

inequality, was reasonably related to a justifiable legislative purpose. This will be discussed further in the next part.

IV. Equality Before The Law

For the purposes of this part, three of the issues concerning the possible meaning of the "equality before the law" clause in section 1(*b*) must be dealt with:

1. What effect has the non-discrimination clause in the opening paragraph of section 1 on the meaning to be given to the "equality before the law" clause in subsection (*b*)?
2. In a federal state, with divided legislative jurisdiction, how does one test "inequality before the law?"
3. Is the proclamation in section 1(*b*) of "equality before the law" to be given an absolute interpretation and application in all cases, or is there some reasonable distinction or qualification?

The first question was discussed, even before the *Lavell* case, in *Curr v. The Queen.*[63] Speaking on behalf of the whole court, Mr. Justice Laskin stated the following:

> In considering the reach of . . . s. 1(b) . . . I do not read it as making the existence of any of the forms of prohibited discrimination a *sine qua non* of its operation. Rather, the prohibited discrimination is an additional lever to which federal legislation must respond. Putting the matter another way, federal legislation which does not offend s. 1 in respect of any of the prohibited kinds of discrimination may nonetheless be offensive to s. 1 if it is violative of what is specified in any of the clauses (a) to (f) of s. 1. It is, *a fortiori*, offensive if there is discrimination by reason of race so as to deny equality before the law. That is what this Court decided in *Regina v. Drybones* and I need say no more on this point. It is, therefore, not an answer to reliance . . . on . . . s. 1(b) of the *Canadian Bill of Rights* that [a particular provision] does not discriminate against any person by reason of race, national origin, colour, religion or sex. The absence of such discrimination still leaves open the question whether [a particular provision] can be construed and applied without abrogating, abridging or infringing the rights of the individual listed in . . . section 1(b).[64]

In the *Lavell* case, Mr. Justice Ritchie stated his understanding of this passage as being that "the effect of s. 1 of the Bill of Rights is to guarantee to all Canadians the rights specified in paras. (*a*) to (*f*) of that section, irrespective of race, national origin, colour or sex."[65] He was not prepared to accept the contention that a law of Canada could be declared inoperative on one of the grounds of discrimination listed in the opening paragraph, if such discrimination did not result in the infringement of any of the rights

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[63] *Supra* note 36.
[64] *Id.* at 896-7.
[65] *Supra* note 2, at 492-3.

and freedoms specifically guaranteed by section 1 of the Bill. From this he concluded that the first two sections of the Bill of Rights "cannot be invoked unless one of the enumerated rights and freedoms has been denied to an individual Canadian or group of Canadians." [66] He asserted:

> There is no language anywhere in the *Bill of Rights* stipulating that the laws of Canada are to be construed without discrimination unless the discrimination involves the denial of one of the guaranteed rights and freedoms, but when, as in the case of *R.* v. *Drybones*, denial of one of the enumerated rights is occasioned by reason of discrimination, then, as Mr. Justice Laskin has said, [in the Curr case] the discrimination affords an 'additional lever to which federal legislation must respond.' [67]

In his dissenting judgment in the *Lavell* case Mr. Justice Laskin also referred to his statement in the *Curr* case. However, he gave a different explanation than did Ritchie for what he had said at that time:

> [F]ederal legislation, which might be compatible with the command of "equality before the law" taken alone, may none the less be inoperative if it manifests any of the prohibited forms of discrimination. In short, the proscribed discriminations in s. 1 have a force either independent of the subsequently enumerated paras. (a) to (f) or, if they are found in any federal legislation, they offend those clauses because each must be read as if the prohibited forms of discrimination were recited therein as a part thereof.
>
> This seems to me an obvious construction of s. 1 of the *Canadian Bill of Rights*. When that provision states that the enumerated human rights and fundamental freedoms shall continue to exist "without discrimination by reason of race, national origin, colour, religion or sex" it is expressly adding these words to paras. (a) to (f). Section 1(b) must read therefore as "the right of the individual to equality before the law and the protection of the law without discrimination by reason of race, national origin, colour, religion or sex." [68]

With respect, it is suggested that neither Ritchie nor Laskin in the *Lavell* case, correctly applied the statements of Laskin in the *Curr* case, which appear to accord most closely with the clear implications of the language used in section 1 of the Canadian Bill of Rights. On the one hand, the approach of Mr. Justice Ritchie tends to sever the enumerated clause—"equality before the law"—from the non-discrimination clause in section 1. This was necessary for him to do in order to be able to apply the Dicey definition of equality before the law. However, it ignores the juxtaposition of the two clauses, and has a tendency, as illustrated in his judgment in the *Lavell* case, to ignore the twentieth century egalitarian concepts which the non-discrimination clause gives to the equality clause.

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[66] *Id.* at 493.

[67] *Id.* *See, e.g.*, Regina v. Chapman, [1971] 1 Ont. 601 (1970), where Vannini, District Ct. J., held that an accused committed for trial to the Court of General Sessions could obtain bail under the Habeas Corpus Act, 1679, even though the Act spoke only of the Courts of Assize. To do otherwise, said the judge, would be to deny him equality before the law and the protection of the law where his trial was unduly delayed by the failure or neglect of the Attorney-General to prosecute with all due haste.

[68] *Id.* at 510-11.

On the other hand, it does not seem to be necessary to go as far as the two alternatives suggested in the dissenting judgment of Laskin. The rights and freedoms "recognized and declared" by the opening paragraph of section 1 are "the following . . . namely" the rights and freedoms in subsections (a) to (f); they are not those in the opening paragraph. The other alternative which he suggests, *i.e.*, that each clause "must be read as if the prohibited forms of discrimination were recited therein as part thereof" appears to be the more correct, although even here there is some danger that this interpretation would confine the enumerated paragraphs only to such infringements as involve discrimination. Perhaps this is suggesting more than Mr. Justice Laskin intended in his *Lavell* decision, but it does seem important to emphasize that one must return to his judgment in the *Curr* case as being more accurate than either his further amplification in the *Lavell* case, or that of Mr. Justice Ritchie. As he stated in the *Curr* case, the non-discrimination clause it not a "*sine qua non*" of the operation of the "inequality before the law" clause, but rather is an additional lever to which federal legislation must respond." His key statements are: (1) "Federal legislation which does not offend section 1 in respect of any of the prohibited kinds of discrimination may none the less be offensive to section 1 if it is violative of what is specified in any of the paras. (a) to (f) of section 1"; and (2) "it is *a fortiori*, offensive if there is discrimination by reason of race [and also, of course, any of the other prohibited criteria] so as to deny equality before the law." [69]

The second question which arose out of the Supreme Court decisions on section 1(*b*) of the Canadian Bill of Rights concerns the determination of equality or inequality in a federal system. This seems to be the main problem which preoccupied Mr. Justice Pigeon in his dissent in the *Drybones* case, and his concurring judgment in the *Lavell* case; and it appears to be the issue which led Mr. Justice Ritchie to devote so large a portion of his judgment in the *Lavell* case to confining *Drybones* to the one provision with which that case was concerned, *i.e.*, section 94 [now section 95] of the Indian Act.

The problem here is to find a definition which will guide us safely between the Scylla of using the conformity of federal legislation with provincial legislation, as the test of equality, and the Charybdis of testing equality under federal legislation by comparing how it deals with people in different provinces or territories. To illustrate: the age of majority may vary from province to province, power of disposition of matrimonial property varies from province to province, there are variations between the provinces on the formal requirements of testamentary instruments, there are variations respecting the minimum dollar amounts reserved for a widow in case of intestate succession, to name but a few. In these circumstances, it is impossible for Parliament to legislate on matters within its jurisdiction in conformity with the laws of province X, without thereby creating an inequality in province Y, where the determination of status or a right is different.

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[69] *Supra* note 36, at 896.

On the other hand, it may be desirable for some federal legislation, such as the criminal law, to accord in some of its procedures and particularities with those of the province in which the criminal law is to be administered. Thus, for example, special provision is made in Criminal Code section 430 for an accused who is charged with an indictable offence in the province of Alberta to be tried by a judge in the superior court of criminal jurisdiction wtihout a jury. Sections 555 and 556 of the Criminal Code make special provision for mixed francophone and anglophone juries in those provinces. Section 507 provides that in the provinces of New Brunswick, Quebec, Manitoba, Saskatchewan, Alberta and British Columbia, and in the Yukon Territory and the Northwest Territories it is not necessary to prefer a bill of indictment before a grand jury. And, of course, sections 150 and 44 of the *Prisons and Reformatories Act* make different provisions for British Columbia and Ontario than the other provinces. In any of these cases, surely it would be absurd if these provisions, automatically and without more, could provide an argument that a person is unequal to someone in another province where a different provision applies.

It must be quite clear that the test for equality before the law cannot simply be a comparison between a federal law and a provincial law because Parliament, in many instances, could not possibly pass legislation which would conform with the comparable provincial legislation. Moreover, if it were to do so, the argument could be turned on its head. For example, suppose that Parliament were to provide in the Indian Act that the testamentary dispositions of Indians were to be governed by the laws of the province or territory in which they are to be found. In that way, testamentary rights of Indians would be equal to all other people living in the same province or territory, but not equal to Indians in other provinces or territories. The inequality, if such there be, must be found in the laws of Canada, whether it be due to conflict between two federal statutes, or whether it be found in the operation of one provision.

This does not mean, however, that the comparison must be made with the laws of the Yukon Territory and the Northwest Territories, even though these come within the legislative jurisdiction of Parliament.[70] For one thing, the autonomy of the legislative bodies of these northern territories has been increased, and would require Parliament to keep changing its legislation to conform with the needs of these areas. For another, what could be appropriate in these northern territories, even with respect to Indians alone, might not be appropriate when applied to Indians living in the southern areas of the country.

Therefore, it is suggested that it is not enough merely to compare which laws apply to whom, and whether they seem equal, but rather to test the inequality which must inevitably arise in a federal system, and even in a unitary system, by some "reasonably justifiable standards."

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[70] Katz, *The Indian Act and Equality Before the Law*, 6 OTTAWA L. REV. 277 (1974).

This brings us to the third question suggested earlier as arising out of the cases on section 1(*b*) of the Canadian Bill of Rights. In his dissenting judgment in the *Lavell* case, Mr. Justice Laskin rejected the "reasonable classification" interpretation of the United States Supreme Court. He did so "because the Canadian Bill of Rights itself enumerates prohibited classifications which the judiciary is bound to respect," and because he doubted, "whether discrimination on account of sex, where as here it has no biological or physical rationale, could be sustained as a reasonable classification even if the direction against it was not as explicit as it is in the *Canadian Bill of Rights*." [71] Although this is the reason he suggested, one suspects that it was for a different reason, which he hinted at in the *Curr* case, and which was his fear of the judiciary substituting its opinion for that of the legislators in a parliamentary system. It must be admitted that there is a risk in recognizing such jurisdiction in the courts if it amounts to a mere substitution of the opinions of an appointed body for those of an elected body on a matter of policy. This could result in the introduction into Canada of the unfortunate history of the substantive due process interpretation of the United States Bill of Rights. Mr. Justice Laskin's caution should be heeded at least to the extent of requiring, as Mr. Justice Martland held in the *Burnshine* case, that the onus be upon the one alleging that federal legislation contravenes a provision like section 1(*b*) of the Bill of Rights to show that "Parliament was not seeking to achieve a valid federal objective." [72]

Nevertheless, as Mr. Justice Ritchie pointed out in the *Drybones* case, Parliament has chosen to place the heavy responsibility upon the judiciary of enforcing the standards of the Canadian Bill of Rights. Moreover, our legislators, as prescient as some might be, cannot possibly envisage every particular circumstance to which legislation applies. Often this is only possible on a case-by-case basis. Events which simply could not have been contemplated by the legislators do arise, and the courts have to construe and apply the law to these situations as well as the more easily foreseeable ones. Moreover, we have a rule of statutory construction which precludes the courts from considering parliamentary debates and committee proceedings in interpreting legislation. One of the main reasons for this rule is that the language finally agreed upon in the legislative process could have different meanings to the different legislators who voted in favour of its enactment. It may even be that this rule should apply *because* circumstances change, and what was justifiable in 1960 may not be justifiable today or tomorrow. Even if the Supreme Court should misjudge the intention of Parliament and hold invalid a federal law which Parliament would consider necessary and desirable, Parliament can change the effect of such a decision by re-enacting the provision with the "non-obstante" clause in section 2 of the Bill of Rights. At least, if this were to happen, Parliament would be required to consider, more directly than it might have done when the

[71] *Supra* note 2, at 510.
[72] *Supra* note 3, at 60.

impugned legislation was first adopted, whether it should enact the "non-obstante" clause.

Rights and freedoms, such as the political civil liberties, even though proclaimed in absolute terms, have always been interpreted by the courts in India, the United States and Canada by some test of "reasonableness." The equality clause in the Fourteenth Amendment of the United States Constitution has not stood in the way of such "reasonable classifications" as progressive income tax laws, contractual disabilities related to the status of such groups as infants, or the denial of certain rights of people such as police officers or inmates.

In the *Lavell* case, Mr. Justice Laskin's dissent on this issue seems too absolute and disabling, whereas Mr. Justice Ritchie's application of the Diceyan interpretation of the "equality before the law" clause avoided the issues. Instead of merely asserting that the *Lavell* case was not concerned with inequality "of treatment in the administration and enforcement of the law before the ordinary Courts of the land" [73] in the way that the *Drybones* case was, Mr. Justice Ritchie could have pointed out that Parliament had to define Indian status in such a way as to exclude some people who intermarry with non-Indians. Although other measures might have been adopted, it was not totally irrational for Parliament to have enacted section 12(1)(*b*) of the Indian Act when one considers that in most cases a married woman takes her husband's surname, and so do the children. In most cases the husband is still the one who is the provider of money to support a household, and has the heavier onus when it comes to obligations of support and maintenance. One hopes that in the near future the rights and obligations of men and women will be equal. But in the meantime, it would not have been unreasonable for the Supreme Court to presume that section 12(1)(*b*) of the Indian Act was reasonably justifiable for a valid legislative object. Such a result, although still not popular with many, would not have diminished the effect of the Bill of Rights as much as the *Lavell* case did. It is to be hoped that the unarticulated adoption of the "reasonably justifiable" test in the *Burnshine* decision will be applied in the future as indicating a way out of the *cul de sac* into which the Supreme Court seems to have led itself with its references to 1960 concepts.

V. Other Decisions Concerning Section 1(*b*) of the Canadian Bill of Rights

A. Equality Before the Law and the Indian Act

It is submitted that, for reasons other than those suggested by the British Columbia Court of Appeal, the result in *Regina v. Gonzales* [74] was

[73] *Supra* note 2, at 499.
[74] 32 D.L.R.2d 290 (B.C. 1962) (Tysoe, Bird, Davey, JJ.).

correct because the inequality was alleged to be between the denial to Indians under the Indian Act of the right to consume alcohol, and the right of everyone else in British Columbia to do so. The same argument applies to the case of *Attorney-General of British Columbia v. McDonald.*[75] In the Saskatchewan case of *Richards v. Coté,*[76] it was held that after July 1, 1960 (when, by way of a proclamation under section 95 [now section 96] of the Indian Act, and the necessary amendments to the Saskatchewan Liquor Act, Indians were given the same right to purchase and consume liquor off a reserve as other Saskatchewan persons) section 94 (*b*) [now section 95(*b*)] became inoperative. Therefore, the accused was acquitted on a charge of being an Indian intoxicated off a reserve. However, the correctness of this result is due to the fact that section 95 [now section 96] specifically provided that no offence is committed if an Indian has possession of intoxicants in accordance with the law of the province where the sale takes place or the possession is had, and not because of what was said in the *Drybones* case regarding the application of section 94 [now section 95] of the Indian Act in the Northwest Territories.

Two decisions rendered on the last day of 1970 by the same Saskatchewan District Court Judge, with regard to the same accused, illustrated the issues involved in construing the effect of section (1)(*b*). The accused was convicted on May 29, 1967, on two charges. One was under section 96(*b*) [now section 97(*b*)] of the Indian Act for being found in an intoxicated condition on a reserve. The other was for being found in an intoxicated condition, three days after the first incident, in a public place, contrary to section 105(1) of the Saskatchewan Liquor Act. In *Regina v. Whiteman (1),*[77] District Court Chief Justice McClelland upheld the conviction under section 96 (*b*) of the Indian Act and held that that provision was not rendered inoperative as being in contravention of section 1(*b*) of the Canadian Bill of Rights. He came to this conclusion on two grounds. The first was that the reference in section 96(*b*) of the Indian Act was to a "person", and not to an "Indian." The second was that the *Drybones* decision must be confined to the special circumstances of its facts concerning an inequality under federal law in the Northwest Territories, and not an inequality arising out of disparities between a federal law and a provincial law. Although section 96(*b*) [now section 97(*b*)] refers to a "person", the result is that Indians can be charged under this section even if found intoxicated in their own homes; whereas white men, not living on reserves, would not in similar circumstances suffer such a disability. However, because such differences arise out of the operation of the legislation of two different orders of legislatures, contravention of section 1(*b*) of the Canadian Bill of Rights does not occur. Therefore, he upheld the conviction.

With respect to the charge under the Saskatchewan Liquor Act in

[75] 131 Can. Crim. Cas. 126 (B.C. County Ct. 1961) (per Morrow, J.).
[76] 40 W.W.R. (n.s.) 340 (Sask. District Ct. 1962) (per McFadden, D.C.J.).
[77] [1971] 2 W.W.R. 316 (Sask. District Ct. 1970) (per McClelland, D.C.J.).

Regina v. Whiteman (2),[78] the court applied the *Drybones* case and held that when the Canadian Bill of Rights was enacted, it rendered section 94(*b*) [now section 95(*b*)] of the Indian Act inoperative. Therefore, it was held, section 105(1) of the Saskatchewan Liquor Act now applies to Indians in the province when they are off their reserves. Therefore, as under the other charge, the appeal from the conviction was dismissed.

It would seem that the distinction made between the two cases was on the ground that section 94(*b*) of the Indian Act was found to be inoperative in the *Drybones* case, whereas section 96(*b*) had not been so found. It seems, however, that this distinction was incorrectly made. Whereas in *Whiteman (1),* the learned judge could not see how an inequality could arise between provincial legislation, which does not make it an offence to be intoxicated in one's home, and federal legislation which would make it so for Indians, in *Whiteman (2),* the learned judge was prepared to consider section 94 (*b*) to be inoperative in the province of Saskatchewan. Perhaps the clue to his distinction is that he questioned whether Parliament had jurisdiction to legislate with respect to the conduct of Indians off reserves on subject matters relating to property and civil rights. However, as indicated earlier, the jurisdiction of Parliament is with respect to Indians whether *on* or *off* reserves. On the other hand, the test of "inequality before the law" cannot be inequality arising out of a conflict between federal and provincial legislation. Therefore, *Whiteman (1)* is correct in finding that section 96 [now section 97] of the Indian Act did not result in Whiteman's inequality before the law. For one thing the offence can be committed by any "person," and not just by Indians. For another, although section 96 creates a de facto inequality—by prohibiting an Indian from being intoxicated in his own home, whereas under provincial liquor legislation a person living off a reserve is not so prohibited—this actual difference in treatment does not amount to inequality before the law within the meaning of the Canadian Bill of Rights because it involves a conflict between provincial and federal legislation.

A much more difficult question arises out of the former section 94 [now section 95] of the Indian Act, and it is a question that was not considered by the judge in *Whiteman (2).* Section 95 of the Indian Act provides:

> 95. An Indian who
> (a) has intoxicants in his possession,
> (b) is intoxicated, or
> (c) makes or manufactures intoxicants, *off* a reserve, is guilty of an offence . . . (emphasis added).

By section 96 [formerly section 95] of the Indian Act it is provided, however, that where section 96 is proclaimed to be in force in a province, there is no offence under subsection (*a*) of section 95 if the intoxicants are sold for consumption in a public place, or had in the possession of an Indian, in

[78] 13 Can. Crim. (n.s.) 356 (Sask. District Ct. 1970) (per McClelland, D.C.J.).

accordance with the law of the province where the sale takes place or the possession is had. However, no such exemption is made for subsection (*b*) of section 95. Therefore, presumably, an Indian who is found intoxicated off a reserve in a public place could be subject to section 95 of the Indian Act, as well as the applicable provision under the Liquor Act of the province wherein he resides. Is he then subject to both provisions, or only one? Since it was submitted above that the *Drybones* case must be confined to its facts as having taken place within the jurisdiction subject to Parliament, it must be deemed inoperative in the Northwest Territories, but not necessarily within the provinces of Canada. Presumably, therefore, an Indian, who is found intoxicated *off* a reserve, but *not* in a public place, is subject only to federal legislation. On the other hand, if he is found intoxicated off a reserve, *and* in a public place, then he could be subject to both federal and provincial legislation. Unless these two Acts are clearly inconsistent within the meaning set down in *Mann v. The Queen* [79] and *O'Grady v. Sparling,* [80] he would thus face double jeopardy.

In the light of this difficulty, it is clear that at least section 95, if not section 97 [section 96 at the time of the *Whiteman* cases] as well, is clearly an anomaly today. It is contrary to the spirit of the new section 96, and places Indians in an intolerable position. Thus, whereas by the provisions of section 96, they are allowed to purchase liquor and to consume it on the premises of a drinking establishment, if they leave those premises then, unlike everyone else, they cannot even go to their own homes to sleep off an intoxication because that would be contrary to section 97 which prohibits being intoxicated *on* a reserve. These provisions are a clear deterrent to going home (which is where everyone should be who is in an intoxicated state), and, instead, induce Indians to try to hide somewhere in the open, or on private or public property, to sleep off the intoxication. Even if these provisions are not contrary to section 1(*b*) of the Canadian Bill of Rights in the provinces, they are clearly inhuman and should be repealed. If Indian bands want to keep intoxicants off reserves, then the time has come to permit them to do so by their own decision and in full knowledge of the consequences.

It would appear, at first glance, that the decision of the Manitoba Court of Appeal in *Canard v. Attorney-General of Canada* [81] contradicts what has been argued herein. In fact, however, it supports both propositions, that is, that the test of "inequality before the law" does not arise out of conflict between provincial and federal statutes, and that some form of "reasonably justifiable" limitation or qualification must be placed on the interpretation of the clause. [82]

On behalf of the Court, Mr. Justice Dickson (now on the Supreme

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[79] [1966] Sup. Ct. 238 (per Cartwright, C.J.C., Abbott, Judson, Fauteux, Martland, Ritchie & Spence, JJ.).

[80] [1960] Sup. Ct. 804 (per Kerwin, Taschereau, Fauteux, Abbott, Martland, Judson & Ritchie, JJ.; Cartwright, C.J.C. & Locke, J., dissenting).

[81] 30 D.L.R.3d 9 (Man. 1972) (per Guy, Dickson, Hall, JJ.).

[82] *Id.* at 20.

Court) referred to the decision of Mr. Justice Hall in the *Drybones* case where he stated:

> The Canadian Bill of Rights is not fulfilled if it merely equates Indians with Indians in terms of equality before the law, but can have validity and meaning only when subject to the single exception set out in s. 2 it is seen to repudiate discrimination in every law of Canada by reason of race, national origin, colour, religion or sex in respect of the human rights and fundamental freedoms set out in s. 1 in whatever way that discrimination may manifest itself not only as between Indian and Indian but as between all Canadians whether Indian or non-Indian. [83]

This is a high-minded definition of the effect of the Canadian Bill of Rights, and should not be detracted from. As Mr. Justice Dickson said, "The *Bill of Rights* proclaims an egalitarian doctrine." [84] He went on to proclaim what he believed section 1(*b*) of the Bill of Rights must mean:

> If the *Bill of Rights* means anything, it means that no racial group shall be deemed inferior to any other racial group in the enjoyment of basic human rights and fundamental freedoms. Clearly one of the central purposes is to eliminate any and all kinds of racial discrimination in order that the colour of a person's skin shall not determine his rights before the law. [85]

This is a proposition which needs affirmation. However, it must be applied carefully. The "equality before the law" clause must be defined in terms of accepted definitions of the concept. It was argued earlier that Mr. Justice Ritchie was wrong in the *Lavell* case to ignore the egalitarian concepts current in Canada, and similarly one could argue that the right to administer the estate of a deceased spouse is one which is so universally accepted for everyone else that dropping below such a standard is not "reasonably justifiable." It is suggested that Mr. Justice Dickson has in fact applied the argument raised herein, namely "reasonable justifiability." Thus, although he acknowledged that there must be some limitation on the right of Indians to alienate lands on reservations, and although he suggested that "[s]ome restriction is essential to the preservation of the treaties and the integrity of the reserves," nevertheless he concluded that "control of testamentary capacity is not a necessary incident to the control of land." [86] He explicitly recognized the validity of the argument that the test of inequality under federal legislation "should not rest upon the law of any province or territory." [87] He asserted that:

> In the present case we have a situation in which the Parliament of Canada has said in effect "because you are an Indian you shall not administer the estate of your late husband." Parliament has thereby in a law of Canada placed a legal road-block in the way of one particular racial group, placing that racial group in a position of inequality before the law. The inequality

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[83] *Supra* note 1, at 300.
[84] *Supra* note 81, at 20.
[85] *Id.* at 21.
[86] *Id.* at 22.
[87] *Id.*

> does not arise through conflict between a federal statute with a provincial statute. It arises through conflict between the *Bill of Rights* and a federal statute. The *Bill of Rights* has capacity to render inoperative, racially discriminatory legislation, whether or not there be provincial legislation touching the subject-matter. [88]

It is suggested that, although Mr. Justice Dickson equated the case before him to the result in the Federal Court of Appeal in the *Lavell* case, [89] which was subsequently overruled by the Supreme Court of Canada, he is nonetheless right on this point.

B. Equality Before the Law and Judicial or Administrative Discretion

One field in which litigants have relied upon section 1(*b*) of the Bill of Rights, although unsuccessfully, has been with respect to the discretionary power of the Crown to proceed by indictment or upon summary conviction with respect to certain offences. The most famous case on this point is the Supreme Court decision in *Smythe v. The Queen.* [90]

The appellant had been charged under section 132 of the Income Tax Act [91] with evading income tax payments of close to $300,000 and making false and deceptive statements on his income tax returns for the years 1964-1967 inclusive. Subsection (2) of section 132 provided that the Attorney-General for Canada could elect to proceed by indictment rather than by summary conviction against a person who is charged under section 132. It also provided that if a conviction resulted, higher penalties were applicable.

The accused had elected trial by a county court judge alone and, after a preliminary inquiry, was committed for trial. An indictment was then preferred with respect to these charges by the agent of the Attorney-General. After arraignment on the indictment, and without any plea having been taken, counsel for the accused moved to quash the indictment on the ground that the election provided for in section 132(2) of the Income Tax Act was inoperative because of subsections 1 and 2 of the Canadian Bill of Rights, and therefore the presiding judge had no jurisdiction to try the charges. The trial judge allowed the motion to quash, reasoning that since the proceedings under section 132(2), by indictment, made the accused liable to more severe penalties than if he had been prosecuted by way of summary conviction under section 132(1), this was contrary to section 1(*b*) of the Canadian Bill of Rights as being an abrogation of the right to equality before the law.

The Attorney-General then applied to the High Court for an order of *mandamus*, and this was granted by Chief Justice Wells. He reasoned that the history of the office of the Attorney-General showed that his discretion

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[88] *Id.* at 23.

[89] 22 D.L.R.3d 188 (Federal Ct. 1971) (per Jackett, C.J., Thurlow & Pratte, JJ.).

[90] [1971] Sup. Ct. 680 (per Fauteux, C.J.C., Abbott, Martland, Judson, Ritchie, Hall & Spence, JJ.).

[91] CAN. REV. STAT. c. 148 (1952) [now CAN. REV. STAT. c. I-5 (1970)].

in conducting criminal proceedings was, at the time of the coming into force of the Canadian Bill of Rights, part of the British and Canadian conception of equality before the law. Further, he asserted that because the American system of government was different, the cases decided in the United States had no application in Canada, even though there was a similarity of wording between the Fourteenth Amendment of the United States Constitution and section 1(*b*) of the Canadian Bill of Rights. An appeal to the Ontario Court of Appeal was dismissed.[92] Chief Justice Gale in the Court of Appeal, as had Chief Justice Wells in the court below, felt bound to follow a decision of the Quebec Court of Appeal in *Regina v. Court of the Sessions of the Peace, ex parte Lafleur*,[93] where a similar argument, made in a case similar to the one at bar, was rejected as ill-founded.

In a unanimous judgment rendered by Chief Justice Fauteux, the Supreme Court of Canada dismissed the appeal from the Ontario Court of Appeal. The then Chief Justice Fauteux rejected the arguments that the discretion given to the Attorney-General contravened section 1(*b*) of the Canadian Bill of Rights. He suggested first that the election provision did not distinguish between a particular person or class of persons and any other member of the community. This provision was applicable, without distinction, to everyone.[94] The comparable decisions in the United States were, he said, "of no assistance in view of the differences existing between the systems of government obtaining in Canada and in the United States of America."[95] He pointed out that in at least one of the American decisions the distinction between a felony and a misdemeanor, which still obtains in the United States, was an important element, and that this distinction was not applicable in Canada.[96] He therefore concluded that section 132(2) of the Income Tax Act was not discriminatory, and did not offend the principle of equality before the law.

Similar conclusions were reached in a case[97] where a similar election was provided for under the Federal Food and Drugs Act.[98]

The discretion of the presiding judge, under sections 722, 771 and 652 of the Criminal Code, to impose a fine with imprisonment in default of payment, has been held by the British Columbia Court of Appeal[99] not to constitute a contravention of section 1(*b*) of the Canadian Bill of Rights. Mr.

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[92] 17 D.L.R.3d 389 (Ont. 1971) (per Gale, C.J., Schroeder & Kelly, JJ.).

[93] [1967] 3 Can. Crim. Cas. 244 (Quebec 1966) (per Tremblay, C.J., Pratte, Casey, Montgomery & Rivard, JJ.).

[94] *Supra* note 90, at 685-6. See Barton, *The Power of the Crown to Proceed by Indictment or Summary Conviction*, 14 CRIM. L.Q. 86 (1971); McGregor, *S.C.C.: 'Equality before the Law in re The Queen v. Smythe*, 19 CAN. TAX J. 35 (1971); McLaughlin, *R. v. Smythe—the Canadian Bill of Rights 'Equality before the Law'—the Meaning of Discrimination*, 51 CAN. B. REV. 517 (1973).

[95] *Supra* note 90, at 687.

[96] *Id.*

[97] *Re* McClary's Application, [1971] 1 W.W.R. 741 (Alta. Sup. Ct. 1970).

[98] CAN. REV. STAT. c. 38 (1952) [now CAN. REV. STAT. c. F-27 (1970)].

[99] Regina v. Natrall, 32 D.L.R.3d 241 (1972).

Justice Tysoe pointed out that even though such a sentence tends to place rich and poor on an unequal footing before the law, the sentencing tribunal has the duty of considering the ability, or lack thereof, of the particular accused to pay a fine that may be levied. He posed the problem of deciding whether inequality before the law arises in such a case in the following terms:

> In being subjected to imprisonment in default of payment of the fine imposed, the appellant has not been treated differently to others. A poor man who is fined inevitably suffers more than a rich man. Some persons are more sensitive than others and for a variety of reasons may suffer from confinement far more than others. Cultural background, personal environment and character may all play their part. In my opinion, "equality before the law" has no relation to such matters and things as these. [100]

His example does illustrate the dilemma which courts face on such issues. [101] If economic circumstances are to be considered in determining equality of sentencing, how far can that be applied without infringing the equality of those who might be somewhat better off? On the other hand, if there were not a discretion in the judge to consider not only the offence but the circumstances of the accused, greater inequality might result. It is suggested that the British Columbia Court of Appeal could not have come to another decision. This is the sort of determination which must be made by Parliament and not the courts.

On the other hand, it is suggested that Mr. Justice Morrow was correct in holding that sections 561, 562 and 563 of the Criminal Code, which give the defence two challenges to prospective jurors, as against four for the Crown, constituted inequality before the law. [102]

C. Equality Before the Law and Prostitutes

One of the questions which was raised in nearly all cases considering the application of section 1(*b*) of the Canadian Bill of Rights is who to compare with whom. One group of cases dealt with the former section 164(1)(*c*) [now repealed] of the Criminal Code which provided:

> 164 (1) Everyone commits vagrancy who
> (c) being a common prostitute or night walker is found in a public place and does not, when required, give a good account of herself.

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[100] *Id.* at 250-1. Bull, J. concurred, while Branca, J. expressed no opinion on this point.

[101] *See also* Regina v. Ganapathi, [1973] 11 Can. Crim. Cas.2d 173 (B.C. Sup. Ct.) (per Hinkson, J.) where it was held that a ten dollar hearing fee to dispute a traffic violation was not a denial of equality before the law, even for indigent persons.

[102] Regina v. Pudlock, [1973] 9 Can. Crim. Cas.2d 256 (1972). *Compare* this result *with* Regina v. Bradley, 23 Can. Crim. (n.s.) 39 (Ont. Sup. Ct. 1973) (per Galligan, J.) where it was held that the accused were not denied equality before the law even though no members of their race were on the jury. And *see* Regina v. Reale, [1973] 3 Ont. 905 (per Gale, C.J.O., Jessup & Martin, JJ.) where a conviction was quashed because the accused had been denied an interpreter during the judge's charge to the jury.

In *Regina v. Viens,* [103] a judge of the Ontario Provincial Court referred to the *Drybones* case and held that the accused was "denied the right to do something her fellow Canadians are free to do without having committed any offence or having been made subject to any penalty, namely 'being found in a public place . . . is required to give a good account of herself.' " [104] Subsequently, however, in three other cases courts came to different conclusions. In the case of *Regina v. Beaulne,* [105] an Ontario High Court judge held that section 1(*b*) of the Canadian Bill of Rights did not render inoperative section 164 (1)(*c*) of the Criminal Code because the provisions of section 164 (1)(*c*) did not apply to all females, but merely a particular group of them. Similarly, in the case of *Regina v. Lavoie,* [106] a judge of the County Court in British Columbia came to the same conclusion. This decision was affirmed by the British Columbia Court of Appeal. [107] The same conclusion was reached in *Regina v. Ferguson* [108] in 1972 when this provision was renumbered in the Revised Statutes of 1970 as section 175 of the Criminal Code. However, the accused in this case was acquitted on the ground that the facts did not show her to be a "common prostitute."

It is suggested that it is spurious to have rationalized section 164(1)(*c*) [later section 175(1)(*c*)] of the Criminal Code as not infringing section 1(*b*) of the Canadian Bill of Rights because it applied only to a particular group of females. The fact remains that section 164(1)(*c*) applied only to females, and treated females on a different basis than males, without any reasonable justification. There is no reason to assume that a "common prostitute" or a "night walker" is more offensive, or more or less able, to fend for herself than is a "gigolo." Although the point is now moot because the provision was deleted in 1972, [109] this was a clear case of "inequality before the law" on the basis of sex, and the section should have been declared inoperative.

D. Equality Before the Law and Immigration

The next group of cases which considered the effect of section (1)(*b*) involved proceedings under the Immigration Act, and the question again arose as to *who* to compare with *whom.* Perhaps the most important of these is the decision of the Citizenship Appeal Court in *Re Schmitz.* [110] It was alleged that section 10 of the Canadian Citizenship Act, [111] which permits an immigrant female who marries a Canadian citizen to apply for Canadian

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[103] 10 Can. Crim. (n.s.) 363 (Ont. Provincial Ct., Crim. Div. 1970) (per Morrison, J.).

[104] *Id.* at 372.

[105] [1971] 2 Can. Crim. Cas.2d 196 (Ont. High Ct. 1970) (per Houlden, J.).

[106] 16 D.L.R.3d 647 (B.C. County Ct. 1970) (per Schultz, J.).

[107] [1972] 5 Can. Crim. Cas.2d 368 (B.C. 1971) (per Tysoe, Bull & Branca, JJ.).

[108] [1972] 7 Can. Crim. Cas.2d 240 (Sask. Q.B.) (per Johnson, J.).

[109] Can. Stat. 1972 c. 13, § 12(1).

[110] 31 D.L.R.3d 117 (Citizenship Appeal Ct. 1972) (per Collier, J.).

[111] CAN. REV. STAT. c. C-19 (1970).

the judge stated, the Court cannot substitute its discretion for that of the Governor in Council. In *Regina v. M.*,[119] the accused, who was 15, was charged with two counts of breaking and entering, and two counts of rape. The Crown applied under section 9 of the Juvenile Delinquents Act to have him tried in the ordinary courts as an adult. The court held that the discretion given to the judge to grant such an application did not contravene section 1(*b*) of the Bill of Rights because the distinction was not based on race, national origin, etc., and because a distinction was necessary in order to provide for variations as to criminal liability on account of age.

Although these courts may have reached the correct results in the particular cases, it was because the distinctions were "reasonably justifiable," and not because the distinctions were based on grounds not mentioned in the opening paragraph of section 1 of the Bill of Rights. The "equality before the law" clause comprises these grounds, but it is not limited to them.

VI. Conclusion

In summation, section 1(*b*) of the Bill of Rights indeed requires a comparison between the person before the court and others in his class. But that in itself is not enough, because it does not help in determining with which class the person is to be compared! That should be at least partly determined by the second step in the process, *i.e.*, assessing whether an inequality in fact constitutes inequality before the law. The purpose of Parliament in enacting the law providing for the distinction must be considered. The onus of showing inequality must be on the one who alleges it. The judges must, in cases of any doubt, resolve the issue in favour of upholding the law. However, the Bill of Rights indicates that Parliament directed the courts to make the assessment. This assessment should be made on the basis of a standard like: "Is the distinction in the law or process reasonably justifiable in a liberal-democratic state which is committed to a policy of equality of opportunity, tempered with the aim of striving for equality in fact."

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[119] [1974] 13 Can. Crim. Cas.2d 437 (Ont. Provincial Ct., Fam. Div. 1973) (per Felstiner, J.).