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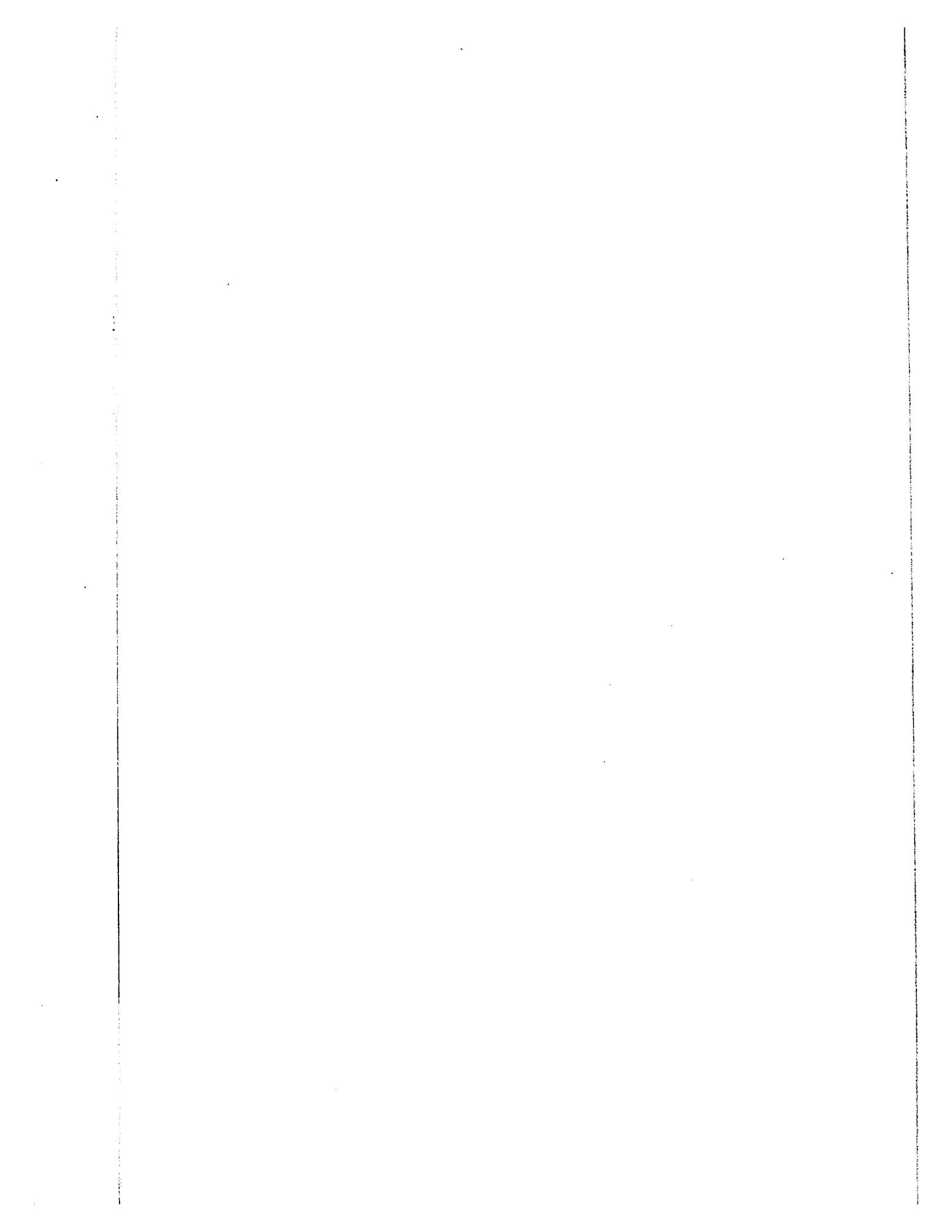
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UNIVERSITY OF OTTAWA

EQUALITY BEFORE THE LAW  
AND  
THE SUPREME COURT OF CANADA

THESIS

(in partial fulfillment  
of the requirements)

FOR THE MASTER'S DEGREE  
IN PUBLIC LAW

presented by  
Kenneth H. FOGARTY

August 1978

Université d'Ottawa  
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## R E S U M E

This work treats of the right of the individual to equality before the law as set forth in Section 1(b) of the Canadian Bill of Rights, as that right has fared in its interpretation by the Supreme Court of Canada.

The spotlight has been put on 'equality before the law' for two main reasons. First, as demonstrated in the text, the demand for equality has been the motivating factor in human rights legislation in Canada and elsewhere. While it appears as one right amongst a number, nevertheless, the concept of equality is so broad as to underpin the whole spectrum of human rights. Secondly, the interpretation of the concept of 'equality' combined with the words 'before the law' has presented to the Supreme Court of Canada its most difficult challenge in response to which it has done its most profound work. Its decision in this area have had a resounding impact on the whole of the Canadian Bill of Rights for they have signalled the role it will play in our law.

Before proceeding to an analysis of the Supreme Court's decisions a rather thorough review is made of the events and the social, political and legal considerations leading to the enactment of the Bill. There follows a study of the categories of rights and

freedoms together with a consideration of the legislative jurisdiction under which they fall in the Canadian federal system. This is in turn followed by an analysis of the Bill of Rights as a whole with special concern for the problem areas which have developed and which, of course, may affect all the rights set forth in the Bill including 'equality before the law'.

A close study is made of the important decisions of the Supreme Court touching on equality before the law. No attempt has been made to set forth a summary which would categorize the decisions on the basis of some principle for the reason that such an approach is just not possible. On the other hand, where there has been a consensus which would tend to give direction for the future, this has been highlighted.

Without any desire to belittle the efforts of the members of the Court, it is observed that the wavering in the position of the Court arises from several aspects with which the Court has concerned itself and which have produced for it seemingly insurmountable difficulties.

The first problem is twofold: a desire to protect Parliament from encumbering its sovereignty and a reluctance to assume the obligation of judicial review so

clearly placed on the Court by the Bill of Rights. By reference to certain English and Commonwealth decisions and a study of the writings of a number of distinguished legal scholars on this subject, the writer has advanced the proposition and (hopefully) demonstrated that, in the manner and form requirements contained in the Bill of Rights, Parliament has acted on a sound legal basis and that, in any event, its sovereignty remains intact since it has the power to amend, suspend or repeal the Bill at any time if it chooses to do so.

The second problem has been the apparent failure of the Court to establish any test against which to measure 'equality before the law - for it has approached each case on an ad hoc basis in a seemingly conscious effort to avoid being locked into a set pattern or approach. This attitude has caused concern since it gives no direction to the Canadian Judiciary, the legal profession or the public generally. A thorough analysis has been made, in the text, of the reasonableness test developed by the Supreme Court of the United States, including the views of both supporters and critics. It is urged that the Court should closely consider its adoption for the many reasons set forth in the text, not the least of which is its inclusion in provincial human rights legislation - as well as the Canadian Human Rights Act, recently proclaimed.

EQUALITY BEFORE THE LAW  
AND  
THE SUPREME COURT OF CANADA

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## INTRODUCTION

Le développement graduel de l'égalité est un fait providentiel. Il en a les principaux caractères: il est universel, il est durable, il échappe chaque jour à la puissance humaine, tous les événements comme tous les hommes ont servi à son développement. (1)

The history of man bears testimony of a continuous struggle for the recognition of the worth of the human person. The development of our western civilization has demonstrated a constant yearning for fairness in the treatment of human beings. This has been reflected in a demand for the abolition of special privilege, and special power in the hands of the few. (2) This craving was not possible of containment and many nations in their national development experienced the full measure of its force. In England we see the battle which raged between monarchs and Parliament culminating in the supremacy of the people's elected representatives and a victory for the ordinary man. (3) In France, we study the causes of the French Revolution in which the word "égalité" bore a special significance and had a resounding impact as a motivating feature in the

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- (1) Alexis de TOCQUEVILLE, De la démocratie en Amérique, Paris 10<sup>e</sup> Edition, Gallimard, Vol. 1, P. 41.
  - (2) For further reading, see Dictionary of the History of Ideas, Ed. Philip P. Wiener, Charles Scribner's Sons N.Y. 1973, Vol. II, 138.
  - (3) Winston S. CHURCHILL, A History of the English Speaking Peoples, McClelland and Stewart Ltd., London, 1956, Vol. I, 273.

political progress of that nation. (4) In the United States we witness the dramatic influence that the concept "that all men are created equal" (5) had in establishment of the new independent union and how a civil war in that nation became necessary because of a deep-rooted conviction in the efficacy of that principle.

The word "equality" hardly denotes a new concept for it has been the underlying stimulus in the human story as there has evolved a new social order. It is strange therefore that when we search for a legal definition of the word we find it difficult to find. Is it a term that is self evident and needs no explanation? Or is it likely that the Courts have deliberately avoided setting parameters to this concept? (6) Suffice it to say that a search through all the dictionaries of English law does not provide any direction. It is in an American Law Dictionary that we find a helpful exposition of the meaning, namely:

The condition of possessing substantially  
the same rights, privileges and immunities,

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- (4) George LEFEBVRE, La Révolution Française, Paris, Presses Universitaires de France, 1963, P. 67.
- (5) This appears in the first line of the second paragraph of the Declaration of Independence passed by The Congress of the U.S. on July 4, 1776. See S.E. MORISON and H.S. COMMAGER. The Growth of the American Republic, New York, Oxford Univ. Press, 1962, 198 and Vol. 1, 680.
- (6) J.C. SMITH, Regina v. Drybones and Equality Before the Law, (1971) 49 Can. Bar. Rev., 163. This author comments that the Supreme Court of Canada has deliberately avoided a definition to prevent its entrapment in later decisions. However he points out the need for a clear statement from the Supreme Court to serve as a guide to the lower Courts.

and being liable to substantially the same duties. (7)

This definition is not unlike the ordinary dictionary meaning of the word which the Shorter Oxford English Dictionary sets forth in two ways, neither of which is unrelated to this study, namely: (1) the condition of being equal in dignity, privileges, power with others; (2) fairness, impartiality, equity.

No person could ever rationally contend that all men are equal - in the sense of being the same. Each man, within the human dimension, has his own peculiar inherent characteristics, whether they be termed talents or idiosyncrasies. Nor can it be contended with conviction that all men are born equal - in the sense that they have the same opportunity. Such a declaration will not placate the child of poor parents whose horizons are limited by the confines of his environment. Nor can it be successfully argued that all men have the same power so long as the maxim "wealth is power" is a truism.

What then must be taken from the meaning is that all men are entitled to enjoy a standard of treatment which ensures that all have, at least, a minimum of rights in keeping with their dignity as human beings and which will avail them in attaining their individual goals without either

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(7) Black's Law Dictionary (1968) 4th Edition; West Publishing Co. Ltd., St. Paul.

restraint or compulsion. In a democracy, at least, it should not be construed as reducing all human beings to a common denominator. Rather, it is to ensure that from the independence of action, arising out of the rights each person enjoys in common with others, one can achieve his ambitions in accordance with his talents, which may or may not be contained by his special circumstances.

But we must consider what this term means taken in relation to the words "before the Law" as frequently used in the pages that follow, for it is in this manner that the word (or words) are set forth in the Canadian Bill of Rights.<sup>(8)</sup> The simple explanation is that the law will recognize that all citizens have a right to equality. The significance of this rather simple statement must not be lost. It is the State, through its Parliament or Legislature, which enacts the law. If the State declares in its law (as in the Canadian Bill of Rights) that all citizens are equal before the law it therefore professes to assure that in the laws it enacts there will be no inequality.

The state binds itself, therefore, as a question of principle, that no law, within its competence, will offend the individual's right to equality. This is precisely what the Canadian Bill of Rights purports to do. It is for this reason it has been called a declaration of human rights

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(8) The Canadian Bill of Rights is Part 1 of "An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms", which is set forth in the Appendix hereto.

and why the French version of the title "Déclaration Canadienne des Droits" is so apt. It is strange that in all that has been written by the Judges of our highest tribunal, which will be analyzed in this work, no assertion has been made of this preliminary proposition. And yet a close understanding of this basic premise would have been of immense assistance to the Courts.

There is another word which bears analysis - the word "discriminate". The Shorter Oxford Dictionary gives the meaning: "to differentiate, to distinguish". Black's (American) Law Dictionary tells us that, in general, it means: "to fail to treat all equally". A State which, through its Parliament, does not treat its citizens equally is itself discriminating. If a State enacts a Declaration setting forth that it binds itself to ensure equality before the law for all its citizens then it seeks to say that it does not desire nor intend, in its laws, to discriminate.

But there is another purpose for raising this question at this time. The word "discriminate" has been given a popular usage which seems to suggest that it means to differentiate on the grounds of sex, race, religion or colour. The word seems to have been limited to connote the more readily perceivable instances of differentiation - and as such is used in a pejorative sense. It needs to be pointed out that in the concept of equality before the law we are not dealing only with equality in respect of sex,

race, religion or colour. The term "equality before the law" opens up the whole aspect of unequal treatment of citizens before (or by) the law regardless of the basis for such inequality. The Supreme Court, as we shall see, has recognized this fact early in its interpretation of the words "equality before the law" as contained in the Bill of Rights. It is doubtful, however, that the Canadian public, let alone legal practitioners, have thoroughly grasped this significance. As and when they do there will be much greater attention given to the Bill than heretofore in relation to the rights of equality before the law. One has only to take a cursory glance over the cases dealt with by the Supreme Court of the United States - for example, discrimination in rates by common carriers, or discrimination in taxation charges - to perceive the reality of this assertion.

In this work we intend to analyze the manner in which the Supreme Court of Canada has treated of the right of equality before the law as contained in the Canadian Bill of Rights. The cases in which this provision of the Bill has been raised have presented considerations for the Court of far reaching implications. These have involved the very nature and intent of the Bill itself, the inter-play of certain of its sections, its application to "pre-Bill" and "post-Bill" legislation, as well as the philosophy (or lack thereof) of the Court in applying the Bill generally. In the view of this writer, it is in these cases, dealing with

the right of equality before the law, that the Court has done its more intense work and bared its collective soul in the process. Further, as a consequence of these cases a heated controversy has developed both within the legal profession and in the public forum since the Court's decisions have had a profound impact on what we might expect from the Bill for the future.

In the first chapter we analyse the events leading up to the enactment of the Canadian Bill of Rights and do so in some detail. It is submitted that it is important for those who choose to study this subject to have more than a passing acquaintance with these events. It will be seen that, though the Prime Minister of the day, the Right Honourable John Diefenbaker, must be given due recognition of the part he played in the enactment of the Bill, the interest at the time and for a number of years was not restricted to a few but that the measure enjoyed a wide support. It might even be said that the enactment was bound to come, if not in 1960, then not long afterwards. Such was, as will be shown, the sense of conviction of many concerned Canadians.

As part of this study this writer deemed it necessary to consider the meaning we generally ascribe to civil liberties and to advance an acceptable classification of liberties. This has been done in this chapter for the purpose of showing how "equality before the law" fits into the framework of liberties as presently understood. As part

of this review there is also consideration given to the distribution of legislative power in respect of liberties, which includes "equality before the law" as part of egalitarian civil liberties. Such a question is important in light of the jurisdictional problem posed by a Bill of Rights enacted by a Parliament which does not purport to do more than it can do, namely deal with matters coming solely within its own legislative authority.

There follows as the concluding portion of the first chapter (it is hoped in what is considered proper concern for order) an analysis of the main sections of the Bill. This review necessarily entails a consideration of the major problem areas, in order to delineate them preliminary to the case analysis which follows. It is well, also, to have a reference point to the sections at such juncture to indicate the scope of this work.

In the second chapter we review the major decisions of the Supreme Court of Canada. This writer's comments are supplemented by generous reference to the views of those noted legal scholars who have taken a keen interest in this subject. The conclusion of this chapter does not contain a summary of the decisions made by the Supreme Court in its treatment of equality before the law - for the reasons to be then and there expressed. There will, however, be references to certain areas, where the Supreme Court appears to have reached a consensus.

In chapter three we consider one of the major concerns of the Court: how and with what effect Parliament has, in the enactment of the Bill, transgressed the doctrine of the supremacy of Parliament as understood and espoused by Dicey (and Wade)? The Court has demonstrated a reluctance to apply the Bill to override other federal legislation. One asks whether the Court has been more concerned with Parliament's actions in binding itself by the Bill or a distaste in embarking upon judicial review in a new context. The somewhat thorough consideration given in the third chapter both to parliamentary supremacy and judicial review as envisaged by the Bill, will, hopefully, demonstrate to the reader that the constitutional problem, which appears to have been posed by the Bill, dissipates itself upon a full inquiry. Both Parliament's right to enact the Bill in the manner in which it has, as well as the Supreme Court's power, given pursuant to the Bill, to declare a portion (or all) of a federal enactment inoperative, cannot be seriously questioned.

Chapter four deals with a major concern of those who have closely studied the handiwork of the Supreme Court, namely the absence of a recognizable (as well as acceptable) test or formula to be used by the Court to determine whether there has been a breach of equality before the law. On this much has been written and undoubtedly much more will be written. The fourth chapter brings together a compendium of present thinking on the subject by Canadian legal

scholars. This author, upon the basis of what is considered a full analysis, elects to support the reasonable classification test - or whatever else it may subsequently be called - along the lines developed by the Supreme Court of the United States. However Canadian judges or legal scholars may be opposed (emotionally or otherwise) to borrowing from the experience of the American judicial system, it is submitted in the conclusions of this chapter, that the reasonable classification test affords the only acceptable approach for the Court to follow.

CHAPTER I

THE ENACTMENT OF THE  
CANADIAN BILL OF RIGHTS

CHAPTER I

The Enactment of the Canadian Bill of Rights

A: The social, political and legal considerations leading to a Bill of Rights for Canada:

The Second World War enkindled a keen interest in the basic rights of the individual. It was as if the whole world was shocked into the realization that the rights of the little man were at best illusory. There developed a conviction of the urgent need to safeguard the political and civil rights of individuals everywhere. (9) The international promotion of human rights became one of the major war (and peace) aims of the allies. (10)

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(9) See: John HUMPHREY, Human Rights and Authority, 20, U. of T.L.J. 413. As early as 1941 the Declaration of the Four Freedoms (Under President Roosevelt's initiative) had become a symbol around which the war was organized.

(10) See: Moses MOSKOWITZ, Human Rights and World Order, Oceana Publications, New York 1958 13. The declaration of the twenty-six United Nations of January, 1942, expressed again the profound aspiration of the people of the world and world public opinion when it states its common objectives - the defence of life, liberty, independence and religious freedom.

It would come as no surprise, therefore, that the United Nations Charter itself would contain express provisions reflecting the universal longing for recognition of individual worth and human dignity - concepts which were mocked during the world conflict. (11)

In December of 1948 the General Assembly adopted, without dissenting voice, the Universal Declaration of Human Rights. International lawyers support the proposition that the Universal Declaration has now become part of the customary law of nations and has a binding effect on all nations, including Canada. (12) It has much more than merely a historical significance. (13)

The work of the United Nations in establishing criteria for human rights and fundamental freedoms, rather expectedly, caused individual nations to reconsider their own internal legislation which in turn caused groups of nations in different parts of the world to confer at regional conferences and to establish their own statutes and consider

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(11) Article 55 of the Charter reads as follows:  
"The United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

(12) John HUMPHREY, Loc Cit n. 1 at 414.

(13) Ian BROWNLIE, Basic Documents on Human Rights. Clarendon Press, Oxford (1973) 106.

both legally binding conventions and machinery for supervision and enforcement. (14) The interest exemplified by members of the Commonwealth of Nations must not be lost sight of since the legislation enacted by Commonwealth countries, individually, to adequately protect human rights and fundamental freedoms has been prolific. (15) This initiative might well bear the lie to the proposition that, under the British system of law, these rights were adequately protected by common law and that there was little need for express reference in legislation.

This background of the developing interest in basic individual rights on the international scene is of assistance in understanding and explaining, at least in part, how it came about that Canadians got caught up in the question: Should we have a Bill of Rights? We say "in part" because this was not the whole story - since there was another phenomenon developing. During and immediately following the war there developed a deep-rooted concern, principally amongst lawyers in Canada, as to the extent to which Canadians may sustain loss of their rights.

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(14) Id., P. 338. Consider the work done by the Council of Europe in drafting the European Convention on Human Rights which was signed in Rome on November 9th, 1950. Brownlie states that it was "the first concrete effort in giving specific legal content to human rights in an international agreement" and provides a vehicle of enforcement in the European Court of Human Rights. Consider also the Convention agreed by the majority of South American States - patterned after the European precedent.

(15) Id., PP 29-45.

During the war years, governments had acquired wide-sweeping powers where authority was more and more exercised by Order-in-Council and not by legislative enactment after free expression of views in Parliament. The country, it was claimed, was being run by Order-in-Council under the guise of necessity for secrecy and pursuant to the provisions of the War Measures Act. (16) There was some fear that this method of government would continue after the war. (17) Lawyers and the Canadian public generally, became upset and even shocked when they learned what was allowed to happen to Canadian citizens of Japanese origin in British Columbia during the war. (18) And again there was considerable comment and genuine concern at the manner in which persons were detained and prosecuted at the time of the Soviet espionage trials in Canada immediately after the war was over. (19) In 1946 the Canadian Bar Association created a permanent section known as the Civil Liberties Section. (20) In 1949 Canadian lawyers at their annual convention began discussing the feasibility of the enactment of a "Bill of Rights". (21) Thus, while Canadians may have become interested, in a

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(16) R.S.C. 1970, Chap W-2

(17) See: Minutes of Proceedings of the Canadian Bar Assoc. 1943, PP 29-40; 1944, PP 40-60; 1945, PP 153-171.

(18) Canada, Parliament, Senate. Special Committee on Human Rights and Fundamental Freedoms. Proceedings 1950 (Ottawa, King's Printer, 1950) PP 269-279.

(19) See: Minutes of Proceedings of the Canadian Bar Association. 1946 PP 141-156.

(20) Id., P 156.

(21) Minutes of Proceedings of the Canadian Bar Association. 1949 P 166.

general way, with the subject of civil rights by reason of Canada's involvement in and commitment to the United Nations, the Canadian response had at its source more practical considerations than merely the desire to keep up with the trend of the times. It would be fair to assume, however, that the developments on the world scene made discussion of civil rights a more palatable subject and provided a climate of acceptance to a Bill of Rights when finally enacted.

B: The legislative background to the Bill:

But this enactment was slow in coming. There was some interest on the part of certain parliamentarians commencing in the year 1945, but their commitment was not commonly shared by their colleagues. (22)

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- (22) A- In 1945 Alistair Stewart, a C.C.F. member of Parliament proposed in the House of Commons that there should be incorporated in the constitution a bill of rights protecting minority rights, civil and religious liberties, freedom of speech and freedom of assembly; establishing equal treatment before the law of all citizens irrespective of race, nationality or religious or political beliefs and providing such powers as necessary to eliminate racial discrimination in all its forms. Canada. Parliament. Parliamentary Debates. (House of Commons) Vol. 1 (1945), P 900.
- B- Mr. John Diefenbaker also raised the issue in the House of Commons in 1945 and frequently thereafter. Id., Vol. II (1945), PP 2455-2461. Id., Vol. I (1946), P 513. Id., Vol. IV (1947), P3149. Id., Vol. III (1948), P 2846. Id., Vol. I (1952), p 720. Id., Vol. I (1955), P 894.
- C- The major support for a Bill of Rights in the Liberal party came from the Senator Arthur Roebuck who also spoke frequently on the subject during the same period. Canada. Parliament. Official Report of Debates (Senate) Vol. I (1947/48), PP 679-681.

However, in 1947 the Liberal government was moved to set up a Joint Parliamentary Committee to consider what obligations Canada had assumed in supporting the Universal Declaration of Human Rights and the United Nations Charter.<sup>(23)</sup> The results were negative in that the Committee recommended that more time and thought be given to the enactment of a Bill of Rights.<sup>(24)</sup> In 1950 the Senate of Canada set up a Special Committee on Human Rights and Fundamental Freedoms. It concluded that the best place for a law protecting these rights would be in the B.N.A. Act but an amendment to the Act should only be made when a Dominion-Provincial Conference could decide on the procedure. In the interim it recommended that Parliament adopt a Declaration of Human Rights strictly limited to its own legislative jurisdiction.<sup>(25)</sup> No procedure to amend the B.N.A. Act was agreed upon at the Dominion-Provincial Conference of 1950. The government of the day took no action on the above-noted Senate Committee recommendation. Parliamentary action was at a standstill

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(23) Id., Vol. I (1947), P 672.

(24) Canada. Parliament. Special Joint Committee on Human Rights and Fundamental Freedoms, Minutes of Proceedings and Evidence, 1947/48 (Ottawa, King's Printer 1948) P 211.

(25) Canada. Parliament. Senate. Special Committee on Human Rights and Fundamental Freedoms. Proceedings, 1950. (Ottawa, King's Printer, 1950), PP 301-306. Canada. Parliament. Official Report of Debates. (Senate) (1950). PP 618-621.

until the new Prime Minister of Canada (The Right Honourable John Diefenbaker) introduced Bill C.60 in the House of Commons in September of 1958 and recommended that it be closely studied by all interested persons and groups before implementation. (26) The Bill was re-introduced in Parliament for second reading in 1960, when a special Commons Committee was set up to study the Bill. (27) A number of changes were made in the original draft (one of which will be closely considered later in this work) and after receiving the Report of the Committee, the House gave unanimous third reading to the amended draft. (28) It was immediately passed by the Senate and, on August 10th, 1960, received Royal Assent. (29)

The Diefenbaker government, then, carried out the proposal made by the Special Committee of the Senate in 1950 to enact a Bill of Rights restricted to the federal legislative jurisdiction. Mr. Diefenbaker was firmly of the view that no accord could be reached at a Dominion-Provincial Conference, (30) and therefore that entrenchment of the Bill in the Constitution (B.N.A. Act) was not possible.

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(26) Canada, Parliament, Parliamentary Debates. (House of Commons) Vol. IV (1958), PP 4638-4639.

(27) Id., Vol. VI (1960), PP 5950-5951.

(28) Id., Vol. VII (1960), P 7553.

(29) Id., P 7948.

(30) Id., Vol. IV (1958).

The government therefore chose to enact the Bill by special (constitutional) statute and not a constitutional amendment. The Minister of Justice of the day, the Honourable E.D. Fulton, explained to the Special Commons Committee the alternatives which the Government had considered. (31) He argued with some vehemence that the method chosen was as effective as an amendment to the B.N.A. Act and that it was wrong to think that the only amendments to that Act and only statutes containing such amendments were constitutional. (32) Mr. Diefenbaker remains satisfied to this day that his government chose the right (and only) course. (33) It is not the purpose of this work to embark upon an inquiry as to whether entrenchment in the constitution would have been the more desirable method of enactment.

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(31) Canada. Parliament. House of Commons. Special Committee on Human Rights and Fundamental Freedoms. Minutes of Proceedings and Evidence, 1960, (Ottawa, Queen's Printer, 1960, PP 22-224.

(32) Id., P 409.

(33) See John G. Diefenbaker, "Diefenbaker on the Bill of Rights". (1974) 22 Chitty's L.J. 68, where he states: "I did everything I could to have the Bill of Rights incorporated in the Constitution but had the same lack of success as the two Prime Ministers who followed me because the provinces would not give up their exclusive constitutional powers. In fact, I do not expect they will do so for many years to come, if ever."

Attempts have been made to that end since 1960 but without avail. (34) We are faced with the present Bill as a reality and it is with this that we are now concerned.

C: The Jurisdictional Problem - distribution of powers in a federal system:

A study of the Bill of Rights, in whatever aspect, cannot properly be made without a consideration of the problems posed by the distribution of powers under the B.N.A. Act, particularly when the Bill is said to be related only to the domain of federal legislative competence. To assist in such analysis we should consider certain basics, specifically the meaning to be ascribed to the words, right, liberty and freedom, and the categories to which rights can possibly be assigned.

There is some fuzziness in the use of the terms, right, liberty and freedom. It has been stated that this results from the different legal and ordinary meanings

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(34) Canada. Constitutional Conference, Ottawa, 1968. Proceedings, First Meeting, February 5-7, 1968, Ottawa. Ottawa, Queen's Printer, 1968. Canada. Constitutional Conference, Ottawa, 1968. Federalism for the Future. Ottawa, Queen's Printer, 1968. Canada. Constitutional Conference, Ottawa, 1969. Proceedings, Second Meeting, Ottawa, February 10-12, 1969. Ottawa, Queen's Printer, 1969. Canada. The Constitution and the People of Canada. Ottawa, Queen's Printer, 1969. Canada. Constitutional Conference, Victoria, June, 1971. Proceedings, Victoria, British Columbia, June 14, 1971. Ottawa, Information Canada, 1971. Appendix A: Statement of Conclusions. Appendix B: Canadian Constitutional Charter, 1971. Canada, Parliament. Parliamentary Debates. (House of Commons). Vol. VII (1971) P 6857.

given to them - as well as the profusion of definitions given to them by legal authors. (35) Some authors treat them as immutable concepts having a basis in natural law: others, of the positivistic school, treat them in terms of relationships worked out as between individuals or individuals and the state to better allow people to live together in society with each other. (36)

For our purposes we shall adopt that meaning of "right" which states it to be a claim or advantage by a person which is conferred or protected by law and which implies a corresponding duty on the part of another. What then is the meaning of the words "liberty" or "freedom", terms which are used interchangeably? A liberty is what a person may do when not prevented from doing so by law. However, many liberties or freedoms, in order to survive, need not only the absence of legal restraint but may need the protection of the law and the creation, by law, of a duty on the part of another. (37)

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(35) Walter S. TARNOPOLSKY: "The Canadian Bill of Rights" Second Revised Edition; McClelland and Stewart Limited, Toronto, 1975, 1.

(36) Ibid. It should be pointed out that while this difference in approach has no practical significance in the present work, it is of importance nevertheless to acknowledge that certain fundamental conceptual differences do exist and that such differences can and do contribute to varying degrees of commitment on the part of legislators (and judges) in this whole area of the law.

(37) Id., P 2.

It is understandable, therefore, that rights, liberties and freedoms are words used synonymously and this for the very reason that they must, in the final analysis, find support in the law, whether by express legislation or by the decision of the courts, to ensure their continuance. (38)

The United Nations Charter employed, for the first time, the phrase "human rights and fundamental freedoms." Up to that time the traditional English term "civil liberties" was used in Canada, translated as "libertés civiles" but more precisely "libertés publiques". The new term is very broad. It has been stated that it has not inherited legal definition and that there is more social significance about the phrase that there is concern about classification and terminology. (39)

I. Kinds of civil liberties:

Nevertheless it is desirable for our purposes to adopt, by process of selection, a classification of rights, liberties and freedoms as will assist in understanding the Canadian jurisdictional problem in this area. For such purpose the classification set forth by Professor Laskin

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(38) W.L. LEDERMAN: "The nature and Problem of a Bill of Rights". (1957) 37 Can. Bar. Rev. PP 4-6 and F.R. SCOTT: "Dominion Jurisdiction over Human Rights and Fundamental Freedoms". (1949) 27 Can. Bar. Rev. P 507.

(39) Maxwell COHEN, Human Rights, Programme or Catchall? (1968) 46. Can. Bar. Rev., P 555. "This new phrase has a popular political syntax and aside from firing the imagination, it is such a broad phrase that it can include all the concepts discussed for hundreds of years in this area of interest."

(as he then was) is of particular relevance and finds easy acceptance. His division was as follows: (40)

Political civil liberties: The substance of this kind of liberty is freedom of association, freedom of assembly, freedom of utterance, freedom of the press and freedom of conscience and religion.

Legal Civil Liberties: These are liberties connected with the legal order. Amongst these are freedom from arbitrary arrest, or arbitrary search and seizure of person, premises and papers; the protection of impartial adjudication, involving notice and hearing, and independent judiciary and access to counsel; and protection against compulsory self-incrimination.

Economic Civil Liberties: This includes freedom from state regulation or intervention in economic affairs. (41)

Egalitarian Civil Liberties: This involves positive state intervention to secure such things as equality of employment opportunity or of access to public places without discrimination on account of colour, religion or ethnic or national origin or ancestry. It is, in a sense, the antithesis

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(40) Bora LASKIN: "An enquiry into the Diefenbaker Bill of Rights. (1959) 37 Can. Bar. Rev., PP 80-81.

(41) Id., P 81 - Laskin states "that economic civil liberties are more relative in their operation than either political or legal civil liberties, since government, in the general social interest, has made heavy inroads on economic individualism." The theme now seems to be: Ask not what the individual can do for himself but what the State can do for the individual.

of economic individualism that deprecates state interference in business or social relations. (42)

## II. Legislative jurisdiction for civil liberties:

In a federal state like Canada legislative action by Parliament or a legislature in whatever area must, of necessity, involve a preliminary assessment of the distribution of legislative power - as contained in the B.N.A. Act. The question is no less relevant and difficult in the area of civil liberties. On the federal side, we have the power of the federal government to legislate for the peace, order and good government of the nation. (Sec. 91). We also find that Parliament has a clear jurisdiction in the field of criminal law. (Sec. 91 (27)). On the other hand, we have certain express jurisdiction in the provinces to legislate over property and civil rights in the provinces (Sec. 92(13)) and as well over matters of a private nature in the provinces. (Sec. 92(16)).

These problems did not arise only with the implementation of provincial (rights) legislation or the Canadian Bill of Rights. There were a number of important decisions reached by the Supreme Court of Canada, particularly

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(42) See F.R. SCOTT, Loc. cit. n.38 P 536: "In the battle to preserve freedom" the role of government inevitably changes from oppressor to protector: Preventing the state from taking away liberties does not help the man whose freedom is attacked by a fellow citizen, or whose liberty is destroyed by poverty. Defence against the state and protection by the state are two correlating functions, not contradictory but complimentary."

in the 1950's and subsequent to the abolition of appeals to the Privy Council (in 1949) which bear examination. A brief review of the more significant decisions will be of assistance prior to embarking upon an examination of the contents of the Canadian Bill of Rights.

While we will briefly discuss at this juncture leading decisions of the Supreme Court of Canada since abolition of appeals to the Privy Council, in the areas as set forth in the classification hereinbefore described, (43) we should not be unmindful that the earlier decisions of the judicial committee have had a profound impact on the later decisions of Canada's final appellate tribunal. (44) For our present purposes a close understanding of the earlier decisions of the Judicial Council must be assumed.

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(43) See Laskin's classification at P 22 supra.

(44) Of particular importance are cases which stated that the provincial legislatures are sovereign bodies within their jurisdiction, just as the federal Parliament is sovereign within its jurisdiction. See Liquidators of the Maritime Bank vs. Receiver General of New Brunswick (1892) A.C. 437 and Attorney General for Canada vs. Cain; Attorney General for Canada vs. Gilbula (1906) A.C. 542. Also of importance are three rules which the Privy Council established in determining questions relating to validity of federal or provincial legislation: (1) the "pith and substance" rule. See, for example: Russell vs. The Queen (1882) 7 A.C. 829 as well as Union Colliery of British Columbia Ltd. vs. Bryden (1899) A.C. 580; (2) the "double aspect rule". See for example: Hodge vs. The Queen 1883 9 A.C. 117; and (3) the "paramountcy" rule: See, for example, Attorney General of Canada vs. Attorney General for British Columbia (1930) A.C. 111.

We will also have to assume an understanding of those decisions of the Supreme Court made in the area of human rights which were not appealed to the Privy Council and which were rendered during the period from the establishment of the Court (in 1875) to the time when the Court became the appeal court of last resort (in 1949). While they are not numerous they do not lack in significance. Dean Beaudoin gives an excellent summary of these decisions as part of an article written on the occasion of the centennial year of the Supreme Court of Canada. (45) We must also bear in mind that the B.N.A. Act does not deal with human rights and fundamental freedoms (46) as they are treated in this work, although there are certain constitutional guarantees of a specific nature contained in the Act. (47)

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(45) Gérald A. BEAUDOIN, La Cour Suprême et la Protection des Droits Fondamentaux. (1975) 53 Can. Bar. Rev. 675 at P. 682.

(46) See D.A. SCHMEISER, Civil Liberties in Canada, London, Oxford University Press, 1964, P 10.

(47) See British North America Act 1867, 30, 31 Vict Chap 3; Sec. 20: annual session of Parliament; Sec. 50: general election not less than every 5 years; Sec. 51: representation to H. of C. on basis of population; Sec. 92(13): property and civil rights - to the provinces; Sec. 93: protection of confessional schools; Sec. 97: independence of judiciary; Sec. 113: use of the English and French languages.

I. Political Civil Liberties

Dealing first of all with political civil liberties, we find that these find their home (essentially) under federal jurisdiction, although the road to that habitat was not an easy one. There are three decisions in the main which have laid out the route.

The case of Switzman vs. Elbling <sup>(48)</sup> (known as the Padlock case) dealt with provincial legislation which attempted to regulate the dissemination of ideas. An Act of the Quebec Legislature passed in 1937 <sup>(49)</sup> declared it to be illegal to use a house for the propagation of communism (which included its use for printing, publishing or distributing communist literature). The Supreme Court held that this was legislation with respect to criminal law, and was under federal jurisdiction by virtue of Sec. 91(27). The right of free opinion, public debate and discussion could never have been intended to be included in "Property and Civil Rights" or "Matters of a merely local or private Nature" but clearly necessary to Parliamentary government. Under such government freedom of discussion in Canada has a unity of interest and significance extending equally to every part of the Dominion, and cannot have limitations consistent only with a local matter. <sup>(50)</sup>

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(48) (1957) S.C.R. 285

(49) 1937 S.Q., C. 11 An Act to Protect the Province against Communistic Propaganda

(50) See Note 48: Rand J. at P 306

Municipalities may pass by-laws under provincial legislation enabling provinces to regulate use of streets but when such a by-law is aimed at censorship of one group and limits freedom of expression as such then it is quite another thing. The case of Saumur vs. City of Quebec (51) decided that a by-law of the City of Quebec which was used to prohibit Witnesses of Jehovah from distributing their literature on the streets of Quebec City could not be valid merely because it purported to be an exercise of a City's regulatory power to ensure cleanliness, order and good government in the City. Freedom of speech and freedom of religion were not purely local matters and hence were under federal jurisdiction. (52)

Freedom of religion was dealt with again in Birks & Sons (Montreal) Ltd. vs. City of Montreal. (53) In a unanimous decision the Supreme Court invalidated provincial legislation which provided for the closing of stores on certain "holy" days. It held that in "pith and substance" this was religious and Sunday observance legislation. This is part of the criminal law and therefore within the jurisdiction of Parliament. Neither the absence of federal

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(51) (1953) 2 S.C.R. 200.

(52) This decision was from a very badly divided court, but it is fair to say that the above statement represents the view of at least 4 members of a 9 member court with which one judge (Kerwin, J.) concurred on a different ground. In any event this statement is consistent with the interpretation since given to the decision. See D.A. SCHMEISER Civil Liberties in Canada Opus cit., Ref. 46, P 91.

(53) 1955 S.C.R. 799.

legislation nor the limited area of the operation of the law could validate it. (54)

## 2. Legal Civil Liberties

With the background of the above cases we next consider legal civil liberties. There is little doubt that the primary responsibility in this area is federal because of the federal responsibility for criminal law under 91(27) of the B.N.A. Act. The above cases dealt with in another aspect, show how wide an interpretation can be given to this section to protect the liberty of the Canadian Citizen. It is logical, therefore, that in respect of those rights of citizens appearing before the courts and relating to arrest, search, seizure, right to counsel and protection against compulsory self-incrimination should be, as they are, clearly in the federal domain. (55) Where the Criminal Code and The Canada Evidence Act do not adequately treat of these (procedural) rights it must be remembered that the common law principles are available to an accused in his defence unless otherwise prohibited by the Criminal Code. (56)

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(54) See (1959), 37 Can. Bar. Rev. where the point is made clear in three separate articles: (1) Louis Philippe PIGEON, The Bill of Rights and the British North America Act, P 76; Bora LASKIN, Loc cit n. 40 at PP 121-2; F.R. SCOTT, The Bill of Rights and Quebec Law, P 141.

(55) Many of these safeguards presently appear in the Criminal Code R.S.C. 1970, Chap. C. 34, e.g. Sections 448-462 and in the Canada Evidence Act R.S.C. 1970 Chap. E-10., e.g. sections 4 and Sec. 5(2).

(56) Criminal Code, Supra, sec. 7(3).

This covers not only the area of justification, excuse or defence but would include principles relating to the impartiality (and independence) of the Judiciary, right to notice and right to be heard - embracing what is understood as the principles of natural justice.

Regard must be had, however, to the responsibility of the provinces in the area of civil law which includes jurisdiction under the prerogative writs (57) which have a bearing on a citizen's liberties as well as the civil remedies for trespass, false arrest and false imprisonment (58) and for a public official exceeding his legal authority. (59)

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(57) ARMAND vs. Home Secretary 1943 A.C. 147.

(58) Chaput vs. Romain (1955) S.C.R. 834 Lamb vs. Benoit 1959 S.C.R. 321.

(59) Roncarelli vs. Duplessis, 1959 S.C.R. 121. See F.R. SCOTT, Civil Liberties and Canadian Federalism, Univ. of Toronto Press (1959) 47. Professor Scott (writing in 1959) cites this case as an example of a situation where the rule of law governs and in reality what we mean when we say that we are all equal before the Law and that in our policy the state is under the law. (In this case the Hon. Maurice Duplessis, Premier of Quebec was found to have instructed the Quebec Liquor Commission to cancel the liquor licence of Roncarelli without any legal justification and the Supreme Court of Canada gave judgment against him for some \$33,000.00 for damages suffered by Roncarelli). Professor Scott's view may well have been the basis for the definition of equality before the law advanced by Ritchie J. in the Lavell case *Infra* Note 147 at P 1360. Certainly Martland J. in his judgment in the Burnshine case gives Scott's statement considerable weight (*Infra* note 172 at P 705). While more will be said on this subject, below, the important aspect for our purposes at this point is to realize the protection given to legal civil liberties in the provincial context.

The provinces also have the power to fine, penalize or imprison anyone for transgressing a law validly passed by them. (60) It is equally clear that the provinces have a wide power to interfere with liberties arising out of their exclusive jurisdiction in tort, contract and property law under Sec. 92 (27) of the B.N.A. Act.

The Supreme Court of Canada has not refused to strike down provincial legislation which conflicts with the federal criminal law power under the paramountcy doctrine but there has been an increasing tendency on the part of the court to uphold provincial legislation under the double aspect doctrine. (61) On the other hand it seems clear that if a right is being whittled down by a province and it is a right which all Canadians should enjoy the Courts would find no difficulty relying on the federal criminal law power to preserve it. (62)

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(60) Sec. 92 (15) of the B.N.A. Act.

(61) In re: Sec. 92 (4) of the Vehicles Act 1957 Sask. 1958 S.C.R. 608.

(62) See SAUMUR vs. The City of Quebec supra note 51.

### 3. Economic Civil Liberties

We shall now consider, briefly, how "economic liberties" fare under the distribution of powers in the B.N.A. Act. In Laskin's classification he speaks of this category of liberties as one wherein the citizen is protected from the state.<sup>(63)</sup> While that aspect is important it has become less and less a concern since government has changed its position and enacted so-called social legislation, which, though incidentally enlarging the degree of involvement of government, has met general acceptance on the basis that it is designed to enlarge the individual's liberty by removing fear of economic stress. It is therefore in this latter sense that we consider this aspect - resulting in the move from laissez-faire liberalism to government paternalism.

Here again the conflict is between the federal criminal law power and the provinces' power under property and civil rights. In this instance the Supreme Court has held that the primary jurisdiction is provincial.

The main bone of contention was whether the provinces had responsibility for supervision of industrial relations. The question was put to rest (temporarily) by the Privy Council in 1925 and 1937 when it held that the

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(63) See Laskin's classification, supra P 22 of this work.

Provinces had the edge (64) and that provincial power in the field covered holidays, minimum wages and limitations of work. (65) The question arose again in 1963 when the Supreme Court had to decide whether the Province of British Columbia could, in its Labour Relations Act, prohibit unions from using their funds to support a political party. From a rather badly divided Court came the decision of the majority. (66) In essence it stated that where a province enacts legislation which in pith and substance is in relation to a subject matter within its jurisdiction it will be valid even though it may affect rights of citizens which are otherwise within federal jurisdiction. (67) This case has, by every implication, confirmed to the provinces a very wide jurisdiction in the field of economic liberties.

In the provision of services or benefits of an economic character, the Provinces have also emerged victorious. Essentially the message is that the Criminal

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(64) Toronto Electric Commissioners vs. Snider (1925) A.C. 396.

(65) Attorney General for Canada vs. Attorney General for Ontario (1937) A.C. 326.

(66) Oil, Chemical and Atomic Workers International Union, Local 16-601 vs. Imperial Oil Ltd. 1963 S.C.R. 584.

(67) The Court quite obviously had difficulty wrestling with its earlier decision of Switzman vs. Elbing supra note 48.

Code should not be used to control economic activity. (68) Significantly, an amendment to the B.N.A. Act was obtained in 1940 to enable the Federal Government to provide for unemployment insurance. (69) While the Federal government has made financial contributions in other areas (either to the provinces and/or to citizens) such as family allowances, old age pensions, aid to universities and health care, there can be little doubt that if Parliament were not merely helping out with its largesse but sought to move into these areas on an exclusive basis then it would be in trouble. These responsibilities would seem to fall exclusively upon on the provinces under "property and civil rights", "education" or "health".

On the other hand the provinces cannot use their power under "property and civil rights" to oust the federal power to legislate in those subjects which are expressly set out in Sec. 91 of the B.N.A. Act. For instance, the provinces cannot use their jurisdiction over property and contract law to interfere with banks and banking, interest rates, bankruptcy, postal service, navigation and shipping, nor in the industrial relations in respect to classes of

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(68) An important case in this respect is: Canadian Federation of Agriculture vs. Attorney General for Quebec (the Margarine case) (1949) S.C.R. 1.

(69) British North America Act 1940 3 & 4 Geo VI Chap. 36 (UK).

subjects exclusively given to Parliament by that section. (70)

#### 4. Egalitarian Civil Liberties

Let us now look briefly at egalitarian civil liberties, an area more directly related to this study. Here we are dealing with the equality of treatment which includes the problem of discrimination relating to race, colour and/or sex. Legislative action is necessary to advance and protect these liberties since discrimination per se at common law is not unlawful. (71) This approach undoubtedly arose out of the old traditionalist view that each citizen must be free to attain his own goals unfettered by state interference. In such circumstances it was assumed that each man would find his own level of reward and in doing so must advance and protect his own interests - a doctrine not unrelated to the theory of the survival of the fittest. Latterly this approach has been supplanted by humanitarian (or egalitarian) concepts where each person is to be

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(70) There are a number of decisions which uphold the non-inviolability of express federal power. See: Attorney General for Alberta vs. Attorney General for Canada (1943) A.C. 356; Attorney General for Saskatchewan vs. Attorney General for Canada (1949) A.C. 110; Canadian Bankers Association et al vs. Attorney General for Saskatchewan (1956) S.C.R. 31. Re: Validity of the Industrial Relations and Disputes Investigation Act. (1955) S.C.R. 529.

(71) See for example the 1940 decision of Christie vs. York Corporation (1940) S.C.R. 139.

respected as a member of society and is to be helped, if need be, to attain at least a minimum of the good things of life. (72)

A. The initiative of the Provinces.

Cases dealing with discrimination on the basis of race, colour, creed or sex first arose in the provinces. It seems to have been assumed from early decisions that property and civil rights were involved and there was hence no need to define the jurisdictional question. (73) Little wonder, therefore, that the Provinces felt moved to enact legislation in this area without any qualms about their power to do so. Both the nature of the liberty in question as well as the provincial initiative in taking legislative action have combined to give to the provinces a very wide jurisdiction indeed which neither the Parliament of

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(72) John HUCKER and Bruce C. McDonald, Securing Human Rights in Canada, (1969) 15 McGill L.J. 220. This article contains an excellent review of the efforts made by the Provinces of Canada in the advancement of economic rights.

(73) See: Rogers vs. Clarence Hotel (1940) 2 W.W.R. 545 (B.C.C.A.) Franklin vs. Evans (1924) O.L.R. 349 (Ont. H.C.)

Canada can ignore nor the courts will be inclined to limit at this time. (74)

Ontario took the lead in 1944 by enacting the Racial Discrimination Act. (75) Saskatchewan followed in 1947 with a very sweeping Act called the Saskatchewan Bill of Rights. (76) These were followed by the enactment by the Provinces of Fair Employment Practices Acts, starting with Ontario in 1951. (77) There then followed the enactment by the Provinces of Fair Accomodation Practices Acts, commencing with Ontario in 1954. (78)

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(74) I.A. HUNTER - Human Rights Legislation in Canada: Origin, Development and Interpretation (1976) 15 U.W.O.L.R., 21.

(75) S.O. 1944: Chap. 41.

(76) R.S.S. 1965 Chap. 378.

(77) S.O. 1951, Chap. 24. Other provinces followed: Manitoba S.M. 1953, Chap. 18. Nova Scotia S.N.S. 1955 Chap. 5. New Brunswick S.N.B. 1956, Chap. 9; British Columbia S.B.C. 1956, Chap. 16; Saskatchewan S.S. 1956 Chap. 69; and Quebec S.Q. 1964, Chap. 46.

(78) S.O. 1954, Chap. 28. Other provinces followed suit, as follows: Saskatchewan S.S. 1956, Chap. 56; New Brunswick S.N.B. 1959, Chap. 6; Nova Scotia S.N.S. 1959, Chap. 4; Manitoba S.M. 1960, Chap. 4; British Columbia S.B.C. 1961, Chap. 50; Quebec placed a section in the Hotels Act which forbade similar discrimination: S.Q. 1963, Chap. 40, Sec. 8.

This legislation later was followed by Acts designed to prevent discrimination on grounds of sex and age. (79)

In 1962 Ontario consolidated all human rights legislation in one Statute called the Ontario Human Rights Code, administered by the Ontario Human Rights Commission. (80) Other provinces followed this new approach (81) which took the onus off a complainant to lay charges such as under the previous quasi-criminal legislation and provided for a scheme of administration which involved the whole community in an educational exercise.

In 1975 Quebec enacted the "Charter of Human Rights and Freedoms" (assented to June 27, 1975). (82) This Act makes abundant provision for the rights above referred to but goes on to include rights outside the area of either economic or egalitarian civil liberties namely

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- (79) A succession of Equal Pay Acts were enacted by the Provinces; Ontario S.O. 1951, Chap. 26; Saskatchewan S.S. 1952, Chap. 104; British Columbia S.B.C. 1953, Chap. 6; Manitoba S.M. 1956, Chap. 18; Nova Scotia S.N.S. 1956, Chap. 5; Alberta S.A. 1957, Chap. 38; Prince Edward Island S.P.E.I. 1959, Chap. 11; New Brunswick S.N.B. 1960-61, Chap. 7. In 1964 Quebec gave married women full equal capacity as to legal rights S.Q. 1964, Chap. 66. Age discrimination legislation was passed by Ontario S.O. 1966, Chap. 3 and British Columbia S.B.C. 1969, Chap. 19.
- (80) S.O. 1961-62 Chap. 93, updated 1972 S.O. Chap. 119. For a historical analysis of the legislation see: I.A. HUNTER, The Development of the Ontario Human Rights Code: A Decade in Retrospect. (1972) 22 U. of T. L.J. 237.
- (81) Nova Scotia: S.N.S. 1969 Chap. 11; Alberta: S.A. 1972 Chap. 2; New Brunswick: S.N.B. 1971 Chap. 8; British Columbia: S.B.C. 1969 Chap. 10; Manitoba: S.M. 1970 Chap. 104; Saskatchewan: S.S. 1972 Chap. 108.
- (82) S.Q. 1975 Chap. 6.

political rights and judicial (legal) rights. While the inclusion of these rights could lead either to confusion or a judicial hassle such an outcome may well be remote since the Charter seeks to declare in a positive way and expand human rights and freedoms and not to cut them down. The Charter is an excellent document and could well be the basis of a Human Rights Charter for all Canada, entrenched in the Constitution, if such a step could be worked out amongst the Provinces and the federal authority.

Where discrimination arises in the sale and leasing of land it seems clear that it falls within provincial jurisdiction. There have been several landmark cases which have gone to the Supreme Court of Canada on the point. (83) So long as the pith and substance of the legislation related to control of property within the province then the province will have paramountcy. This does not suggest that the provinces have encouraged discrimination in this area - for there is evidence that the contrary is true. (84)

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(83) See: Walter et al vs. Attorney General of Alberta (The Communal Property Act and the Hutterites) (1969) S.C.R. 383; Noble and Wolf vs. Alley (covenant in deed prohibiting sale to Jews), 1951 S.C.R. 64.

(84) In 1972 Alberta repealed the Communal Property Act which had sought to control the acquisition of land by Hutterites. S.A. 1972 Chap. 103. In 1950 Ontario amended the Conveyancing and Law of Property Act to make covenants restrictive on basis of race, colour, or creed, void. S.O. 1950, Chap. 11. Manitoba passed similar legislation S.M. 1950, Chap. 33. Saskatchewan's Bill of Rights prohibits racially restrictive covenants. R.S.S. 1965, Chap. 378.

It is obvious that the jurisdiction of the Provinces in the field of egalitarian civil liberties is vast. (85) This, however, does not mean that the federal Parliament has no such power. In all classes of subjects within the federal jurisdiction Parliament has similar powers and has not failed in the past to take the initiative in its own area of responsibility. (86)

Of particular interest at this time is the enactment by Parliament in 1977 of the "Canadian Human Rights Act" (assented to July 14, 1977). (87) This Act covers much the same area as the provincial legislation (save reference to political or legal rights) and is expressly stated to extend only within the purview of matters coming within the legislative authority of Parliament. It has a heavy emphasis on employment practices. It does, however, contain provisions in respect of the denial of rights to persons in respect of accommodation, of both commercial and residential premises. Here we have a

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(85) The review of provincial legislation contained herein is not intended to be exhaustive. It is acknowledged that there exists other instances where the Provinces have legislated. It is sought to demonstrate that the initiative taken by the Provinces is extensive.

(86) Parliament has passed some significant legislation in this area. For instance: in 1953 the Canada Fair Employment Practices Act S.C. 1952-53 Chap. 19. In 1956 the Female Employees Equal Pay Act S.C. 1956 Chap. 38; these Acts were consolidated in 1967 in the Canada Labour Code, R.S.C. 1970 C. 1. Part 1 thereof has now been repealed since it was made redundant in light of the Canadian Human Rights Act (Infra n. 87).

(87) S.C. 1977 25-26 Eliz. II Chap. 33.

potential conflict with the provincial jurisdiction in property and civil rights. However since these provisions can relate only to federally controlled residential and commercial premises and since these are so limited, the problem may be more theoretical than real.

2. An important distinction.

The Provincial human rights codes or charters are designed to establish a standard of conduct amongst citizens, to discourage discrimination and to foster, by encouragement, conciliation and finally by sanction, a spirit of concern and understanding for all persons regardless of considerations of sex, colour, race or religion.

The Canadian Bill of Rights, as we are soon to discover, seeks to declare the existence of certain rights which fall within federal jurisdiction and in so doing to protect these rights from being eroded by Parliament itself. Herein lies the essential difference between the provincial legislation in the area of human rights and the Canadian Bill of Rights and explains why the Bill does not contain sanctions in respect of the 'conduct of citizens', for Parliament by the Bill seeks to control 'its own conduct'. (88)

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(88) E.A. DRIEDGER, The Canadian Bill of Rights, Contemporary Problems of Public Law in Canada, Ed by O.E. Lang, U of Tor. Press 1968, 47:  
Professor E.A. Dreidger has given an excellent explanation of the purpose behind the Bill of Rights which assists us in understanding why and how the Canadian Bill of Rights stands in a unique position and is not cut down in its effect by provincial legislation. For similar reasons it would not be affected by the recent enactment of the Canadian Human Rights Act.

Let us now turn to an examination of the Bill of Rights, having in mind that the purpose of this work is to examine in a particular way the nature and extent of egalitarian civil rights which the Bill seeks to recognize in the terms thereof, namely "equality before the law", as this clause has been interpreted by our highest tribunal to this point of time.

D. An Analysis of the Canadian Bill of Rights:

It is appropriate at this juncture to analyse the most significant provisions of the Bill of Rights preliminary to a review of those decisions of the Supreme Court of Canada relevant to the purpose of this work. It should be noted that the Act incorporating what is expressly referred to therein as the Bill of Rights is known as "An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms." (89) The Act contains a lengthy preamble. The sections that follow therein are divided into two parts. The words "Bill of Rights" are set forth as a title in the Act following Part 1 and the last section of Part 1 (Sec 4) states: "The provisions of this Part shall be known as The Canadian Bill of Rights". This analysis shall be limited 'primarily' to a discussion of the preamble and the problems of a general nature posed by

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(89) 1960 8-9 Elizabeth II Chap. 44 - It is of interest to note that this Act has not been incorporated in the Revised Statutes of Canada 1970 but remains in its original state. It appears as Appendix III in R.S.C. 1970.

sections 1 and 2 (of Part 1), although Sections 3 and 4 of Part 1 and Section 5 of Part 11 will be considered. For an excellent analysis of the whole of the Act, the reader is referred to an essay by Bernard Grenier recently published. (90)

### I. The Preamble

In recent years the practice has been to get away from preambles and let statutes speak for themselves. Thus when the first draft of the legislation came to Parliament no provision had been made for a preamble. Much discussion took place in the Special Committee on the subject, at which time it was suggested that without a preamble the Bill was too dry and uninspiring, that the educative value of the Bill was being lost and that the Bill should set out the principles by which we live. (91)

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(90) Bernard GRENIER, Essai sur Les Applications judiciaires de la Déclaration canadienne des Droits, (1975) 6 R. Gen. D - 7.

(91) Canada. Parliament. House of Commons. Special Committee on Human Rights and Fundamental Freedoms. Minutes of Proceedings and Evidence, 1960. (Ottawa, Queen's Printer, 1960) PP 44, 113, 316.

The Government agreed to include a preamble and after much discussion and reworking of drafts, the following was adopted and found part of this final legislation: (92)

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada:

Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:.....

A preamble is a preliminary statement of the reasons which have made the passing of the statute desirable. If there was any doubt as to its relevancy and purpose this has been set at rest in Canada by Sec 11 of the Interpretation Act which reads:

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(92) Id. 714, 718.

"The preamble of an enactment shall be read as part thereof intended to assist in explaining its purpose and object." (93)

The rule has developed however that the preamble should not be relied on unless the clauses in an Act are imprecise and ambiguous but ambiguity must not be created into order to resort to the preamble. (94) When it becomes necessary to refer to it, it is for the purpose of ascertaining the reasons for the statute, that is to say, the intentions of Parliament. (95)

The Supreme Court of Canada has on occasion referred to the preamble in the B.N.A. Act to give assistance in relation to certain freedoms held to be in the domain of the Federal Parliament. (96) However the Court has not yet relied upon the preamble to the Bill of Rights in order to ground a decision, although passing reference has been made to it. (97)

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(93) R.S.C. 1970 ch. 1-23.

(94) Midland Railway vs. Young (1893) 22 SCR 190.

(95) Halbury's Law of England, 3rd Edition Vol. 36 London: Butterworth (1961) 370.

(96) Saumur vs. City of Quebec (1953) 2 S.C.R. 299, 330, 359.  
Switzman vs. Elbing 1957 S.C.R. 285, 306, 328.

(97) See Judgment of Ritchie J. in the Lavell case (infra note 147 at P 1365) where he makes reference to the words 'rule of law' in the preamble to assist him in defining 'equality before the law'.

Those legal scholars who take the view that the Court is unmindful of the intentions of Parliaments argue that the Court should bring in aid the preamble as a legitimate basis of construction. (98) It should be understood that the Court has not ruled out the probability of reliance on the preamble. It can only be assumed that it has so far found it unnecessary to do so. This does not mean that there is no likelihood that it will not do so in the future: the probabilities seem to be that it will in the light of decisions handed down in another context. (99)

One thing is certain. Given a provision which becomes ambiguous when considering a specific case before it, the Court is able to find limitless assistance having regard to the general language of the preamble when one considers such terms as the "dignity and worth of the human person", "the position of the family", "respect for moral and spiritual values" and the "rule of law" which are stated to be principles on which the nation is founded. On the other hand if the conduct of all citizens is to be based on these principles, the Court has a ready tool to control certain conduct when a right which is being asserted

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(98) See, for example, the views of W.E. Conklin (infra note 308) where he places special emphasis on the words in the preamble namely, 'dignity of the human person'.

(99) The use of the preamble to interpret the B.N.A. Act is a precedent not without significance.

offends the rights of others. There comes to mind the limitations on freedom of speech when it conflicts with the dignity and worth of fellow humans or the freedom of the press to disseminate literature of an obscene nature when it transcends the moral and spiritual values of the community. The preamble, it is submitted, has a potential which has not yet been tapped.

## II. Section 1

Let us now examine section 1 of the Bill. It reads as follows:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms namely,
  - (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
  - (b) the right of the individual to equality before the law and the protection of the law;
  - (c) freedom of religion;
  - (d) freedom of speech;

- (e) freedom of assembly and association;  
and
- (f) freedom of the press.

It is of interest to consider the effect of the words "recognized and declared". While the words have not been interpreted with precision it would appear that the word "recognize" means to acknowledge. While the ordinary meaning of "declared" is to make known or manifest the word has been interpreted to mean (when referring to a statute) a formal statement as to what the existing law is on a given subject, so as to remove any doubts thereon. (100) Taken alone, it would seem that Sec. 1 is a formal declaration as to existing law relative to human rights and fundamental freedoms which fall under Federal jurisdiction. The section states that these rights and freedoms are declared as "having existed." This would preclude any suggestion that Parliament was only now (in 1960) creating them by this legislation.

It is noted that the opening paragraph of the section contains the words "without discrimination by reason of race, national origin, colour, religion or sex". A question of some importance is whether this indicates that such non-discrimination is a part of each of the rights recited in the section or do these words have a separate

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(100) Dictionary of English Law, London: Sweet: Maxwell 1959.

and distinct meaning or value? We will see in later pages how the Supreme Court has grappled with this question and how it has attempted to resolve it when dealing, in the main, with that enumerated right in Section 1 with which we are more directly concerned, namely the right "of equality before the law".

If Section 1 constitutes a formal declaration of the existence of certain rights is there any guide as to how they are to be applied? For this answer we must consider Section 2.

### III. Section 2

The opening paragraph of Section 2 reads as follows:

2. Every law of Canada shall, unless it is, expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to.....  
(there follows seven specific rights).

This section, simply put, states that the laws of Canada shall be applied or construed so as not to infringe on any of the rights and freedoms recognized and declared by the Bill, unless an Act of Parliament expressly excludes the operation of the Bill.

It first should be pointed out that the rights and freedoms set forth in Section 1 are referentially incorporated in Section 2. (101) This would mean that while Section 1 declares certain rights to exist, Section 2 becomes the operating section in spelling out how the Courts are to interpret them.

The next aspect of some importance is the "non obstante" clause which appears in the section. Parliament has stated that the Bill applies to all the laws of Canada unless expressly excluded. Parliament would appear to be giving a clear direction to the Courts to apply the Bill of Rights but at the same time indicating that it maintains its sovereignty untrammelled in that it can, by amendment to existing legislation as well as by a provision in future legislation, suspend the application of the Bill. Furthermore, if the effect of judicial interpretation were to

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(101) While this question has given the Supreme Court some continuing difficulty it must be borne in mind that Laskin J. made the point, as above stated, in the decision accepted by the majority in Curr vs. The Queen 1972 S.C.R. 889, when he said: "section (1) is given its controlling force over federal law by its referential incorporation into Section 2". (P 896).

sterilize a federal enactment then Parliament can either accept that decision or enact, certainly within its exclusive authority, legislation which either refines its objective within the context of the judicial finding or outright suspend the application of the Bill. At the present time the only federal Act which is excluded from the operations of this Bill is the War Measures Act. (102) This does not mean to say, however, that Parliament has bound itself only to this one exception. Parliament is free to exclude any other federal Act from the operation of the Bill. However, it has not done so to this point of time.

In the review of decisions of the Supreme Court to follow it will be urged that the Court may not have really grasped the significance of this clause, demonstrated by its reluctance, on occasion, to logically follow through with a decision to render a Federal Act inoperative in part by reason of its collision with a right enumerated in the Bill. We say "inoperative in part" since the Court has stated that each decision in a case before it must be taken to apply only to the facts of that case and in no event will the Court be taken to void or invalidate an enactment. It may decide that a clause or section of the Act is inoperative having regard only to the specific situation before it.

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(102) War Measures Act, R.S.C. 1970, Chap. W-2.

Another question which has arisen is the meaning to be assigned to the opening words of the section, namely: "Every law of Canada". In considering the laws of Canada in relation to the rights and freedoms set out in the Bill do we consider that law and those rights as of the date of enactment of the Bill only or do we consider them at the time that a legal question is raised under the Bill? The answer to this question is difficult to determine since there is considerable division of opinion amongst the judges of the Supreme Court and it is not really possible to say which view predominates. (103)

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- (103) (a) In Regina v Smythe 1971 S.C.R. 680 Fauteux C.J.C., speaking for the Court stated that we must look at the law at the time of enactment of the Canadian Bill of Rights for aid in construing its provisions.
- (b) In Robertson and Rosetanni v The Queen 1963 S.C.R. 651, at 654, Ritchie J., speaking for the majority, stated that the Court is concerned with such rights and freedoms as existed in Canada immediately before this Statute was enacted.
- (c) In Curr v. The Queen Supra Note 101 at 893, Laskin J., speaking for the majority, and considering the time frame within which the provisions of the Bill are to be construed, stated that the Bill did not freeze the federal statute books as of its effective date, August 10th, 1960.

IV. Section 5

Having said this, one must bear in mind that Sec. 5(2) of the Act states as follows:

5(2) - The expression "law of Canada" in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

Simply put the expression "law of Canada" in the Bill means such laws as are enacted before or after the coming into force of the Act. This means that the Bill will apply to all federal Canadian law whether enacted before or after August 10, 1960. This does not, however, seem to answer the problems raised by the Court in considering the time at which the construction of the Bill is to be related.

Speaking of the construction of the Bill, we will examine, in our review of the relevant decisions of the Supreme Court, the proposition advanced by several of the members of the Court that the words "construed and applied" do not indicate anything more than a rule of construction. The words do not give the Court the authority to refuse to give effect to clearly expressed words of Parliament contained in a federal enactment. (104)

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(104) This is essentially the position taken by Pigeon J. in Regina v Drybones 1970 S.C.R. 282 at 304 which will be considered later in this work.

While this position has not found favour with the majority of the Court, the question will be treated later in considering the specific cases in which it was raised. Suffice it to say, for the moment, that this proposition initiated a storm of judicial controversy which is only now beginning to subside.

V. The categories and legislative power.

Before concluding our analysis of the two major sections of the Bill, it is desirable to determine in what way the rights and freedoms enumerated in the Bill do or do not fit into the categories of human rights and fundamental freedoms treated earlier in this work.

Section 1 declares as existing six fundamental freedoms. Four of these, namely:

- (c) freedom of religion;
- (d) freedom of speech;
- (e) freedom of assembly and association; and
- (f) freedom of the press.

would clearly come under the category of political civil liberties and fall within the exclusive jurisdiction of Parliament. The first clause reading

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

poses a problem in the reference made to enjoyment of property and the right not to be deprived thereof. At first glance this portion of the subsection may well fall under provincial jurisdiction. The point has not yet been raised. The balance of the subsection would undoubtedly find its home in federal jurisdiction as political civil liberties pursuant to the federal criminal power.

A mixed picture is presented by Sec. 1(b) which reads: "The right of the individual to equality before the law and the protection of the law". This is the expression of egalitarian civil liberties and it is that section of the Bill with which this work is more directly concerned. As already shown it is not exclusively in the federal domain but can find a berth in both federal and provincial jurisdiction. It is a broad statement of principle and its generality has led to much of its difficulty in interpretation, as we shall soon see.

Section 2 contains seven subsections which deal with arrest, punishment, right to counsel, protection against self-incrimination, right of a fair hearing by an independent and impartial tribunal including right of an interpreter. There is little doubt that all seven subsections are legal civil liberties. Since they are

procedural in essence and relate to criminal proceedings in the main, they would fall, with little doubt, into exclusive federal jurisdiction.

Since Sections 3 and 4 do not treat of any specific rights, and we look only to Sections 1 and 2 to find the rights of which this Bill treats it will be seen that the Bill makes no mention of any right which would fall into the category of economic civil liberties. This omission is nothing but deliberate. While there is power in the Federal Parliament to legislate in this field in relation to federal objects, it is not an area that can be easily covered in a Bill of Rights, particularly in light of the massive provincial legislation in this field. In 1968 the Government of Canada displayed a renewed interest in a Charter of Human Rights for all Canadians. However it is pertinent to note that The Honourable Pierre Trudeau, as Minister of Justice, was not optimistic that economic rights were to be easily dealt with and he favoured postponement of their consideration in the proposed Charter of Human Rights. He wrote:

The guarantee of such economic rights is desirable and should be an ultimate objective for Canada. There are, however, good reasons for putting aside this issue at this stage and proceeding with the protection of political, legal, egalitarian and linguistic rights. It might take considerable time to reach agreement on the

rights to be guaranteed and on the  
feasibility of implementation. (105)

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- (105) P.E. TRUDEAU, A Canadian Charter of Human Rights,  
Queen's Printer Ottawa (1968) P 27. This was  
the Charter which was proposed and discussed at  
the Dominion-Provincial Conference at Victoria  
in June 1971 but on which consensus was not reached.  
Also see:  
P.E. TRUDEAU, Economic Rights, (1962) 8 McGill L.J.  
121.  
Constitutional Reforms and Individual  
Freedoms, (1969) 8 U.W.O.L.R. 1

CHAPTER II

JUDICIAL INTERPRETATION BY THE  
SUPREME COURT OF CANADA OF SECTION  
1(b) OF THE CANADIAN BILL OF RIGHTS

CHAPTER II

Judicial Interpretation by the Supreme  
Court of Canada of Section I(b) of the  
Canadian Bill of Rights

In the Introduction of this work we have treated of equality before the law and advanced a general definition. We turn now to review how the Supreme Court of Canada has grappled with the question as it proceeded to interpret Sec. 1(b): "The right of the individual to equality before the law and the protection of the law."

It is fair to say that in the many decisions both of Provincial Courts of Appeal and of the Supreme Court of Canada itself the interpretation of this subsection of the Bill of Rights has posed its greatest difficulty. It is understandable, therefore, that the judicial decisions in this area have engendered controversy in legal circles which has by no means subsided. One could say that the difficulty has arisen because of the general nature of the subsection: such an explanation is much too simplistic. The fact is that, when dealing with this question, the Supreme Court is called upon to provide basic philosophical considerations in determining what meaning to give to this subsection in the context of present day society. Coupled with this aspect is the ever bothersome problem of how far the Court can go before it is deemed to be in breach of the doctrine of parliamentary

sovereignty by over-riding federal legislation and taking unto itself the role of judicial law-maker. Since these two fundamental questions produce counter-acting forces it is understandable that the Court, being pulled in both directions, has not been able to establish guidelines that are easily discernible, let alone universally defensible.

However, since we are dealing in this area with very fundamental issues, the decisions of the Courts have a profound impact on the effect which the Bill of Rights will have on Canadian law, or putting it another way, in the degree of paramountcy the Bill will have, if any, when related to existing or future federal legislation. Hence when considering the Supreme Court treatment of the right of equality before the law and the protection of the law we are considering, it is submitted, concepts which are basic to the whole Bill and have profound implications in the interpretation of other subsections of the Bill. This is the reason, or shall we say motivation, for considering only equality before the law in this work. (106)

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- (106) For a succinct analysis of major decisions rendered by the Supreme Court of Canada dealing with its interpretation of other clauses of the Bill of Rights which it has had occasion to consider (including equality before the law)  
See: 1) Gérald A. BEAUDOIN, La Cour Suprême et la Protection des Droits fondamentaux, loc.cit. n.45 at P 691;  
2) Bernard GRENIER, Essai sur Les Applications judiciaires de la Déclaration canadienne des Droits, loc.cit. n. 90 at P 23.

A. The first cases:

The first decision of a higher court which dealt with equality before the law was that of Regina vs. Gonzales. (107) While this decision was not appealed to the Supreme Court of Canada, it has been referred to extensively by that Court and could be credited as being the testing ground for several view-points later espoused by certain of the members of the Court. For this reason it bears examination.

The accused was convicted by a provincial magistrate of being an Indian unlawfully in possession of an intoxicant off a reserve contrary to Sec 94(a) of the Indian Act. (108) An appeal was taken first to a single judge and thereafter to the British Columbia Court of Appeal and in both instances the conviction was affirmed. Counsel for the accused urged that Sec 94(a) of the Indian Act infringed Sec 1(b) of the Bill of Rights and therefore that Sec 94(a) must be taken to have been "repealed" by the Bill of Rights.

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(107) (1962) 37 WWR 257 (BC., CA).

(108) RSC 1952 Ch 149: Section 94, in its entirety, reads as follows: 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 and is liable on summary conviction to a fine of not less than ten dollars and not more than fifty dollars or to imprisonment for a term not exceeding three months or to both fine and imprisonment.

Davey J.A. and Tysoe J.A. in separate judgments held that Sec 2 of the Bill of Rights provided only a rule or canon of construction for existing legislation. (109) Such rule of construction might well require a change in the judicial interpretation of some statutes where the language permits and thus change the law. Davey J.A. states that if prior legislation cannot be construed and applied in a way that will avoid derogating from the rights and freedoms in Sec. 1, the effect of Sec. 2 is exhausted and the impugned legislation must prevail according to its plain meaning. Sec. 94(a) must be applied in the only way its plain meaning permits and the Bill of Rights can have no nullifying on it.

Tysoe J.A. advanced his understanding of equality before the law when he said that this clause does not "mean the same laws for all persons" but to the position occupied by persons to whom a law relates or extends. He states:

"Persons are entitled to have the law as it exists applied equally and without fear or favour to all persons to whom it relates or extends." (110)

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(109) See Note 107, P 260.

(110) Id. P 264.

Here we have the origin of the concept that the Bill of Rights is an interpretation statute and the further concept that the Bill only relates to equality in the administration of the law as it exists. We will see how both of these views have found favour or disfavour with the justices of the Supreme Court of Canada.

The following year the Supreme Court of Canada had occasion to consider the opening paragraphs of Sections 1 and 2 of the Bill and to comment on the views of Davey J.A. as above-stated. The case of Robertson and Rosetanni vs. the Queen (111) does not deal with equality before the law but is notable in its consideration of the place to be accorded to the Bill when considering federal legislation.

The appellants were charged with breach of Sec. 4 of the Lord's Day Act in that they operated a bowling alley on Sunday. They appealed on the ground that the Lord's Day Act was either repealed or rendered ineffective by virtue of Sec 1(c) of the Bill, namely: freedom of religion. Ritchie J. in his judgment written for the majority held that the Lord's Day Act did not infringe the Bill. He states that one must consider rights and freedoms as they existed in Canada immediately before the Bill was passed. The Lord's Day Act was on the statute books for a long period of time and when considering its

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(111) 1963 S.C.R. 651

effect one could not say that it infringed freedom of religion. Although non-Christians did not observe the Sabbath on that day there was nothing preventing them from observing their own separate day of rest and thus the practical result is a purely secular and financial one in that they are required to refrain from work on Sunday as well as their own Sabbath. This did not mean that their freedom of religion was infringed.

Cartwright J. wrote a strong dissent. In finding that the Lord's Day Act did infringe upon freedom of religion he made a strong plea in favour of the paramountcy of the Bill. He made it very plain that he disagreed with the views of Davey J.A. in the Gonzales case (112) and did so in the following terms:

With the greatest respect I find myself unable to agree with this view. The imperative words of s. 2 of the Canadian Bill of Rights ...appear to me to require the courts to refuse to apply any law, coming within the legislative authority of Parliament, which infringes freedom of religion unless it is expressly declared by an Act of Parliament that the law which does so infringe shall operate notwithstanding the Canadian Bill of Rights...(Section 5(2)) - makes it plain that the Canadian Bill of Rights is to apply to all laws of Canada already in existence at the time it came into force as well as to those thereafter enacted. In my opinion where

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(112) See Note 107 at P 260.

there is irreconcilable conflict between another Act of Parliament and the Canadian Bill of Rights the latter must prevail.

Mr. Justice Cartwright went on to say:

But in enacting the Canadian Bill of Rights Parliament has thrown upon the courts the responsibility of deciding, in each case in which the question arises, whether such an imposition infringes freedom of religion in Canada. In the case at bar I have reached the conclusion that s. 4 of the Lord's Day Act does infringe the freedom of religion declared and preserved in the Canadian Bill of Rights and must therefore be treated as inoperative. (113)

Mr. Justice Cartwright took issue with the conclusions of the majority on one point which has had some significance in later decisions. He stated that the fact that the Lord's Day Act has been in force for over half a century does not mean that Parliament is taken to have the view that the Lord's Day Act did not infringe freedom of religion. To do so would be to disregard the plain words of Sec 5(2) of the Bill which makes clear that the Bill is to apply to all laws of Canada at the time it came into force as well as these hereinafter enacted.

The majority judgment did not express any view, clearly asserted, that the Bill of Rights could render federal legislation inoperative although Ritchie J. did

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(113) See Note 111 at P 662.

state at several places in his judgment that the Bill guaranteed freedom of religion. It would be fair to conclude that there was no disagreement amongst the judges on the point - that is to say that there was accord that the Bill was more than a mere canon or rule of construction in interpretation of federal legislation. Undoubtedly this is why Cartwright J. chose to discount the views of Davey J.A. in a decision which was not before the Courts on appeal at all but with the rationale of which he had some concern. Regrettably, he had the misfortune, on a later occasion, to withdraw from his position so forceably put in this case and to support, with equal force, the views originally expressed by Davey, J.A.

B. The Drybones case:

Seven years later the Supreme Court rendered its landmark decision in Regina vs Drybones (114) in which it dealt directly with the effect of the Bill of Rights on a statute which it found to be inconsistent with it. It is the first and only case where the Court held a section of a federal statute to be inoperative.

The appellant was found drunk in a hotel in Yellowknife, Northwest Territories, and was charged with being an Indian who was unlawfully intoxicated off a reserve, contrary to Sec 94(b) of the Indian Act. He

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(114) 1970 S.C.R. 282.

pleaded guilty before the magistrate and fined \$10. Later an appeal, de novo, was taken and he was acquitted. From that decision the Crown appealed to the Court of Appeal of the Northwest Territories which dismissed the appeal. A further appeal was taken to the Supreme Court which also dismissed the appeal. It can be said that it is the first time in Canadian judicial history that a charge involving a \$10.00 fine got so much attention from the judiciary, the legal profession and the public.

Appellant's counsel argued that the accused was not given the same treatment as other Canadians in that it was an offence for him to be found intoxicated off a reserve while for others it was an offence if found drunk in a public place. Sec 94(b) of the Indian Act (115) provides a minimum fine of \$10.00 or imprisonment not exceeding three months. Sec 19 of the Liquor Ordinance of the Northwest Territories (116) did not provide for a minimum fine and the maximum term was 30 days. Hence it was argued that a law of Canada contravened Sec 1(b) of the Canadian Bill of Rights and was therefore invalid for it was in breach of the right of equality before the law. Mr. Justice Ritchie wrote the majority judgment in which Hall J, by separate judgment, concurred. In considering

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(115) See Note 108 above, where Sec 94 of the Indian Act is set out.

(116) R.O. N.W.T. 1957 C.60.

whether the Bill of Rights could render a federal enactment inoperative he adopted the dissenting judgment of Cartwright J. in the case of Robertson and Rosetanni vs. The Queen (117) and stated that the majority decision in that case did not conflict with Cartwright J's analysis as to the effect of the Bill of Rights. He also took issue directly with the view expressed by Davey J.A. in the Gonzales case saying:

"This proposition appears to me to strike at the very foundations of the Bill of Rights and to convert it from its apparent character as a statutory declaration of the fundamental human rights and freedoms which it recognizes into being little more than a rule for the construction of federal statutes..." (118)

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(117) Note 111.

(118) Note 114 at P 293.

He went on to say:

If Mr. Justice Davey's reasoning were correct and the Bill of Rights were to be construed as meaning that all laws of Canada which clearly offend the Bill were to operate notwithstanding its provisions, then the words which I have italicized in s. 2 would be superfluous unless it be suggested that Parliament intended to reserve unto itself the right to exclude from the effect of the Bill of Rights only such statutes as are unclear in their meaning.

It seems to me that a more realistic meaning must be given to the words in question and they afford, in my view, the clearest indication that s. 2 is intended to mean and does mean that if a law of Canada cannot be "sensibly construed and applied" so that it does not abrogate, abridge or infringe one of the rights and freedoms recognized and declared by the Bill, then such law is inoperative "unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights". (119)

He made it clear that a declaration by the Courts that a section or a portion of a section is inoperative must be distinguished from the repeal of such section and is to be confined to the particular circumstances of the case before the Court.

There was a second aspect to the Ritchie judgment in that he expressed the views of the court on the scope of the clause "equality before the law."

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(119) Id. at P 294.

He took issue with the view of Tysoe J.A. in the Gonzales case who stated that the right of equality before the law was the right of a person, to whom a particular law relates or extends, to stand on an equal footing with every other person to whom that particular law relates or extends. In other words, if all Indians stand on an equal footing in respect of a law relating to them they enjoy the right of equality before the law and the protection of the law. He wrote:

I think that the word "law" as used in s. 1(b) of the Bill of Rights is to be construed as meaning "the law of Canada" as defined in s. 5(2) (i.e. Acts of the Parliament of Canada and any orders, rules or regulations thereunder) and without attempting any exhaustive definition of "equality before the law" I think that s. 1(b) means at least that no individual or group of individuals is to be treated more harshly than another under that law, and I am therefore of opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty. (120)

There were three dissenting judgments. It was in this case that Cartwright (then C.J.C.) retreated from his strong support of the Bill of Rights set forth in

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(120) Id. at P 297.

his dissenting judgment in Robertson and Rosetanni vs. The Queen and embraced the view of Davey J.A. in the Gonzales case which he had previously faulted. (121)

He held that the Bill of Rights should not render federal legislation inoperative and where the impugned legislation is expressed in plain and unequivocal words it must be given effect according to its plain meaning. He took the view that Parliament did not have the intention to confer the power and impose the responsibility upon the Courts of declaring inoperative any provision in a federal statute, the meaning of which is perfectly plain, if in the opinion of the Courts it infringes any of the rights or freedoms declared by Sec. I of the Bill. He held: "The Bill desires the Courts to apply such a law, not to refuse to apply it." (122)

It seems obvious that Cartwright C.J.C. became concerned that Judges at all levels would proceed with reckless abandon to declare federal statutes inoperative and that this would create problems both for Parliament and the Judiciary for he said:

"In approaching this question it must not be forgotten that the responsibility mentioned above, if imposed at all, is imposed upon every Justice of the Peace Magistrate and Judge of any Court in the Country who is called upon to apply a Statute of Canada or any

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(121) See note 111.

(122) Supra Note 114 at P 287 and 288.

order, rule or regulation made there-  
under". (123)

This comment has been under criticism by legal commentators. (124) It has been suggested that the Chief Justice was unmindful that these same judges were called upon to assume similar responsibility when considering whether legislation, either federal or provincial, were ultra vires when placed against a background of the division of powers in the B.N.A. Act. (125) Perhaps one practical way to ensure thorough treatment by the Courts would be to insist that the Attorney General of Canada should be made a party on notice when the Bill of Rights

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(123) Id. at P 287.

(124) J.A. MACDONALD, The Canadian Bill of Rights: Canadian Indians and the Courts, (1968) 10 Crim. L.Q. 305 at 319. Professor MacDonald in treating of this case before it went to the Supreme Court of Canada stated that this is precisely what Parliament had in mind. He quoted Rt. Hon. John Diefenbaker who said in the House of Commons in the debate on the Bill on July 1st 1960: "Furthermore, if any of these several rights should be violated under legislation now existing the Courts in interpreting the particular laws or statutes which have been passed hereafter, if this bill is passed, be required to interpret those statutes of to-day in the light of the fact that wherever there is a violation of any of these declarations or freedoms, the statute in question is to that extent non-operative and was never intended to be operative."

(125) See W.S. TARNOPOLSKY, The Canadian Bill of Rights from Diefenbaker to Drybones (1971) 17 McGill L.J. 437 at 450.

is being considered by a Court in relation to impugned federal legislation. Certain of the Provinces have, by their legislation, required that whenever a constitutional matter is being considered in a case then the Attorney General of Canada and the Attorney General of the Province must be notified and be given the right to intervene in respect to the constitutional issue before the Court. This arrangement seems to have worked well. (126)

In finding that the Bill of Rights could not be used to declare inoperative a federal statute, he held that if this were so Parliament:

"would have added after the word "declared" in the seventh line of the opening paragraph of Sec. 2 of the Bill some such words as the following "and if any law of Canada cannot be so construed and applied it shall be regarded as inoperative as pro tanto repealed." (127)

There is no doubt that such a clause would have been preferable. However in regard not being had to the last words of the opening paragraph of the section which states that no law shall be construed or applied so as to "infringe on the rights or freedoms mentioned in this Bill"? If it does so infringe does the clause not mean that it should not be applied? What about the relevancy of the 'non obstante' clause in Sec. 2? It is this clause which uses the word "operate" in relation to a law of Canada which, though it would infringe upon the rights

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(126) (1) The Ontario Judicature Act R.S.O. 1970 C. Sec. 36  
(2) Code de Procédure civile de la province de Québec,  
Art. 95.

(127) Supra note 114 at 288.

in the Bill, it would continue to operate if so expressly declared to do so. (128) It is submitted that Parliament must have intended that if not expressly declared to override the Bill of Rights, a federal law could be declared inoperative if it collided with the Bill.

Mr. Justice Pigeon also dissented in a long judgment which shared with Cartwright C.J.C. a reluctance to assume that responsibility which the majority of the Court was prepared to accept.

He states that since the Bill declares that the enumerated rights and freedoms "have existed and shall continue to exist" and does not create new rights, Parliament could not be taken to have intended that the Indian Act, which is in its exclusive jurisdiction, should be fundamentally altered by the Bill of Rights. Parliament must be taken to know the law and to have considered that the existing rights and freedoms were not infringed by the exercise of its jurisdiction in enacting the Indian Act. Surely Parliament does not now have to declare that the Indian Act shall operate notwithstanding the Bill. (129)

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(128) K. LYSYK, Canadian Bill of Rights - Irreconcilable Conflict with another Federal enactment - Equality Before the Law and the Indian Act (1968) 46 Can. Bar. Rev. 141 at P 145. The writer questions the view of Davey J.A. on which Cartwright C.J.C. relies.

(129) For a critical analysis of the Judgment of Pigeon J., see Silverman H.W., Comment on Regina vs. Drybones (1970) 10 Crim. Rep. (N.S.) 356.

Secondly, he advances the propositions first advanced by Davey J.A., in the Gonzales case and now endorsed by Cartwright C.J.C., that the words "be so construed and applied as not to abrogate, abridge or infringe" (the rights and freedoms recognized in the Bill) enact nothing more than a rule of construction. This, he says, does not mean to say that though canons of constructions are of less importance than constitutional rules they are of minimal importance.

Perhaps the whole key to the Pigeon judgment is his concern with protecting parliamentary sovereignty.

He writes:

In the present case, the judgments below hold in effect that Parliament in enacting the Bill has implicitly repealed not only a large part of the Indian Act but also the fundamental principle that the duty of the courts is to apply the law as written and they are in no case authorized to fail to give effect to the clearly expressed will of Parliament. It would be a radical departure from this basic British constitutional rule to enact that henceforth the courts are to declare inoperative all enactments that are considered as not in conformity with some legal principles stated in very general language, or rather merely enumerated without any definition.

And he adds:

In the traditional British System that is our own by virtue of the B.N.A. Act, the responsibility for updating the statutes in this changing world rests exclusively upon Parliament. If the Parliament of Canada intended to depart from that principle in enacting

the Bill, one would expect to find clear language expressing that intention. (130)

His concluding statement is as follows:

On the whole, I cannot find in the Canadian Bill of Rights anything clearly showing that Parliament intended to establish concerning human rights and fundamental freedoms some overriding general principles to be enforced by the courts against the clearly expressed will of Parliament in statutes existing at the time. In my opinion, Parliament did nothing more than instruct the courts to construe and apply those laws in accordance with the principles enunciated in the Bill on the basis that the recognized rights and freedoms did exist, not that they were to be brought into existence by the courts. (131)

Mr. Justice Abbott was equally concerned with the implications of the Bill overriding federal statutes. In a brief judgment he wrote:

The interpretation of the Bill of Rights, adopted by the courts below, necessarily implies a wide delegation of the legislative authority of Parliament to the courts. The power to make such a delegation cannot be questioned but, in my view, it would require the plainest words to impute to Parliament an intention to extend to the courts, such an invitation to engage in judicial legislation. I cannot find that intention expressed in s. 2 of the Bill. On the contrary, I share the opinion expressed by the Chief Justice, by my brother Pigeon and by Davey J.A., as he then was, in the Gonzales case that, with respect to existing legislation,

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(130) See note 114 at PP 305, 306.

(131) Id. at P 307.

the section provides merely a canon or rule of interpretation for such legislation. (132)

One can understand the concern of the judges who dissented. They were not about to give the Bill paramountcy, in the absence of clearer language, by reason of the danger that the Courts would be infringing on the rights of Parliament. (133) It is if these judges wished to save Parliament from its own folly as well as protecting the Courts from becoming involved in judicial law making. There can be little doubt that these judgments are a signal to Parliament to consider the consequences of the Bill in relation to federal enactments. On the other hand the majority decisions of the Court did precisely what the dissenters were reluctant to do and Parliament has not responded to this day to indicate any concern.

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(132) Id. at 299.

(133) Understanding the concern, however, doesn't resolve this problem. One commentator writes: "The Canadian Bill of Rights was enacted by Parliament for an important purpose, and for lawyer and judges to decline to accept the responsibility because the Bill is not sufficiently technical to suit their taste is to thwart the will of Parliament. The irony is that many who take this view claim to be observing the doctrine of parliamentary supremacy." J.N. LYON, Drybones and Stare Decisis, (1971) 17 McGill L.J. at 597.

Rather the decision of the majority was heralded by both Parliamentarians and legal commentators. (134)

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(134) L.H. LEIGH, The Indian Act, The Supremacy of Parliament and the Equal Protection of the Laws, 1970 16 McGill L.J. 390 "there can be no doubt that the Bill of Rights was intended to apply to prior legislation. Had it been intended as a purely interpretative measure, section 2 would surely have been more narrowly drafted since section 1, contains such general language as the Bill of Rights contains".

J. Grant SINCLAIR, The Queen vs. Drybones: The Supreme Court of Canada and the Canadian Bill of Rights (1970) 8 O.H.L.J. 599 "The decision in this case has been hailed as one of the most significant decisions of the Supreme Court in the history of Canadian constitutional law" (at P 599), "By judicially reviewing legislative and administrative action for Bill of Rights purposes, the courts provide a more detailed, non legislative second look". (at P 619)

J.C. SMITH, Regina vs. Drybones and Equality Before the Law (1971) Loc. cit., note 6 at P 163. "Regina vs. Drybones marked the beginning of a new and different role for the Supreme Court of Canada, being a role where the Court has a far greater potential than ever before to use the fundamental principle of justice and law incorporated in the Bill of Rights, to safeguard and enrich the basic liberties and rights of the citizen." (at P 187)

J.S. DIEFENBAKER, On the Bill of Rights, Loc. cit., note 33 at P 70. "The judgment of the Court was acclaimed as a landmark for freedom and justice to Canadians under legislation within the jurisdiction of the Parliament of Canada."

Arther MALONEY, - The Supreme Court and Civil Liberties (1976) 18 Crim. Law J. 202

"The Supreme Court decided that the judiciary should undertake the job of protecting individual freedoms. The temptation for those in official positions ... to infringe on the liberties of the individual citizen is very strong and that it should be the role of the courts to impose the necessary restraints on these officials is a fairly common view among civil libertarians."

The interesting point to consider is that none of the dissenting judges questioned the right of Parliament to delegate to the Courts the power to find that federal legislation was inoperative if it infringes the enumerated rights and freedoms. They merely found that the language of this Bill, in their view, did not clearly make this delegation. The interpretation of the majority was that this power was given to the Courts by a sovereign Parliament and that the Courts had the obligation to apply the Bill as Parliament intended by the language it used in the Bill. In this there seems to be the recognition that Parliament can change the Bill if it is dissatisfied with the interpretation of the Courts or it can enact a clause declaring that a federal Act is not deemed to infringe the Bill of Rights. So long as these avenues are open to Parliament how then can it be said that Parliament has surrendered its sovereignty?

C. The Smythe case:

In 1971 the Supreme Court had another occasion to deal with the "equality before the law" clause in Sec. 1(b) of the Bill, namely Smythe vs. The Queen. (135)  
The Judgment of the Court was rendered by Chief Justice Fauteaux and there were no dissents.

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(135) 1971 S.C.R. 680.

The appellant, charged with evasion of income tax, contended that sec. 132(2) of the Income Tax Act (136) which provided for an election by the Attorney General for Canada to proceed by indictment rather than by summary conviction contravened the right of equality before the law in that it made him liable for a more severe penalty. The trial judge in the first instance quashed the indictment preferred against the accused on the grounds that he had no jurisdiction to try the charges holding that Sec. 132(2) was inoperative by reason of Sec. 1(b) of the Bill of Rights.

An Order of mandamus was sought directing that the trial proceed. This was granted by Well C.J.H.C. after a lengthy judgment and affirmed by the Ontario Court of Appeal. (137) A further appeal was taken to the Supreme Court of Canada which again dismissed the appeal.

Fauteux C.J.C. held that the provisions of Sec. 132(2) of the Act are not discriminatory and do not affect the principle of equality before the law. They do not, by themselves, place any particular person or class of persons in a condition of being distinguished from any

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(136) R.S.C. 1952 c. 148.

(137) 1971 3 C.C.C. (2nd) 97. This report contains both the judgment of Wells C.J.H.C. and the Court of Appeal decision given by Gale C.J.O. For a thorough and objective view of the judgment of Wells C.J.H.C. Sec. G. MCGREGOR, "Equality before the Law" in Re The Queen vs. Smythe (1971) 19 Can. Tax J. 35.

other member of the community. They are applicable without distinction to everyone.

He then stated that before the enactment of the Bill of Rights the discretion of the Attorney General to elect the mode of prosecution was part of British and Canadian conception of equality before the law. He wrote further.

"And I am unable to infer from the provisions of the Canadian Bill of Rights any suggestions that Parliament differed from that view or had any intention to depart so radically from that state of the law...

Appellant's submission is potentially destructive of statutory ministerial discretion conferred upon a Minister of the Government for the administration of the law of Canada and tantamount to a recognition that Parliament had used an oblique method to paralyze the administration of the law". (138)

Fauteux C.J.C. implicitly supports the view expressed in the decision of the Court in Robertson and Rosetanni vs. The Queen (139) in that when

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(138) Supra Note 135 at PP 686 and 687.

(139) Supra Note 111.

considering Sec. 1 one must look at the law at the time of the enactment of the Bill for aid in construing its provisions. One wonders whether it was necessary to his judgment that he touch on that aspect at all. If this is an unalterable test then there would appear little likelihood that the Court would override a pre-existing statute on the assumption that since it had weathered the storm until that date it would be taken to have co-existed with the existing rights and freedoms. When considered closely this approach is not unlike that advanced by the dissenters in the Drybones decision.

D. The Curr case:

The Supreme Court in 1972 had a further look at Sec. 1(b) when it considered the appeal of Curr vs. The Queen. (140) This case turned on whether the Section 223(1) and Sec. 224(a) of the Criminal Code requiring a person to comply with a request of a peace officer for a breath sample and permitting admission in testimony of his refusal, were inoperative as contrary to Sec. 1(a) and (b) and Sec. 2(d) (c) and (f) of the Bill of Rights. The Court agreed unanimously that the relevant Criminal Code sections were not contrary to any of the enumerated provisions of the Bill.

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(140) 1972 S.C.R. 889.

Laskin J. wrote a lengthy judgment concurred in by 4 other members of the Court. Ritchie J. gave a judgment, concurred in by 2 other Judges, arriving at the same result but on somewhat different grounds. Fauteux C.J.C. agreed with both Laskin and Ritchie in the result but preferred the simpler approach taken by Ritchie J. The important point in this is that Laskin spoke for the majority when he made certain pithy but very significant observations relating to the Bill. Briefly, these were as follows:

- (1) Regina vs. Drybones had decided that the Bill of Rights "may have a sterilizing effect on federal legislation." (141)
- (2) Federal law enacted after the date of the Bill, as well as pre-existing law, may be found to contradict the provisions of the Bill. (142)
- (3) Sec. 1 of the Bill is given its controlling force over federal law by its referential incorporation in Sec. 2. Further, federal legislation which does not offend the prohibited kinds of discrimination in the opening paragraph of Sec. 1 may still be deemed offensive if it violates what is

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(141) Id. P 892.

(142) Id. P 893.

specified in clause (A) to (F) of Sec.

1. (143)

(4) The Canadian Bill of Rights did not freeze the federal statute books as of its effective date (1960). (144)

(5) Compelling reasons ought to be advanced to justify the Court 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. (145)

Ritchie J. in his opinion took issue with Laskin J's meaning of due process of law (with which we are not here directly concerned). He did say, however, that he preferred to base his conclusion on his understanding that 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 the Bill was enacted. (146)

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(143) Id. P 896. This conclusion answered the question asked by W.R. Bowker who stated that if equality depended only on discrimination as mentioned in Sec. 1 of the Bill then the Bill is very narrow in scope. W.F. BOWKER, Comments on Regina vs. Drybones (1970) 8 Alta L. Rev. 417.

(144) Note 140 at 893.

(145) Id. P 899.

(146) Id. P 916.

Laskin J. had made a review of Canadian, English and American jurisprudence to assist him in determining that meaning. Here we have a fundamental difference of view which we will see accentuated in later decisions.

E. The Lavell and Bedard cases:

In 1973 the Supreme Court of Canada considered again a provision of the Indian Act in relation to allegations that it was contrary to the right of equality before the law in the Bill of Rights in the cases of Attorney General of Canada vs. Lavell and Isaac et al vs. Bedard which were heard together.<sup>(147)</sup> The Court found itself not only badly divided but appearing to repudiate some of its earlier statements. It is little wonder that the decision has been widely criticized by legal commentators.

In one case Mrs. Lavell, born an Indian, married a non-Indian with whom she resided off the reserve. Upon her marriage her name was deleted from the Indian Register pursuant to Sec. 12(1)(b) of the Indian Act. She appealed the Registrar's decision before Grossberg J. who held that there was no conflict with the Bill of Rights.<sup>(148)</sup> An appeal was taken to the Federal Court which held that Sec. 12(1)(b) offended the right of an Indian woman as an

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(147) 1974 S.C.R. 1349.

(148) (1971) 22 D.L.R. 3rd 182.

individual to equality before the law and was therefore rendered inoperative by the Canadian Bill of Rights. (149)

An appeal was then taken to the Supreme Court of Canada.

In the second case, Mrs. Bedard, also born an Indian, married a non-Indian and lived off the reserve. When she separated from her husband she returned to the reserve to live in a house bequeathed to her under her mother's will. The Council of Six Nations gave her permission to reside on the reserve only temporarily during which time she was to convey her property to a registered member of the band. She conveyed the property to her brother who allowed her to reside in the house. The Council resolved to have served upon her a notice to quit. She sued for a declaration that the position of the Council discriminated against her by reason of race and sex and denied her equality before the law. Osler J. supported her contention basing his decision on the judgment of the Federal Court of Appeal in the Lavell Case. (150) From his decision an appeal was taken before the Supreme Court.

The majority judgment was written by Ritchie J. with whom Pigeon J. concurred, in a separate judgment. A dissenting judgment was written by Laskin J. with whom Spence and Hall J.J. concurred. Abbott J. in a brief judgment supported the minority view.

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(149) (1971)22 D.L.R. 3rd 188.

(150) (1971)25 D.L.R. 3rd 551.

First of all Ritchie J. held that the Bill of Rights cannot be construed as overriding the B.N.A. Act which by 91(24) gave to Parliament exclusive jurisdiction in relation to Indians. It is difficult to comprehend this position since, while the Indian Act was passed under the authority of B.N.A., so too is every piece of federal legislation. It was only one section of the Indian Act which was being impugned. To give support to his assertion he called in support the dissenting judgment of Pigeon J. in the Drybones case which had opposed the majority judgment written by himself in that case. He became concerned (as did Pigeon J.) that Parliament had, by the Bill of Rights, given up its authority to deal with Indians (effectively). He wrote:

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) and in my view can only be changed by plain statutory language expressly enacted for the purpose. It does not appear to me that Parliament can be taken to have made or intended to make such a change by the use of broad general language directed at the statutory proclamation of the fundamental rights and freedoms enjoyed

by all Canadians, and I am therefore of opinion that the Bill of Rights had no such effect. (151)

He then went on to reaffirm the position he took in the Curr case that when examining the language in the Bill of Rights one must give it the meaning which it bore at the time of enactment. This brought him to repudiate the suggestion that equality before the law is related to an egalitarian concept (as it purports to be in the United States) but is related to the rule of law as developed and defined by Dicey as follows:

It means again equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary courts. (152)

Ritchie stated:

The relevance to the present circumstances is that "equality 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 "equally before the law" as employed in section 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.

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(151) Supra Note 147 at PP 1360, 1361.

(152) Stephen's Commentaries on the Laws of England.  
21 Ed. 1950 Vol. III P 338.

This construction is, in my view, supported by the provisions of subsections (a) to (g) of s. 2 of the Bill which clearly indicate to me that it was equality in the administration and enforcement of the law with which Parliament was concerned when it guaranteed the continued existence of "equality before the law". (153)

The above proposition seems directly opposed to what Ritchie had said in the Drybones case. That this statement coupled with reliance on Dicey's second meaning of the rule of law should evoke widespread comment from legal scholars should come as no surprise.

It should be mentioned that Ritchie J. does not repudiate his (majority) decision in Drybones. Rather he contends that the case does not assist in determining the conclusion in the Lavell and Bedard case. He states:

The Drybones case can, in my opinion, have no application to the present appeals as it was in no way concerned with the internal regulation of the lives of Indians on Reserves or their right to the use and benefit of Crown lands thereon, but rather deals exclusively with the effect of the Bill of Rights on a section of the Indian Act creating a crime with attendant penalties for the conduct by Indians off a Reserve in an area where non-Indians, who were also governed by federal law, were not subject to any such restriction.

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

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(153) Supra Note 147 at pages 1366, 1367.

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. (154)

Laskin J's judgment given in dissent runs counter to Ritchie J's judgment on all the issues raised by the latter and is written with equal force of conviction. Little wonder that the controversy in these matters, which seems at times to boil in the Court, should spill over into the legal profession. The difficulty, of course, is that the Canadian public is left perplexed as to the real meaning of the Bill of Rights.

Laskin J's first statement is that it is impossible to distinguish Drybones from the two cases under appeal. He puts the point very clearly when he says:

In my opinion, unless we are to depart from what was said in Drybones, both appeals now before us must be dismissed. I have no disposition to reject what was decided in Drybones; and on the central issue of prohibited discrimination as catalogued in s. 1 of the Canadian Bill of Rights, it is, in my opinion, impossible to distinguish Drybones from the two cases in appeal. If, as in Drybones, discrimination by reason of race makes certain statutory provisions inoperative, the same result must follow as to statutory provisions which exhibit discrimination by reason of sex. (155)

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(154) Id. at P 1372.

(155) Id. at P 1375.

He repudiates the proposition that the Canadian Bill of Rights does not apply to Indians on a reserve, nor to Indians in relation to one another whether or not on a reserve where there is substantial discrimination by reason of sex, which he found to exist in the facts of the two appeals. He writes:

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. In any event, taking the Indian Act as it stands, as a law of Canada whose various provisions fall to be assessed under the Canadian Bill of Rights, I am unable to appreciate upon what basis the command of the Canadian Bill of Rights, that laws of Canada shall operate without discrimination by reason of sex, can be ignored in the operation of the Indian Act. (156)

He repeats his submission in the Curr case that though you may have inequality before the law even in the absence of any of the prohibited heads of discrimination in Sec. 1 when you do have discrimination, as in this case on grounds of sex and race, there is the extra lever which comes into play. The words "without discrimination by reason of race, national origin, colour, religion or sex" must be taken as added to each of the subsections of sec. 1. When then, such discrimination does exist, as

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(156) Id. P 1382.

here, and there results inequality before the law, sec. 12(1) (b) of the Indian Act cannot operate.

Finally, he found no merit in the contention that since the Indian Act is a fruit of the exercise of Parliament's exclusive legislative power in relation to Indians and lands reserved for Indians it was saved harmless from the effect of this Bill of Rights. He put the point succinctly when he wrote:

Discriminatory treatment on the basis of race or colour or sex does not inhere in that grant of legislative power. The fact that its exercise may be attended by forms of discrimination prohibited by the Canadian Bill of Rights is no more a justification for a breach of the Canadian Bill of Rights than there would be in the case of the exercise of any other head of federal legislative power involving provisions offensive to the Canadian Bill of Rights. The majority opinion in the Drybones case dispels any attempt to rely on the grant of legislative power as a ground for escaping from the force of the Canadian Bill of Rights. The latter does not differentiate among the various heads of legislative power: it embraces all exercises under whatever head or heads they arise. Section 3 which directs the Minister of Justice to scrutinize every Bill to ascertain whether any of its provisions are inconsistent with ss. 1 and 2 is simply an affirmation of this fact which is evident enough from ss. 1 and 2. (157)

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(157) Id., at P 1389.

Abbott J., who had been a dissenter in the Drybones case based on his reluctance to accept the authority assumed by the majority in that case, did full circle in his judgments in these two appeals. He obviously felt that Drybones was binding upon him and he could not afford the luxury of opposing the majority judgment which he held was indistinguishable in relation to the Lavell and Bedard appeals. Or, he could have satisfied himself that he had served fair warning in his dissent in Drybones case that the Court was stepping into the field of judicial legislation and that now he had nowhere else to go but to allow the Bill of Rights to override a clause of a federal statute. He concluded:

In my view the Canadian Bill of Rights has substantially affected the doctrine of the supremacy of Parliament. Like any other statute it can of course be repealed or amended, or a particular law declared to be applicable notwithstanding the provisions of the Bill. In form the supremacy of Parliament is maintained but in practice I think that it has been substantially curtailed. In my opinion that result is undesirable, but that is a matter for consideration by Parliament not the courts. (158)

The Supreme Court's decision in Lavell and

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(158) Id., at 1374.

Bedard created considerable static in the legal profession.<sup>(159)</sup> There was a general feeling that the Canadian Bill of Rights had been emasculated and that the Court had repudiated the Drybones decision.<sup>(160)</sup> The difficulty is that the Court was badly divided and thus the final decision is difficult to fathom. The majority opinion has questionable weight since Pigeon J. concurred with the majority only in the result, deliberately refraining from supporting the rationale of the four judges who upheld Sec. 12(1)(b) of the Indian Act.<sup>(161)</sup>

It has been suggested that the Court, in the majority judgments, believes that the subject was so highly politically sensitive that it was wiser to overlook the discrimination than to declare the provision inoperative.<sup>(162)</sup> There was no doubt that the Court was confronted with a number of organized bodies of Indians who intervened to urge that the appellants not be allowed to succeed.<sup>(163)</sup>

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(159) D.J. FLEMING, Att. Gen. of Canada vs. Lavell; Isaac et al vs Bedard. (1974) 33 U.N.B.L.J. 97 at 101.

This author gives a good, if somewhat jocular, review of the inconsistency in this case and that of Drybones.

(160) Herbert Marx and François Chevrette, Libertés publiques, (1973) 33 R du B. 557.

J.K. Samson, La Déclaration canadienne des Droits: Une interprétation nouvelle (1973) 14 C de D 354 at 364.

(161) S.A. COHEN, Attorney Gen. of Canada vs. Lavell; Isaac et al vs Bedard. (1974) 39 Man. B. News 197 at 201.

(162) B.J. MCCOURT, Civil Rights: re Lavell & Attorney General of Canada (1974) 6 Ottawa L.R. 635 at 639.

(163) D.E. SANDERS, The Indian Act and the Bill of Rights (1974) 6 Ottawa L.R. 397. The author gives a thorough account of the concern of the Indian bands with an analysis of the historical reasons for their views.

This would imply that the Court, in the majority, made a value judgment to hold the Indian Act inviolate and thereafter merely came up with reasons to attempt to justify their position. This may explain why the reasons given are difficult of understanding and have been so widely criticized.

The reliance by Ritchie J. on Dicey's second definition of the rule of law to define equality before the law as meaning "equality in the administration or application of the law by the law enforcement authorities and the ordinary courts of the land" has been questioned by every legal scholar who has had occasion to comment on the Lavell Decision. One commentator has cryptically stated that Dicey would turn in his grave if he knew that his language was being used as a gloss on a bill of rights. (164) Another takes the view that associating the concept of equality before the law to the aspect of the rule of law constitutes a brutal reversal of the jurisprudence developed under the Bill of Rights since 1960. (165) Professor Tarnopolsky has given us a thorough review of Dicey's meaning of the rule of law and urges that it is not relevant. (166)

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(164) P.W. HOGG, Canadian Bill of Rights - Equality before the Law A.G. Can. vs. Lavell (1974) Can. Bar. Rev. 263 at 273.

(165) H. BRUN, La Décision dans Lavell ou les Bonds de la Cour Suprême (1973) 14 C. du D. 541 at 553.

(166) W.S. TARNOPOLSKY, The Canadian Bill of Rights and the Supreme Court Decisions in Lavell and Burnshine: A Retreat from Drybones to Dicey. (1975) 7 Ottawa L.R. at P 15.

In this respect he relies on the editor of Dicey's Law of the Constitution, Professor E.C.S. Wade, for this explanation. (167) He states that it is a concept which became outdated in Dicey's time and is no longer respected in the United Kingdom. (168)

Tarnopolsky asks how the Court can, if it thinks that the rule of law is applicable, ignore the definitions of the rule of Law agreed to by both Canadian and English jurists in the International Commission of Jurists. (169) How can the Supreme Court ignore that Canada had participated in the preparation by the United Nations of a Universal Declaration of Human Rights as well as the Conventions that resulted therefrom? These efforts, in which Canada was so closely involved, culminated in the affirmation of an egalitarian concept in a broad definition of the rule of

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(167) A.V. DICEY, Law of the Constitution, 10th ed. 1961, LONDON, MACMILLAN, at XCVI-CXIII.

(168) W.S. TARNOPOLSKY, Loc. cit., note 166 at P 16.

(169) W.S. TARNOPOLSKY, The Canadian Bill of Rights, Opus cit., note 35 at P 159.

law on which equality before the law could be predicated in the present day. (170)

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(170) N. MACDERMOT (Secretary General, International Commission of Jurists, Geneva) (The Credibility Gap in Human Rights (1976) 3 Dalhousie L.J. 262. Tarnopolsky's view is well taken when we consider the statement made by MacDermot who writes as follows:

"The International Commission of Jurists exists according to its statute to promote the Rule of Law. For us, human rights and the Rule of Law are two sides of the same coin; we believe that neither can exist for long without the other. This is recognized in the Preamble to the Universal Declaration which says in words which sound a warning to authoritarian regimes:

"It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law".

What do lawyers mean when they speak of the Rule of Law? There is, of course, a vast literature on the subject. The International Commission of Jurists, in a series of international conferences held in Europe, Asia, Africa and Latin America between 1955 and 1967 brought together lawyers from all parts of the world to spell out as precisely as possible what is meant by the Rule of Law. In essence it means four things.

First and foremost, it means a system in which those who govern cannot do so arbitrarily but are themselves subject to the law.

Secondly, to make this subjection of the Executive to the law meaningful, there must be a genuinely independent Judiciary. And I think most of us would say that there needs to be an independent Legislature as well. When judges and legislators are dependent upon the Executive they are liable to end up as little more than the tools of an authoritarian government.

Thirdly, the law must itself have a moral basis recognizing the inherent dignity of every human being and his equal entitlement to the protection of his fundamental rights and freedoms without discrimination on grounds of race, religion, sex or other distinction.

Fourthly, the law must provide an effective and speedy system of judicial remedies to enforce these rights; this implies among other things a fair trial system, and an independent legal profession so organized as to provide the public with the service it needs for its protection."

It is obvious that the egalitarian concept is not merely the American invention which Ritchie J. seemed to imply. Perhaps now we know why the idea of equality before the law is said to be one of the most elusive in the whole of jurisprudence. (171)

F. The Burnshine case:

The following year (1974) the Supreme Court of Canada had a further occasion to deal with the right of equality before the law in Regina vs. Burnshine. (172) While the majority did not hold that the federal enactment infringed the Bill of Rights (Sec. 1(b)) it did affirm positions which, theretofore, had not been clearly acceptable to the majority.

The appellant, a seventeen year old youth, was convicted and sentenced, on a charge of causing a disturbance, to three months definite and two years less one day indeterminate by a British Columbia Court. The Criminal Code (173) provides for a penalty of not more than \$500.00 or to imprisonment for six months. The Court imposed the sentence it did under the authority of a federal enactment, namely Sec. 150 of the Prisons and Reformatories Act, (174) which allows that a Court in British Columbia may,

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(171) R.N. MCLAUGHLIN, The Attorney General of Canada vs. Lavell and Equality before the Law (1973) 21 Chitty's L.J. 282 at 285.

(172) (1975) 1 S.C.R. 693.

(173) R.S.C. 1970 C C-34.

(174) R.S.C. 1970 C. P 21.

where a penalty is provided of not less than 3 months (or longer) and a person is under 22 years, sentence such person to imprisonment for a term of not less than three months and for an indefinite period of not more than two years less one day. The accused's submission was that Sec. 150 of the Prisons and Reformatories Act infringed Sec. 1(b) of the Bill of Rights in that he was denied equality before the law since he was made subject to a penalty which did not obtain in any other part of Canada, save Ontario. The Appeal Court of British Columbia supported this contention declaring Sec. 150 to be inoperative and striking out the indeterminate portion of the sentence. From that decision an appeal was taken to the Supreme Court of Canada.

Martland J. wrote the decision of the majority. Laskin J. gave a dissenting judgment with which J.J. Spence and Dickson concurred. It is worthy of note that this case did not turn on discrimination in respect of race, national origin, colour, religion or sex - and unlike its predecessors did not relate to provisions of the Indian Act. Martland J. made the point, which Laskin J. had made in the Curr case, that discrimination on any of the said bases is not a sine qua non of the operation of Sec. 1 of the Bill. That point is thus well confirmed and established.

Martland J. supported the position of Ritchie J. in A.G. Can. vs. Lavell; Isaac et al vs. Bedard that the Bill of Rights must be interpreted on the basis of rights and freedoms existing at the time of the enactment (1960) since the Bill did not create new rights. He wrote:

It is quite clear that, in 1960, when the Bill of Rights was enacted, the concept of "equality before the law" did not and could not include the right of each individual to insist that no statute could be enacted which did not have application to everyone and in all areas of Canada. Such a right would have involved a substantial impairment of the sovereignty of Parliament in the exercise of its legislative powers under s. 91 of the British North America Act, 1867, and could only have been created by constitutional amendment, or by statute. In my opinion, the wording of the Bill of Rights did not do this, because, as has already been noted, by its express wording it declared and continued existing rights and freedoms. It was those existing rights and freedoms which were not to be infringed by any federal statute. Section 2 did not create new rights. Its purpose was to prevent infringement of existing rights. (176)

He went one step further, however, and quoted with approval Ritchie J.'s view that equality before the law is governed by Dicey's definition of the rule of law and not by any egalitarian concept. (176) However it should be pointed that while he quoted it he did not expressly accept it.

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(175) Supra note 172 at P 705.

(176) See W.S. TARNOPOLSKY supra note 166 at P 15.

He then advanced a proposition which constituted a new approach for the Court - and one which will be referred to later in this work. He looked at the legislative purpose of Sec. 150 and found that it was not to impose harsher punishment on offenders in British Columbia in a particular age group than upon others. Its purpose was to seek to reform and benefit persons within the younger age group in British Columbia which was equipped with special institutions for such a purpose. (177) He concluded:

In my opinion, it is not the function of this Court, under the Bill of Rights, to prevent the operation of a federal enactment, designed for this purpose, on the ground that it applies only to one class of persons, or to a particular area.

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. This was not established or sought to be established. (178)

Laskin J's first significant statement was that if a construction producing compatibility between the Bill of Rights and a federal enactment cannot reasonably be found the federal enactment will give way. On the other hand, he said:

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(177) It is noted that Ritchie J. wrote a brief concurring judgment to express his support of this view. Id. a P 708.

(178) Id. at PP 707, 708.

The primary injunction of the Bill, however, 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. (179)

He found that Sec. 150 provided for the imposition of a greater punishment of the accused in British Columbia than elsewhere in Canada (save Ontario) and as such it denied the accused equality before the law. That inequality consisted of the greater disability to which the accused was exposed than in other parts of Canada. He did not give weight to the special object of rehabilitation implicit in Sec. 150 since he found that this would mean that Sec. 150 establishes a permissible classification within the framework of the individual's right to equality before the law. He resisted any inclination to examine the policy behind the enactment stating only that he found such exercise unnecessary since he was able, without such inquiry, to find a construction of the section which was compatible with the Bill of Rights. (180) - a preference for a construction that would avoid a collision between the two enactments.

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(179) Id. at P 714.

(180) It is to be noted that he did not rule out the efficacy of such an approach. Did he leave the door ajar to take this course in a future judgment? It would seem a justifiable inference.

This construction he explained, in his conclusion, as follows:

It seems to me to be very much more consonant with the suggested purpose, considered in the light of the Canadian Bill of Rights, that the combined fixed and indeterminate sentences be limited in their totality by the maximum term of imprisonment prescribed by the Criminal Code or other federal enactment creating an offence and prescribing its punishment. In this way, 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. On this view, which commends itself to me, the age factor under s. 150 does not amount to a punitive element in that provision but rather rebounds to the advantage of an accused who is within the age group. (181)

He would have dismissed the appeal but vary the order of the Appeal Court of British Columbia by deleting the finding that Sec. 150 was inoperative and declaring that this section, construed and applied under Sec. 1(b) of the Bill of Rights, does not authorize the imposition of determinate and indeterminate sentences beyond that fixed by the Criminal Code. His judgment does appear to be a good mix of judicial innovation and judicial restraint which does little violence to the demands of logic.

The majority in the Burnshine case has been criticized on several counts. First of all Martland J.

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(181) Supra Note 172 at page 718.

gave support to Ritchie's statement in Lavell that the meaning to be given to the language in the Bill of Rights is the meaning it bore at the time of the enactment - which was the position Ritchie J. took in Robertson and Rosetanni (182) and in his dissenting judgment in Curr. (183) It was also the position Pigeon J. took in the Drybones case. (184) Laskin J. had repudiated this approach in his majority judgment in the Curr case when he said that "the Bill of Rights did not freeze the federal statute books".

There are two questions properly asked: (185)

1. What about Sec. 10 of the Interpretation Act (186) which reads as follows:

10. The law shall be considered as always speaking, and whenever a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment and every part thereof according to its true spirit, intent and meaning.

Since the Canadian Bill of Rights is a federal statute, the Courts are required to construe it in accordance with the Interpretation Act. Thus it would appear that a statute speaks as of today - not the date of its enactment.

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(182) Supra Note 111 at P 654

(183) Supra Note 140 at P 916

(184) Supra Note 114 at P 306

(185) W.E. CONKLIN and G.A. FERGUSON: The Burnshine Affair: Whatever happened to Drybones and Equality before the law? (1974) 22 Chitty's L.J. 303.

(186) R.S.C. 1970 C 1-23.

2. If the Bill of Rights embraced all the human rights and freedoms existing in Canada why was Sec. 5(1) placed in the Bill? Its very presence suggests that Sec. 1 does not include all such freedoms. It has been suggested that it is incorrect therefore to conclude that this Bill must speak only from the date of its enactment for the Courts would be bound within narrow and impossible limits in the future. These submissions made by the learned authors are persuasive. Perhaps the safest route is to follow Laskin's interpretation. This would obviously give more flexibility to the Courts. Furthermore it would be nigh impossible to interpret, say fifty years from now, what meaning is to be given to the language of the Bill in 1960 in the light of changing social trends in the interim.

Whatever may be said of the views of Martland J. on his aspect, it must be borne in mind that he did not rely on this point in arriving at this conclusion. He proceeded on the basis that the impugned Act satisfied a reasonable valid legislative purpose and this had little to do with the so-called frozen concept of federal statute law, vintage 1960.

Martland J's judgment has been assailed on the further ground that he referred to Dicey's rule of law as the determinant in defining equality before the law. However there is real doubt that he did no more than quote it - not expressly accepting it. In any event, a reference to

Dicey's rule of law (as advanced by Ritchie J.) was not in the least necessary to his conclusions, (for the reasons above stated) and would likely be considered obiter. There is little point therefore in treating again of the fallacy which underlies reliance on the Dicey rule in this instance.

G. The Canard case:

Coming on the heels of the Burnshine case was the decision of Attorney General of Canada vs. Canard (187) which again considered the equality before the law clause of the Bill of Rights. The Court was once again divided with the majority favouring dismissal of the appeal and supporting the impugned federal legislation with Laskin C.J.C. and Spence, J. dissenting.

Mrs. Flora Canard, the widow of an Indian, ordinarily resident on a reserve, applied to the Surrogate Court (in Manitoba) for letters of administration for her deceased husband's estate which were issued to her as Administratrix. At about the same time, an officer of the Indian Affairs Department was appointed Administrator of the deceased's estate by the Minister of Indian Affairs pursuant to provisions of the Indian Act. (188) These provisions allowed the Minister the right to name an administrator and thus remove any power of a Surrogate Court to make a grant of letters of administration in an estate of an Indian.

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(187) (1976) 1 S.C.R. 170.

(188) R.S.C. 1970 C. 1-6 Secs. 42 and 43.

Mrs. Canard brought an action in the Supreme Court of Manitoba claiming that the provisions of the Indian Act relating to administration of estate of Indians were contrary to the Canadian Bill of Rights in that she was denied equality before the law.

Martland J. wrote for himself and Judson J. J.J. Ritchie, Pigeon and Beetz wrote separate judgments concurring, in the result, with Martland J's judgment. Laskin C.J.C. wrote a dissenting judgment for himself and Spence J. It should be mentioned that the trial Judge held that the deceased was not ordinarily resident on a reserve and therefore the provisions of the Indian Act did not apply. The Manitoba Court of Appeal held that the deceased was ordinarily resident on a reserve and with this contention the Supreme Court of Canada agreed. The Court of Appeal, however, had gone on to find that Sec. 43 of the Indian Act was inoperative in that, in violation of Sec. 1(b) of the Bill of Rights, it deprived the deceased's widow of equality before the law on the ground of discrimination by reason of race when it prevented her from administering her husband's estate. With this decision, the majority of the Supreme Court disagreed and upheld the right of the departmental officer to act as Administrator of the deceased's estate.

Martland J. stated that the provisions of the Indian Act provide a scheme for testamentary capacity and

for administration of estates. It is characterized by a discretionary and supervisory jurisdiction in the Minister of Indian Affairs rather than in the Courts. He stated that this was clearly the right of Parliament having regard to its exclusive jurisdiction over Indians. He wrote:

The subject-matter defined in s. 91 (24) necessarily contemplates legislation respecting the status and rights of a particular class of persons. If the words "equality before the law" in s. 1(b) of the Bill of Rights were to be construed as precluding legislation of this kind it would prevent Parliament from exercising the power entrusted to it by s. 91(24).

The majority of this Court in Attorney General of Canada v. Lavell, rejected the application of the Bill of Rights in that way..... (189)

He held further that there was no discrimination against the respondent by means of race. The provisions of the Act relate exclusively to the administration of estates of deceased Indians and apply generally to such estates. There is no federal legislation relating to administration of the estates on Non-Indians and if there were it would be unconstitutional. Thus there is no conflict between two federal acts nor has Parliament, in any way, permitted certain acts by non-Indians and forbidden similar acts by Indians. The Indian Act deals only with the legal rights of Indians.

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(189) Supra Note 187 at P 187.

Ritchie J., generally supporting the above conclusions, went on to say that if these provisions were declared inoperative by reason of Sec. 1(b) of the Bill of Rights because Indians are treated differently from other Canadians:

eventually all such differences will be eradicated and Indians will in all respects be treated in the same way as their fellow citizens under the law. I cannot believe that the special Indian status so clearly recognized in the British North America Act is to be whittled away without express legislation being passed by the Parliament of Canada to that effect. (190)

The same approach was taken by Pigeon J. which would come as no surprise since this is the proposition he advanced in his minority judgment in Drybones to which he referred. However, in addition, he stated that the impugned provisions of the Indian Act cannot be treated as infringement of the principle of equality before the law any more than provisions creating a special jurisdiction respecting juvenile delinquents and authorizing discretionary transfers to the ordinary Courts violate the same principle.

Beetz J. wrote a lengthy judgment. He treated of the authority of the Manitoba High Court to hear the case in place of the Federal Court - but his conclusions on this aspect are not germane to this work. Of direct relevance is his statement that there is nothing unconstitutional in Parliament excluding the authority of provincial courts over the subject of estates of Indians and bestowing it

upon the Minister. Furthermore there is nothing in the provisions to prevent the Minister, on account of the respondent's race, from authorizing her to administer her late husband's estate. If there is discrimination it is administrative in nature: it does not flow from the Indian Act. Consequently no part of the Indian Act need be declared inoperative. The Minister's discretion should not be interfered with and hence the grant of Letters of Administration issued out of the Manitoba Surrogate Court must be deemed a nullity.

Laskin J., in his dissenting judgment, supports the view of the Manitoba Court of Appeal in the judgment written for the Court by Dickson J.A. (191) He wrote:

The effect of the judgment of Dickson J.A. is to measure the operation of a federal statute, or any provision thereof, by the guarantees (if I may so term them) of the Canadian Bill of Rights alone, and thus to treat those guarantees as requiring not only comparative conformity to their terms but conformity by a challenged statute alone.

I do not find this to be other than a proper appreciation of what the Canadian Bill of Rights says. (192)

Laskin did not think this case turned on whether the Court was asked to consider rights under provincial legislation and which admittedly were beyond the scope of the Canadian Bill of Rights which applies only to federal law. The question remains one of considering

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(191) At this time Mr. Justice Dickson was a member of the Supreme Court and for obvious reasons did not sit on the appeal in that Court.

(192) Supra Note 187 at P 178.

the federal enactment and considering the reach of the Bill of Rights. He felt that the Bill of Rights was concerned with whether a person was denied a right which he would otherwise have in the absence of such prohibition. His view was stated thus:

What is involved in this approach, patent on the face of the Canadian Bill of Rights, is the premise of our legal system that no legal permission is needed to do anything or act in any manner not prohibited by law, whether statute law or common law. Hence, if a federal enactment were to operate prohibitively against a specified class of persons by reason, for example, of colour or religion, saying nothing about other classes, the question of its operability under the Canadian Bill of Rights would arise notwithstanding that there was no federal legislation expressly sanctioning for those other classes what was prohibited for a specified class. In short, the question would be whether, having regard to the purpose of the statute, it had accorded equality before the law (to take s. 1(b) of the Canadian Bill of Rights as illustrative) to the affected class. (193)

This advances a very fundamental consideration which if followed in later decisions by the Supreme Court can give a new significance to the Bill of Rights. It would take the Drybones decision to the point of establishing a principle of general application which succeeding Courts may have difficulty avoiding. The question would

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(193) Id. at 179.

become: Does an impugned federal enactment take away a right which we would ordinarily have were it not for the enactment and does it take it away from all in the same way or to the same extent regardless where the right originates?

Respecting the position of the majority of the Court in their concern that the Indian Act, which is clearly within Parliament's exclusive jurisdiction to enact, would be whittled away and rendered useless, he stated what he had earlier said in the Lavell case - but he put it somewhat differently and with more force:

I do not regard the mere grant of legislative power as itself authorizing Parliament to offend against its generally stated protections in the Canadian Bill of Rights. If Parliament deems it necessary to treat its grant of legislative power under s. 91(24) of the British North America Act in terms that would be offensive to the Canadian Bill of Rights, it is open to Parliament to do so, but s. 91(24) is not, in my opinion, an invitation to the Courts to do what Parliament has not chosen to do. It seems to me patent that no grant of federal legislative power, as a mere vehicle for legislation, should be viewed as necessarily carrying with it a built-in exclusion of the mandates of the Canadian Bill of Rights. (194)

In the result, Laskin C.J.C. would have dismissed the appeal but would vary the order of the Manitoba Court of Appeal to state that Sec. 43 must be applied consistently with Sec. 1(b) of the Bill and that Sec. 11 of the

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(194) Id. at P 184.

Indian Estates Regulations is inoperative in so far as it excludes Indians from eligibility to be administrators of the estates of deceased Indians.

It is significant that no member of the Court in the Canard case gave support to the 'administration or application approach' to the concept of equality before the law developed by Ritchie J. in the Lavell case. In fact, it was not referred to at all and no member of the Court renewed any attempts to define equality before the law. This may indicate an impending change in direction away from the Dicey definition. (195) Or does the Canard case leave us with Lavell and the good old rule of law which has added nothing to the matter of equality before the law. (196)

The Court had some difficulty with the question whether the Bill of Rights could have regard to provincial legislation. Ritchie, Martland and Judson J.J. said that the Bill could only relate to discrimination between provisions in a federal statute or statutes. Laskin C.J.C. took a different position and held that Mrs. Canard was being prohibited from exercising a right which she had, namely to act as administratrix of her husband's estate. The question which we ask however is whether this right was hers in the absence of positive provincial

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(195) D. PHILLIPS, Indians and Inequality: A Commentary on A.G. Canada vs. Canard 13 Osgoode Hall L.J. 368 at 380.

(196) H. BRUN, Re Drybones & Lavell & Canard: Les joies du Tango Judiciaire (1975) Vol. 53 Can. Bar. Rev. 795 at 800.

legislation. Beetz J. acknowledging the difficulty, proposed a possible solution (although in the result he didn't rely on it) when he said:

"But there may well emerge from the variety of provincial laws on these matters a body of general rules common to all or many provinces, which for want of other criteria and as a sort of jus gentium is susceptible to provide general minimum standards to which reference can be made for the purpose of deciding how the principle of equality can be safeguarded." (197)

This may indicate a way out of this dilemma for the future. It has been urged that a federal directive to Courts to consider comparable provincial principles in construing federal legislation does not amount to federal legislation in provincial matters. (198) Perhaps a reliance on a general minimum standard of rights in legislation across the provinces, which seems reasonable enough, will assure that equality which the Bill seeks to protect in federal enactments.

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(197) Supra Note 187 at P 211.

(198) D.W. ELLIOTT, Canard: A Triad Returns (1975) 25 U. Toronto L.J. 317 at 326.

H. The Prata case:

On the same day that the Supreme Court rendered its judgment in the Canard case it handed down another judgment which treated of equality before the law. In Vincenzo Prata vs. Minister of Manpower and Immigration, (199) the appellant, who was not a Canadian citizen, and against whom a Deportation Order had been made, appealed to the Immigration Appeal Board to exercise its discretion under Sec. 15 of the Immigration Appeal Board Act (200) to allow him to remain in Canada on compassionate grounds. The Board refused since a certificate had been filed with the Board by the Immigration Minister and the Solicitor General under Sec. 21 of the same Act setting forth that it would be contrary to the national interest for the Board to exercise its discretion in this instance. By Sec. 21, such a certificate removes from the Board any jurisdiction to exercise its discretion.

The appellant appealed to the Federal Court on the ground that the application of Sec. 21 deprived him of the right to "equality before the law", as declared by Sec 1(b), the Canadian Bill of Rights, since it did not apply equally to all persons seeking the exercise of discretion

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(199) 1976 1 S.C.R. 376

(200) R.S.C. 1970 Chap I-3

under Sec 15 of the Act. The Federal Court refused the appeal and the appellant took a further appeal to the Supreme Court of Canada with similar result. (201)

The judgment of the Court was written by Martland J. and there was no dissent. He held, first of all, that the appellant was not attempting to assert a right but rather to obtain a discretionary privilege. When dealing specifically with Sec 1(b) the Bill of Rights he said:

"The purpose of enacting S. 21 is clear and it seeks to achieve a valid federal objective. This Court has held that S. 1 (b) of the Canadian Bill of Rights does not require that all federal statutes must apply to all individuals in the same manner. Legislation dealing with a particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective". (202)

Martland J. was satisfied that the federal objective was valid and hence the appellant's submission must fail. He obviously followed the reasoning advanced in his judgment (of the majority) in the Burnshine case. (203) Further reference will be made to this approach in the succeeding chapter of this work.

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(201) For a commentary on this case see: John HUCKER, Immigration - Deportation - Bill of Rights: (1975) 53 Can. Bar. Rev., 810.

(202) Supra Note 199 at P 382.

(203) Supra PP 97 to 99 of this work.

I. The Morgentaler case:

Several months later the Supreme Court had another occasion to render judgment where Sec 1(b) of the Bill of Rights was one of a number of items to be considered-in the highly controversial case of Dr. Henry Morgentaler. (204) Dr. Morgentaler had been acquitted before judge and jury on a charge of procuring the miscarriage of a female person. His defence at trial, which the trial jury allowed to be put to the Jury and explained in his charge, was the common law defence of necessity and the statutory defence of necessity found in S.45 of the Criminal Code. The Crown appealed to the Court of Appeal which set aside the acquittal, entered a conviction and directed that the accused be sentenced by the trial judge. An appeal was then taken to the Supreme Court of Canada and the majority of the Court affirmed the decision of the Quebec Appeal Court. While the defence raised at trial was the major argument advanced by the appellant on appeal to the Supreme Court of Canada, he raised a number of additional grounds to urge that the jury's verdict should remain unchanged. Of relevance to this work was the argument advanced on his behalf that there was a denial of equality before the law and the protection of the law under S 1(b) because S. 251 (4) of the Criminal Code, in permitting but not compelling

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(204) Dr. Henry Morgentaler vs. Her Majesty the Queen et al 1976 1 S.C.R. 616.

the establishment of therapeutic abortion committees and in specifying the numbers of medical practitioners for those committees, operates unequally in respect of women in rural areas and in areas where no such committees have been established and in relation to women whose economic status prevents the mobility necessary to avail themselves of such committees where they exist, and in any event, creates inequality because the vague standard given to the committees makes varying interpretations and applications thereof inevitable and consequently enables some women to obtain the protection of the law and others not.

It should be pointed out that the Court unanimously decided in the course of the appeal that no case had been made out in respect of the effect (as alleged) of the Bill of Rights on Sec. 251 of the Criminal Code. The majority judgment written by Pigeon J. made mention only of this fact and did not pursue the matter further. Laskin J., who (with Judson and Spence J.J. dissented in the result) was of similar mind as to the non-applicability of the Bill of Rights, chose to give reasons for his views on this point. Directing his mind to the argument in respect of equality before the law (mentioned above) he said:

I do not regard s. 1(b) of the Canadian Bill of Rights as charging the courts with supervising the administrative efficiency of legislation or with evaluating the regional or national organization of its administration, in the absence of any touchstone in the legislation itself which would

indicate a violation of s. 1(b) including the specified prohibitions of discrimination by reason of race, national origin, colour, religion or sex. There is nothing of this sort in s. 251. Nor is that section vulnerable to attack on any substantive ground inhering in the command of "equality before the law and the protection of the law". (205)

He then went on to say:

There may be situations where, in determining whether federal legislation is incompatible with s. 1(b) or other provisions of the Canadian Bill of Rights, the Court may have to examine and come to a conclusion on the purpose or object of the challenged legislation and decide whether its provisions bear a rational relation to that purpose. The present case does not raise this issue when there is nothing to show that s. 251 offends against the prohibited discriminations or is otherwise offensive to s.1(b). I do not find any judicial basis for impeaching s. 251 under s. 1(b) of the Canadian Bill of Rights because not all persons affected by s. 251 may find it feasible because of geographical or economic considerations to take shelter under its exculpatory terms. (206)

Of interest in this excerpt is Laskin J's assertion that there may be instances where the object of the legislation should be determined and then whether its provisions are rationally (that is to say, reasonably) related to such purpose. This statement has a particular significance and signals a new interest in the reasonable classification test (which we will treat of in the concluding chapter) although he had previously shown indifference to this

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(205) Id. at P 635.

(206) Id. at P 636.

approach. The reason that it would not be necessary to make the suggested assessment in this case is because Laskin J. (along with all of his colleagues) could not find that inequality existed or if it did exist it was not within the jurisdiction of the courts to correct. He said:

Any unevenness in the administration of the relieving provisions is for Parliament to correct and not for the courts to monitor as being a denial of equality before the law and the protection of the law. (207)

J. The Miller and Cockriell case:

There is one last case we should treat of, not because it deals directly with equality before the law, but because it considers certain fundamental propositions which have been discussed in the above pages. In October 1976 in the case of Miller and Cockriell vs. The Queen (208) the Supreme Court dealt with the question whether the death penalty was cruel and unusual punishment and hence whether Sec. 214 and Sec. 218 of the Criminal were rendered inoperative by virtue of Sec 2(b) of the Canadian Bill of Rights. All nine judges were unanimous in the result which was to the effect that the death penalty was not cruel and unusual punishment. It was the manner in which

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(207) Ibid.

(208) (1977) 2 S.C.R. 680.

this result was arrived at that gives us some concern.

The judgment of Ritchie J. was concurred in by four members of the Court with Beetz J. also concurring in the result. The judgment of Laskin J. was concurred in by two members of the Court. While the end result of all judgments was a dismissal of the appeal the judgment of Ritchie J. constitutes a majority judgment on the points raised by him and with which Laskin J. and two of his colleagues disagreed.

While Ritchie J. acknowledged that the Bill of Rights (by virtue of Sec. 5(2)) affected Acts of Parliament enacted before or after the coming into force of the Bill, he gave paramountcy to Sec. 1 of the Bill over Sec. 2 and held that Sec. 1 set out the rights which existed in Canada when the Bill was enacted. Sec. 1(a) states that no one may be deprived of life except by due process of law and thus it was recognized by the Bill that a person may be deprived of life provided all the usual procedural safeguards were adhered to. Relying on what Martland J. said in the Burnshine case he held that Sec. 2 did not create new rights but only particularized the rights which were part of the rights contained in Sec. 1. Parliament never intended in enacting Sec. 2(b) to preclude punishment by death and this was borne out by the fact that Parliament had amended the Criminal Code several times since the Bill was enacted making provision for the death penalty and

no non obstante clause was placed in these amendments. Parliament never intended to eliminate the death penalty by way of judicial interpretation of the Bill of Rights; it had the power to do so directly at any time if it so decided.

Laskin J. re-affirmed the position which he had taken in writing the majority judgment in the Curr case<sup>(209)</sup> that Sec. 2 gave force to Sec. 1 and he would not diminish the prescriptions of Sec. 2 by reference to what is more generally prescribed in Sec. 1. Sec. 2(b) must be considered on its own terms as providing that no law of Canada shall be construed or applied so as to impose or authorize the imposition of cruel or unusual treatment or punishment.

He went on then to hold that the death penalty as a sanction for the taking of a human life was not cruel and unusual treatment or punishment. Beetz J. in a short judgment held that it was not necessary to consider whether or not Sec. 2 of the Bill creates new rights or whether or not it is subordinate to Sec. 1. He merely agreed that punishment by death for murder is not contrary to Sec. 2(b).

This writer is in accord with the views expressed by Beetz J. It was unfortunate that Ritchie J. took the majority of the Court down the path he did since

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(209) Supra Note 143.

his approach will cause considerable difficulty for the future. As Laskin J. stated this aspect had been resolved in the Curr case (210) and in Brownridge vs. The Queen. (211) Furthermore he asserted that the Court cannot be governed by the course of parliamentary legislation especially post-Canadian Bill of Rights legislation. He said:

It is rather that the legislation of Parliament falls to be tested as to its operative effect by what the Canadian Bill of Rights prescribes; otherwise, the Canadian Bill of Rights becomes merely an interpretation statute, yielding to a contrary intention in legislation measured against it. This Court rejected such an approach in its majority judgment in the Drybones case, and it re-affirmed its rejection of that approach in both the majority and minority judgments in Hogan vs. The Queen. (212)

The failure of all members of the Court to bind themselves to one interpretation as to the effect of Sec. 1 and 2 and as to the effect of the Bill on legislation enacted after 1960 is regrettable. While the division of views persists the judiciary of Canada and the legal profession stands back in a mood which is a mixture of amazement and confusion - a mood which has no resemblance to awe, only

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(210) Supra note 140.

(211) 1972 S.C.R. 889

(212) Supra note 208 at 686.

incredulity. (213) It is of interest to note that the law requires jurors in a jury trial to be unanimous when considering any charge brought before a jury. If a disagreement is reported the trial judge is required to request the jury to return to the jury room and reconsider its position, suggesting that each juror should seriously consider his position lest the views of the others amongst them, advanced by persons of both equal competence and concern, may not be the more persuasive. One wonders whether the members and the Supreme Court ever sit down this way and thrash out their views before writing their judgments.

One gets the impression that there is a minimum of such consultation since so frequently one reads a judgment which states that its author has had occasion to review a judgment of a colleague sitting on the same case and then there follows a critical analysis of the judgment then referred to. We do not suggest that there should not be dissenting opinions - but surely such dissenting opinions should only be advanced after all

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(213) Alan W MEWETT, The Bill of Rights (1976) 18 Crim. L.Q. 265 states at 266: "It is less individual decisions that worry me (although some of them are difficult to comprehend) so much as the fear that, by adopting pre-Bill of Rights canons of construction, principles of interpretation or notions of the role of the judiciary, our courts will render the Bill of Rights largely nugatory."

avenues have been explored in a pre-judgment conference where a justice has the opportunity of persuading his colleagues to his point of view or allowing himself to be persuaded to a colleague's point of view held with equal conviction. While it is important that a member of the Supreme Court bench should be free to advance a position honestly held and which cannot be reconciled with the views of the others, safe from domination by a senior (or more articulate or persuasive) member of the Court, it is equally important to bear in mind that a decision of a badly divided Court gives no direction to the judiciary or legal profession in Canada. There results that sense of disappointment which arises upon a failure to succeed when success was reasonably predictable - the frustration which accompanies a lost opportunity. Perhaps no more should be said on the point: certainly no more can be discreetly said.

Conclusion:

By way of conclusion of this chapter, containing as it does a case analysis of the major decisions of the Supreme Court of Canada treating of equality before the law, the writer had hoped to be able to present a summary of the principles arrived at by the Court to serve as a useful guide. After closely considering the matter I have decided, contrary to my first intention, not to embark upon such undertaking for the reason that such a summary would need be as long as the preceding pages in this chapter and further because it is just not possible to distill from the cases a firm set of principles in respect of equality before the law which can serve as a guide. On certain of the fundamental considerations the Court has wavered back and forth so much, at times blandly ignoring, and at other times closely distinguishing previous majority judgments, that one cannot, with any degree of certitude, say what the Court will next do when a case dealing with equality before the law comes before it. We have had occasion to

refer to some commentators who are extremely critical of this state of affairs and to others who are more patient.<sup>(214)</sup> Such comments do not make one's task the easier.

We can, however, advance one very significant benchmark arising out of the Drybones case. This is to the effect that the Canadian Bill of Rights is more than a canon of construction, the terms of which would give way to contrary legislative intent. It renders inoperative any law of Canada that cannot be construed and applied so that it does not abrogate, abridge or infringe one of the rights and freedoms recognized by the Bill, unless it is expressly declared by an Act of Parliament that it shall operate notwithstanding the Bill and it confers upon the Courts the responsibility to declare any such law inoperative. This position does not appear to have been detracted from in theory in subsequent decisions of the Court - it has been referred to, supported and then distinguished. Commenting on the decision in Drybones, Laskin C.J.C. has recently written.

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(214) Amongst those who are both critical and patient see Herbert Marx, La Déclaration canadienne des Droits et l'affaire Drybones (1970) R.J.T. 305 at 322.

"Toutefois le temps, l'expérience et de nouveaux visages à la Cour changeront, nous l'espérons, son orientation. Il a fallu à la Cour Suprême des Etats Unis plusieurs générations avant de parvenir à son niveau actuel de raffinement dans les questions de libertés fondamentales. La protection judiciaire des libertés fondamentales prévue dans une Déclaration des droits évolue lentement avec le temps -- un temps auquel nous ne sommes pas habitués en notre époque où tout est "instantané". "

Although this moves the problem of the application of the Canadian Bill of Rights to a common plane, it by no means determines the scope of its application, nor its force in particular cases. Such decisions of this Court as Attorney-General of Canada v. Lavell; R. v. Burnshine; and Attorney-General of Canada v. Canard show this in no uncertain fashion. (215)

On another fundamental aspect there is regrettably a failure to give a clear direction. There is little doubt that the Bill of Rights will be utilized to render inoperative an Act of Parliament (or a provision thereof) which anti-dates the Bill if that Act (or a provision thereof) abridges a right set out in Bill. It is not as clear that the Bill will be applied in a similar fashion in respect of post-Canadian Bill of Rights legislation. We have seen how the majority view in the Curr case, which held that, without question, the Bill must apply to post-1960 legislation, was completely disregarded by the majority without comment in the Burnshine case and the Miller and Cockriell case. One would have thought that the Curr case had resolved the matter and that the position then taken was not only the better view but the only view possible in the light of Sec 5 (2) of the Act (in which the Bill is incorporated as Part 1 thereof). Such facile assumptions cannot be made when considering our Bill of Rights against the background of the Supreme Court's

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(215) Miller and Cockriell v The Queen supra note 208 at 686.

inclinations. Suffice it to say that this writer supports the view advanced by a goodly number of Canadian legal scholars that the Court must acknowledge that the Bill of Rights must be taken to apply to post - 1960 legislation and that to take any other position is to be derelict in the duty assigned to it by Parliament.<sup>(216)</sup> More will be said on this point in the next chapter.

There is one point which the writer wishes to make abundantly clear in concluding this chapter. If these pages contain criticism of certain of the decisions or positions of the Supreme Court, it is not because of any disappointment that the Court has not seen fit to apply the Canadian Bill of Rights and render federal legislation inoperative for the sheer satisfaction of doing so. Rather, we are concerned with the rationale of the Court's decisions and the absence of guidelines which emerge from them. One cannot fault the Court for being cautious having regard to the importance of the subject with all its implications.

Mr. B. Grenier in his recent work urges that we should not be pessimistic about the efforts of the Supreme Court. He reminds us that from 1960 (to the date of his essay in 1975) the Court has given effect to the Canadian

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(216) See the views of Professor E.A. DRIEDGER on this aspect - as one who had much to do in the drafting of the Bill: The Meaning and Effect of the Canadian Bill of Rights: A Draftsman's Viewpoint, (1977) Ottawa L.R. 303 at 309.

Bill of Rights five times in the cases in which it had to consider the Bill (in its varied aspects) and finds this situation to be satisfactory. (217) This is an interesting observation and, when made ex post facto, has validity. What concerns the writer is the implication inherent therein (though there is no suggestion that Mr. Grenier would agree) that the Court itself does or is inclined to approach the matter on the basis of some score such as that advanced above. In other words, will the Court say to itself - "in the last case we applied the Bill of Rights - in this case we won't since we do not want to give the impression that we will apply the Bill every time we consider it?" We would not want to suggest such a thing. If one is skeptical it is because of the way the Court strained not to apply the Bill in dealing with "equality before the law" after the Drybones decision in those cases (which have

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(217) Bernard GRENIER, loc. cit., Note 90 at P 81.  
"Ce bilan, qui est assez satisfaisant, à notre avis, oppose un démenti catégorique à l'appréciation d'incrédibilité ou de pessimisme dont fait généralement l'objet la valeur judiciaire de la Déclaration des droits. Une telle performance est de nature seulement à détromper ceux qui s'illusionnaient sur le rôle et la mise en oeuvre d'un pareil instrument: au début surtout, l'insertion effective d'une loi fondamentale dans un ensemble juridique requiert prudence et modération tant pour favoriser le développement progressif de son emprise que pour éviter les retombées qui accompagnent d'ordinaire les bouleversements trop subits."

been reviewed in this chapter) where the circumstances were not particularly dissimilar. Nor can we be unmindful of the complete reversal of the position of Cartwright C.J.C. in the Drybones case from that advanced in Robertson and Rosetanni vs. The Queen. (218)

The Court will want to exercise caution, as it has in the past, but caution cannot be an excuse for not doing what it must - whether that be to apply or not to apply the Bill of Rights. What it must avoid at all costs is affording any grounds for a suggestion that the Court is keeping score and proceeding on that basis, since then citizens will conclude that we have justice meted out by chance and not weighed on the merits. The Court must make every effort to dispell any basis for such a suspicion.

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(218) Treated on pages 69 to 72 herein.

CHAPTER III

PARLIAMENTARY SOVEREIGNTY -- AND

THE BILL OF RIGHTS.

IS THERE REALLY A PROBLEM?

CHAPTER III

Parliamentary Sovereignty -- and  
The Bill of Rights.  
Is There Really a Problem?

A. The Significance of the Drybones decision:

In the case analysis set forth in the previous chapter we have reviewed how the Supreme Court of Canada dealt with the words "construed and applied" in Sec. 2 of the Bill. The Court held that the Bill was more than a canon of interpretation for doubtful or equivocal language in federal statutes, rather it was a "constitutional" instrument which would override inconsistent federal statutes. The Court should first "construe" a federal statute to avoid as far as possible any conflict with the Bill of Rights but if the conflict cannot be avoided then the Court should hold the statute to be inoperative. (219) This interpretation raises the constitutional question whether Parliament can be taken to bind itself in this way by enactment of a simple statute not entrenched in the constitution. We have thus to consider the conflicting principles of parliamentary sovereignty and judicial review.

B. The Concept of Parliamentary Sovereignty as defined by Dicey:

The notion of parliamentary sovereignty was

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(219) Regina vs. Drybones - Supra Note 114.

first advanced by Coke and Blackstone and was elevated into a doctrine by A.V. Dicey. It has come to be known as Dicey's rule of parliamentary sovereignty and has been steadfastly supported by Wade, a noted English legal scholar, who sees it as an irreversible doctrine. (220) Few lawyers (and judges) have escaped the influence of this concept for it has had a profound impact on our legal order and has directed the development of that system. It is little wonder that those who would seek to question either its validity or efficacy are considered heretics, at least by the disciples of Dicey.

Dicey defines the concept in this way:

"The principle of parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and further, that no person or body is recognized by the laws of England as having a right to override or set aside the legislation of Parliament." (221)

The concept is generally understood to be that Parliament cannot bind its successors and no body, including a court of law, has right to overrule the legislation of Parliament. Our purpose will be to determine how the Canadian Bill of Rights may offend this principle.

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(220) A.V. DICEY, Introduction to the Study of the Law of the Constitution (10th ed.) by E.C.S. Wade, London, Macmillan and Co. at PP 188, 193.

(221) Id. at P 39.

There are two aspects to this question as we view the Canadian scene. First, there is the effect of the Bill of Rights on earlier (pre-1960) statutes and secondly the effect of the Bill on statutes passed after its enactment.

I. Pre - Bill of Rights legislation:

There seems to be little doubt that, in respect of the first aspect, the doctrine of parliamentary sovereignty is not transgressed. Here we have a situation where there is a potential conflict between two federal statutes caused by the enactment of the second - the Bill of Rights. There is little difficulty in ensuring the paramountcy of the Bill of Rights by way of reliance on the very concept of parliamentary sovereignty. The common law has provided a general rule for resolving such conflicts between two laws of the same legislative body with its doctrine of implied repeal. The doctrine states that the later statute is deemed to have implicitly repealed the earlier to the extent of the inconsistency. (222) In *Drybones* the Bill of Rights was the later of the two statutes under review. For this reason the *Drybones* decision does not appear to produce any constitutional problem. Of course, *Ritchie J.* did not declare the inconsistent provision of the Indian Act repealed but said that it was inoperative:

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(222) Maxwell on Interpretation of Statutes (12th Ed. 1969) 191.

"I think a declaration by the Courts that a section or portion of a section of a statute is inoperative is to be distinguished from the repeal of such a section and is to be confined to the particular circumstances of the case in which the declaration is made. The situation appears to me to be somewhat analogous to a case where valid provincial legislation in an otherwise occupied field ceases to be operative by reason of conflicting federal legislation." (223)

Clearly, the Court chose the word "operate" by reason of its presence in Sec. 2 of the Bill where it was used to show what effect a non obstante clause in a federal enactment would have on the Bill of Rights. It is surely proper to conclude from this language that the Bill would have similar effect on a federal enactment if a non obstante clause were not contained therein. (224) Further, while Parliament could have used the word "repeal", it has not done so although it would have every right to "repeal" prior legislation by a subsequent enactment. If it can do this, it seems logical to conclude that it can do something less forceful or drastic.

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(223) Regina vs. Drybones supra note at P 294.

(224) E.A. DRIEDGER, The Canadian Bill of Rights, Contemporary Problems of Public Law in Canada Ed. O.E. Lang (1968) U of T Press P 41. Professor Driedger, writing two years before the Drybones decision, supports this kind of approach also analogizing to a conflict between Federal and Provincial legislation.

In any event, it should be noted that by the doctrine of implied repeal, the earlier document which is inconsistent becomes ineffective (at the very least) by operation of the common law relating to interpretation of statutes. Thus the words used do not change the end result.

Apart from the common law rule we must also have regard to certain provisions of the Interpretation Act. (225) Section 10 thereof states that the law shall be considered as always speaking and whenever the present tense is used the law shall be to circumstances as they arise. (226) At the very least this section should make it clear that the Bill of Rights applies to legislation passed before its enactment. Then there is Section 11 which reads as follows:

"11. Every enactment shall be deemed remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

Is there any reason why the Interpretation Act should not apply to the Canadian Bill of Rights when the latter is being construed and interpreted by the Court? Perhaps it could be argued that to do so the Court would be down-grading the Bill of Rights. Surely this would be a spurious argument. Are all the standards of

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(225) See Supra note 186.

(226) The complete ~~the~~ text of this section is set forth on P 102 of this work.

interpretation to be set aside when the Bill of Rights is being interpreted? Is a moratorium to be declared on all existing principles of law (on interpretation of statutes or otherwise) and the Court to proceed in a vacuum? We think not. There is no reason why Section 3 of the Interpretation Act should not apply to the Bill of Rights, since there is no contrary intention indicated. The section reads as follows:

"3(1) Every provision of this Act extends and applies, unless a contrary intention appears, to every enactment whether enacted before or after the commencement of this Act."

The Interpretation Act bulwarks the common law principle. The two, taken separately or together, clearly compel us to the conclusion that the Court has no legal restraints when it seeks to apply the Bill to pre-1960 legislation.

## II. Post-Bill of Rights legislation:

We turn now to consider the second aspect - the effect of the Bill on legislation subsequently enacted by Parliament. There is little question that the Bill itself provides that it is to apply to later statutes for Sec. 5(2) defines "law of Canada" as including a federal statute "enacted before or after the coming into force of this Act". Furthermore, in providing that the Bill would not operate in the face of a federal enactment which contained a 'non obstante' clause Parliament must have

intended this effect since obviously no such clauses exist in statutes passed prior to the Bill. It is also apparent from our case analysis that this is the interpretation given by at least some members of the Supreme Court.

The question still remains whether this application of a Bill to later statutes is defensible from a constitutional law viewpoint. There is a host of constitutional lawyers who have taken the position, at least in the early days of the Bill, that it could not apply to render inoperative later inconsistent statutes but could only be used as a canon of construction. (227) It would be correct to say that those legal scholars who opposed an unentrenched Bill of Rights, as being useless or futile legislation, did so for this reason. Fortunately, for the sake of the efficacy of the Bill itself, this is not the whole story. In passing it is of note that of those who held the above-noted view

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(227) Amongst these are:

- (1) D.A. SCHMEISER, Civil Liberties in Canada, Opus cit, note 46 at P 42.
- (2) B. LASKIN, (before his appointment to the Supreme Court of Canada). An Enquiry Into the Diefenbaker Bill of Rights, Loc. cit. note 40 at P 132.  
D.M. Gordon (1961), The Canadian Bill of Rights, 4 Can. B.J., 440.

at least one has reconsidered his position. (228)

The doctrine of parliamentary sovereignty clearly supports the proposition that a legislative body is not bound by self-imposed restraints as to content, substance or policy of its enactments. It is not, by any means, as clear that a legislative body has this freedom when confronting its own self-imposed procedural restraints on its enactments - which limitations have come to be known as "manner and form" restraints. We find that there are firm legal bases for believing that a legislative body can bind itself as to the manner and form of future legislation.

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(228) The outstanding example, of course, is Laskin, C.J.C., who though he wrote critically of the Bill on such basis in 1959 (above), has now on three occasions said the Bill applies equally to subsequent legislation as well as prior legislation. *Curr vs. The Queen* supra note 140 P 893; *Lavell vs. A.G. Can.* supra note 147 P 1388; *Reg. vs Miller and Cockriell* supra note 208 P 329. Laskin, C.J.C. has not given reasons for his statements. While no other judges of the Court has gone this far, neither has any judge said that the Bill does not affect subsequent legislation. In fact they have dealt with subsequent legislation (which was upheld) going into a number of aspects without even mentioning the point. Perhaps this indicates that they support Laskin C.J.C.

C. Parliamentary Sovereignty in England:

We should first of all consider the doctrine as it is taken to apply to the English Parliament. Historically, We are aware of the struggle that the Parliament of England had to control the power of the monarch. After Parliament had won the battle and effectively made the monarch subject to its command it thereupon assumed the accolade of being sovereign - in that the King, the Commons and the House of Lords together, are vested with all power which a sovereign could possess. Nothing but the laws of nature could limit its authority. Thus Parliament was supreme. It could make or unmake laws and no one, including the Courts of law, could control it. (229)

It must be acknowledged that the word "sovereign" is somewhat misleading. Given its historical significance in England, as noted above, the word has nevertheless acquired several meanings which tend to confuse. de Smith makes the point that there is a case for jettisoning the word "sovereignty" altogether as being too ambiguous. He points out that we speak of sovereignty in international law when we mean independence, or freedom from external control. Further he says that "the concepts of national sovereignty, parliamentary sovereignty and popular sovereignty have little in common with one another." (230)

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(229) A.V. DICEY, Op cit note 220 at PP 41-42.

(230) S.A. de SMITH, Constitutional and Administrative Law, Longman, London, 1973, P 67.

It is sufficient for our purpose to recognize that there are shades of meaning in the word, that in Dicey's context he speaks of the Queen in Parliament as the "legal" sovereign and that, in essence, what is meant in this usage is that Parliament is Supreme (231) - not that the law is supreme.

I. The position on judicial review.

The English Courts have refused in the main to consider any attempts made before them to question any Act of Parliament on the basis of error, fraud, morality or other alleged fault on the ground that they had no competence to review the propriety of Parliament's enactments. Once they were satisfied that the impugned Act had been duly "enrolled" they refused to pursue the question further. This has come to be known as the enrolled bill principle or rule.

1. The enrolled Bill rule.

Wade relies principally on two English decisions to bulwark Dicey's thesis that by this rule the Courts have acknowledged their limitations in reviewing the contents of a parliamentary enactment. In Edinburgh and Dalkeith Ry. Co. vs. Wauchope, (232) the validity of a private Act was challenged on the ground that it was

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(231) Jennings also finds fault with the term and would prefer the word "supremacy". Ivor JENNINGS, The Law and the Constitution, 5th Ed. Univ. of London Press (1960) P 149-151.

(232) (1843) 8 Cl. & Fin 710; 8 E.R. 279.

enacted in breach of the Standing Orders of both Houses of Parliament and tainted with fraud and should be declared invalid. The House of Lords held otherwise. Lord Campbell's judgment advanced the proposition that the parliamentary roll was conclusive when he stated:

"All that a Court of Justice can do is to look to the Parliamentary roll: if from that it should appear that a bill has passed both Houses and received the Royal assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction or what passed in Parliament during its progress in its various stages through the Houses."(233)

The case of Lee vs. Bude and Torrington Junctions Ry. Co. (234) also dealt with a private Act involving a railway company and arose out of an allegation that a Bill had passed through Parliament as a consequence of fraudulent misrepresentation. The Court refused to interfere and held that the control of procedure for enactment rested with Parliament as a matter of privilege and in such a question the Courts had no jurisdiction. Willes J. wrote as follows:

"I would observe, as to these Acts of Parliament, that they are the law of the land: and we do not sit here as a Court of Appeal from Parliament... We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by Parliament with the consent of the Queen, Lords and Commons? I deny that any such authority exists. If an Act of Parliament has been passed improperly, it is for the legislature to correct it by

(233) Id. 8 E.R. 279 at 285.  
(234) (1870-71) 6 C.P. 576.

replacing it; but, so long as it exists as law, the Courts are bound to obey it." (235)

Wade and other classical theorists of parliamentary sovereignty rely heavily on these decisions, particularly the Wauchope case, to support their contention that in all matters, both as to procedure in passage of the enactment and in content, the Courts cannot intervene. (236) The critics of this position take the view that the principle is too broad and is a denial of fundamental law. (237) The fact is that in three subsequent cases the principle has been cut down in that the Courts have asserted that an Act of Parliament can be challenged for "error on the face of the record".

2. Error on the face of the record:

In the Pylkington's case (238) the validity of a statute was questioned on the ground that an amendment to a Bill made by the Lords had not been approved by the House before Royal assent. The majority of the Court supported the contention and as a consequence the Act was referred

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(235) Id. at 582.

(236) A.V. DICEY (Wade) opus cit note 220 at XIIV.

(237) D.V. COWAN, Legislature and the Judiciary 16 Mod. L. Rev. 273 at 281. J. Gough, Fundamental Law in English Constitutional History (Oxford) Clarendon Press (1955) at 203.

(238) Pylkington's case 1454-55 Year Book 106.

back to Parliament. In the Prince's case, (239) although a statute was enrolled it was stated that it was enrolled without the assent of all three, the King, the Commons and the Lords. The Court held that it was no Act of Parliament at all. In the Arundel case (240) an Act was impugned on the ground that when the bill was passed by the Commons it had a proviso attached while the bill, which the Lords passed and to which the King assented, did not contain any reference to such proviso. The Court held that it could not intervene since there was no fault to be found on the face of the Act itself. However, the Court did say:

"But if the record of the Act itself carry its death wound in itself, then it is true that the parchment, no nor the Great Seal, either to the original Act, or to the exemplification of it will not serve." (241)

From the three above cases we have the argument advanced that the parliamentary roll is not conclusive and that the Courts have bypassed the roll to scrutinize the original act. (242) Thorough analysis of these views cannot be a part of this work: it is only desired to

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(239) 1606 8 Co Rep; 77 E.R. 481.

(240) The King vs. The Countess Dowager of Arundel HO 109: 80 ER 258.

(241) Id. at 111 (HO): at 260 E.R.

(242) 1. JENNINGS op. cit. note 231 at P 149  
2. COWAN loc. cit. note 237 at P 273, 275, 277-8.  
3. H.R. GRAY "The Sovereignty of Parliament Today" (1953) 10 U. of Tor. L.J. 54 at 54, 67-68.  
4. R.F.V. HEUSTON, Essays in Constitutional Law 2nd Ed. London: Stevens (1964) at P 16-29.

demonstrate that the so-called enrolled bill rule is not the last word and may not be as conclusive as Dicey (and Wade) made it out to be.

It is interesting to note at this juncture, that the enrolled bill rule has been twice considered in Canadian Courts - once supported and once repudiated. In the Irwin case, <sup>(243)</sup> a decision of the Exchequer Court, the Court held that when a statute appears on the face of it to be duly passed by a competent legislature, the Court must assume that all things have been rightly done and cannot entertain any argument that there is a defect in procedure. In Gallant vs. The King, <sup>(244)</sup> a decision of the Supreme Court of Prince Edward Island, the Court held an Act invalid and had no regard to the enrolment principle at all, finding that the Act contravened Sec. 55 and 90 of the B.N.A. Act and did so on the basis of evidence arising from the Gazette. There is consequently no clear indication whether the traditional English rule applies in Canada. One legal scholar suggests that

"the most advantageous position in Canada might be to rely on the enrolled bill rule except in those situations where the courts are implicitly instructed to intervene to safeguard interests that are protected by special official procedures."<sup>(245)</sup>

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(243) 1926 Ex. C.R. 127 (at 129).

(244) (1949) 2 D.L.R. 425.

(245) K. SWINTON, Challenging the Validity of An Act of Parliament: The Effect of Enrolment and Parliamentary Privilege, Vol. 14 Osgoode Hall L.J. 345 at 369.

Regrettably this suggestion is so barren of particularity that it offers no solution which is determinable within its context. It is impossible to grasp the kind of situations which the commentator has in mind.

It is perhaps understandable that the enrolled rule has had little significance in Canada. We say this for the reason that unlike the situation in England which has a unitary system of government, our Courts together with the Judicial Committee of the Privy Council (until 1949) have been judicially reviewing federal and provincial enactments since the Canadian confederation was established under the B.N.A. Act. Even Dicey would agree that this review is allowable in a federal system since here the law and not parliament is supreme. (246) The Courts therefore have a duty to ensure that, under a separation of powers, a legislature is staying within its assigned jurisdiction. (247) With this precedent, it would be perhaps too much to ask the Courts in one case to stop their inquiry upon finding an Act was duly passed by a legislative body and in the next case to proceed as if the rule didn't exist. It must be acknowledged that judicial review of legislation to determine if it conforms to the separation of powers is not quite the same

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(246) A.V. DICEY, op. cit note 220 at P 175.

(247) For a historical analysis of judicial review in Canada, one can refer to E.L. McWhinney, Judicial Review in the English Speaking World, 3rd Ed. U. of Tor. Press 1965; B.L. Strayer, Judicial Review of Legislation in Canada U. of Tor. Press (1968).

thing as reviewing one piece of legislation in relation to another enacted by the same legislative body - such as occurs when the Canadian Bill of Rights is considered in relation to another Act of Parliament. However, one wonders whether the distinction is one of degree and not of kind.

## II. Can Parliament bind its successors?

We have considered the proposition that in the United Kingdom an Act of Parliament cannot be challenged before the Courts - and how this has been questioned by English legal scholars. We have also shown that in Canada the Courts have exercised a power of review in considering whether a legislative enactment is ultra vires - so that, in fact, our practice is significantly different. We now consider the related proposition, as it is understood in Great Britain, that the legislative authority of Parliament cannot be limited by the legislative enactments of its predecessors.

Wade supports this Diceyan theory with three cases which themselves have sparked considerable controversy amongst English legal commentators. Two of the cases relied on by Wade, namely Vauxhall Estates Ltd. vs Liverpool Corporation (248) and Ellen Street Estates Ltd. vs. Minister of Health (249) arise out of a similar fact situation. Sec. 7(1) of the Acquisition of Land Act, 1919,

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(248) 1932 1 K.B. 733.

(249) 1934 1 K.B. 590.

provided that acquisition of land would be subject only to that Act and any inconsistencies in later enactments would be void. Sec. 46(1) of the Housing Act, 1925, set forth a basis for compensation which was in conflict with the earlier Act. In both cases, the Courts held that the later Act took precedence over the earlier one where there was inconsistency.

In the latter case Maugham said:

The Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the Legislature. (250)

The third case which Wade urges is one which has its origins in Canada and was dealt with by the Judicial Committee on Appeal, namely, British Coal Corporation vs. The King. (251) In 1933 the Canadian Parliament, by an amendment to the Criminal Code, abolished appeals in criminal cases to any court in the United Kingdom. The appellant sought to appeal its conviction (which had been affirmed by the Quebec Court of Appeal) to the Judicial Committee. It argued that Sec. 4 of the Statute of Westminster (which precluded any Act of the British Parliament from having effect in a Dominion

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(250) Id. at 597.

(251) 1935 A.C. 526.

unless a Dominion requested and consented to it) did not limit the power of the British Parliament since it could repeal that Act. The implication was, of course, that the Canadian Parliament could not therefore abolish criminal appeals to the Judicial Committee since this was still a power retained by the United Kingdom Parliament. The Judicial Committee rejected this contention but in doing so Viscount Sankey made a statement in his judgment which has confounded legal scholars in its ambivalence. He said:

It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired: indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard s. 4 of the Statute. But that is theory and has no relation to realities. (252)

Wade cites this passage as an example of the Court's support of the doctrine of parliamentary sovereignty. (253) Other commentators argue that the ultimate decision of the Court turned on political considerations which demonstrates that the sovereignty of Parliament has very real limitations (254) one of which is political expediency.

D. Parliamentary Sovereignty in the Commonwealth - a significant difference:

I. Dicey's View:

We turn now to consider how the principle of

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(252) Id. at P 520.

(253) DICEY (Wade) Op.cit note 220 at 1-111.

(254) JENNINGS Op.cit note 231 at P 152.

parliamentary sovereignty has fared in the Commonwealth. From the very outset, aside from any court treatment of the subject in the Commonwealth, we have the acknowledgment from none other than Dicey himself, in discussing parliamentary sovereignty and federalism, that it is the constitution which is supreme and not the legislative body.

"A federal state derives its existence from the constitution, just as a corporation derives its existency from the grant by which it is created. Hence every power, executive, legislative or judicial, whether it belong to the nation or in the individual states, is subordinate to and controlled by the constitution...the constitution constitutes the "Supreme law of the Land"." (255)

In making the above statement he was thinking of the American federal system but he goes on later to say:

"But no one can study the provisions of the B.N.A. Act 1967 without seeing that its authors had the American constitution constantly before their eyes, and that if Canada were an independent country it would be a confederacy governed under a constitution very similar to that of the United States. The constitution is the law of the land: it cannot be changed (except within narrow limits allowed by the B.N.A. Act) either by the Dominion Parliament or by the Provincial Parliament; it can be altered only by the sovereign power of the British Parliament. Nor does this arise from the Canadian Dominion being a dependency. New Zealand

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(255) DICEY note 220 at P 144.

is, like Canada, a Colony, but the New Zealand Parliament can with the assent of the Crown do what the Canadian Parliament cannot do - change the colonial constitution. Throughout the Dominion, therefore, the constitution is the incontestable law of the land". (256)

He concludes:

"In Canada, as in the United States, the Courts inevitably become the interpreter of the constitution." (257)

It seems clear that just as Dicey argues in support of parliamentary sovereignty in Britain he just as strongly urges that in a federal system (unlike in the unitary system in England) it is the law as interpreted under the constitution that is supreme. Where does this leave his principle of parliamentary sovereignty? It might be difficult for Diceyan followers to accept the proposition that, on the basis of Dicey's own postulate, the doctrine of parliamentary sovereignty might well be superfluous to the Canadian experience - neither a hindrance nor a help in considering the binding effect of manner and form legislation passed by the Parliament of Canada - as in the Bill of Rights.

## II. Three Important Cases.

However, we do not have to rely on Dicey to put limits on the doctrine he espoused, for the Courts have

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(256) Id. at P 166.

(257) Id. at P 168.

had occasion, in dealing with three situations arising in the Commonwealth, to give us some new insight into the question. Two of these decisions emanate from the Judicial Committee, one in 1932 and the other in 1965, namely Attorney General for New South Wales vs. Trethowan (258) and the Bribery Commissioner vs. Ranasinghe (259) and the third, Harris vs. The Minister of the Interior (260) is a decision of the Appeal Court of South Africa rendered in 1952. It is important to note that all three cases considered whether the Parliaments of New South Wales, Ceylon and South Africa, respectively, were obliged to follow the manner and form requirements set forth in previous enactments before amending legislation could be enacted in each instance. In all three cases the Courts held that such manner and form provisions contained in previous statutes were mandatory - they must be followed, whether these manner and form provisions were entrenched in a constitutional statute or in a simple statute.

1. The Trethowan case.

In the Trethowan case we find that legislature of New South Wales had provided by ordinary statute that the second chamber could not be abolished except by

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(258) 1932 A.C. 526.

(259) 1965 A.C. 172.

(260) 1952 (2) S.A.L.R. (A.D.) 428.

approval of the voters at a referendum and that such requirement could not be repealed unless by similar approval. In 1930 the legislature passed two Bills, one repealing the requirement and the other abolishing the Legislative Council. The Plaintiff sought and obtained from the High Court of Australia (261) an injunction restraining the government from presenting the Bills for royal assent and this decision was affirmed by the Judicial Committee. Both courts, it should be noted, had regard to Sec. 5 of the Colonial Laws Validity Act which stated that a colonial legislature had the power to amend its constitution "provided that such laws

have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law, for the time being in force in the said colony". (262)

The Judicial Committee affirmed that the Legislature had power to pass the Bills but they could not be lawfully presented for royal assent without having first received the approval of the electors in the manner and form prescribed in the previous enactment.

## 2. The Harris case.

We turn now to the Harris case, for it is the next decision taken in chronological order. The South

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(261) See W. FRIEDMANN, Trethowan's case, Parliamentary Sovereignty, and the Limits of Legal Change, 1950, 24 A.L.J. 103.

(262) Trethowan case supra note 258 at P 535.

Africa Act, 1909, provided that the franchise qualifications (which were minimal and racially inclusive) of the former Cape colony could be changed by the new Union only by two thirds vote of all members of both Houses of Parliament sitting "together". Before this date, the British Parliament had repealed the Colonial Laws Validity Act and in the case of South Africa removed all restraints regarding repeal or amendment to its constitutions. In 1951 the House of Assembly and Senate, sitting "separately", passed the Separate Representative of Voters Act providing for the separate representation of European and Non-European voters (the beginning of the apartheid policy).<sup>(263)</sup> The legislation was challenged before the Courts: the Court of Appeal of South Africa held that the legislation was invalid since Parliament had not satisfied the procedural requirements of the South Africa Act (above mentioned). Centlivres C.J. with the concurrence of all members of the Court held that in declaring the Act invalid it was not questioning the content of the legislation, but applying the law as it stood. It is of interest to note that he did not denigrate the claim of sovereignty of the South African Parliament, stating that Parliament was free to make amendments to its constitution but this did not mean that a Dominion Parliament must act only in the same manner and with the same consequences of the United Kingdom

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(263) See: E.L. McWHINNEY, The Union Parliament, The Supreme Court and the "Entrenched Clauses" of the South Africa Act, 30 Can. Bar Rev. 692; H.R. Gray, The Sovereignty of Parliament Today (1953) 10 U of T.L.J. 54.

Parliament. He specifically denied that Parliament, even though sovereign, could adopt any procedure it saw fit when a form of procedure was already prescribed in what he referred to as the entrenched sections. The Court had full power to inquire whether such sections had been complied with to determine whether an Act was validly passed. His conclusion therefore was that Parliament was not free to disregard a previously enacted manner and form requirement - such power did not inhere in sovereignty. However, once Parliament were to follow the prescribed procedure and enact an amendment it was not for the Court to question the reasonableness or appropriateness of the content of the amendment. Thus the Court was not controlling or dictating to Parliament - but merely endorsing the applicable law as enacted by parliament itself.

It may be obvious that the Trethowan case and Harris case have given rise to considerable controversy amongst legal scholars. Wade joined issue with such scholars as Jennings, Cowen, Friedmann and Marshall in an article which treated exclusively of these two cases. <sup>(264)</sup> He submits that the Trethowan case turned on the position of a subordinate legislature which was not itself sovereign and thus was not bound by its previous enactment as is the British Parliament. This was because it was

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(264) H.W.R. WADE, The Basis of Legal Sovereignty, 1955  
Camb. L.J. 172.

established by a Statute and therefore had to operate under its terms as well as the Colonial Laws Validity Act which required it to conform to a manner and form provision. He holds the view that the case has no effect on the doctrine of British parliamentary sovereignty. In respect of the Harris decision, he suggests that the Parliament of South Africa was sovereign because it had by the Status of Union Act 1934 enacted that no Act of the Union Kingdom could extend to South Africa. Thus there was in office a government established by what was tantamount to a revolution - admittedly carried out with harmony - but it is there just the same. Once this occurred the Parliament of South Africa was sovereign and it could endorse any rules or law it liked. If the Courts in South Africa held that the doctrine of parliamentary supremacy was not binding on it, they would be right. It is up to the new country to enact new laws to take up the vacuum. (265) This the Court was doing in the Harris case.

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(265) Id. at 191-3 - Wade prefers this explanation rather than the argument that the British Parliament abdicated a part of its sovereignty (over the Union of South Africa) thus making its Parliament as sovereign as the British Parliament. He does not appear to be impressed with Dicey's explanation that "sovereignty implies the power of abdication" and that "freedom once conferred cannot be revoked". He prefers to accentuate the political reality as creating a new independent nation which is free to do what it wishes - for it has acquired its own sovereignty without reliance on another government.

Wade's critics are no less restrained in their support of the two decisions. Sir Ivor Jennings finds that the Trethowan case clearly illustrates that a parliament which is legally sovereign may impose legal restrictions on itself without impairing its sovereignty because power to change the law must include power to change the law affecting itself. (266) Friedmann says it is irrelevant whether a legislature is stated to be sovereign or not. (267) The Colonial Laws Validity Act sets forth a position which applies to all legislative bodies - any change in the legislative process itself must be effected in the "manner and form" prescribed in the existing law. Sir Owen Dixon, a member of the Australian Court who sat on the Trethowan case, in commenting on the rule that manner and form requirements must be met said:

"But whatever use may be made of the rule thus established, the rule itself will retain its significance as a modern reconciliation of the conception of the supremacy of the law and the supremacy of Parliament. For it is a demarcation of the limits of the operation of the two principles. The law existing for the time being is supreme when it prescribes the conditions which must be fulfilled to make a new law. But on the question what may be done by a law so made, Parliament is supreme over the law". (268)

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(266) JENNINGS, Op. cit., note 220 at PP 153-4.

(267) FRIEDMANN, Loc. cit., note 261 at P 104.

(268) Owen DIXON, The Law and the Constitution 1935 Law Q.R. 604.

Professor Cowan, commenting on the Trethowan case and the entrenched clauses of the South Africa Act, considered in the Harris case, supports the view when he said that it is implicit that when it is established what the law is which for the time being governs the manner and form of making laws, the manner and form must be followed if the constituent elements of Parliament are to pass laws. This principle he states to be applicable to all law-making bodies sovereign and non-sovereign. (269)

3. The Ranasinghe case.

The third case we refer to appears to have resolved the controversy in large measure. In the Ranasinghe case (270) the Parliament of Ceylon in 1954, by the Bribery Amendment Act, set up Bribery Tribunals to deal with bribery charges against any citizen. The respondent was convicted before such a Tribunal. He appealed on the ground that, since the members of the Tribunal were judicial officers, Parliament was exercising rights to set up courts under the Ceylon Constitution and hence the appointment of such officers other than by the Judicial Service Commission as required by the constitution was an amendment to the constitution and as an amendment to the constitution it did not have attached to it the certificate of the Speaker that

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(269) D.V. COWAN, Parliamentary Sovereignty and the Entrenched Sections of the South Africa Act, Cape Town: Juta, 1951, 16.

See also D.V. COWAN, Legislature and the Judiciary. 1952 15 M.L.R. 282; 1953 16 M.L.R. 273.

(270) Supra Note 259.

the amendment had passed the House with not less than two thirds vote of all members of the House, as required by the Constitution Act of Ceylon.

The Supreme Court of Ceylon upheld this contention and its decision was affirmed by the Judicial Committee of the Privy Council. The report of the decision of the Judicial Committee contains, in some detail, the arguments placed before the Committee by counsel for the parties. It is interesting to note that counsel for the appellant (the government of Ceylon) urged all the points which a Dicey-Wade adherent could possibly have submitted. (271) In that sense the decision of the Judicial Committee constitutes a clear victory for scholars like Jennings, Friedmann, Cowan, Dixon and Marshall who over a long period found fault with the Dicey thesis on the basis that it is too absolute and purports to be conclusive on the subject.

There are a number of statements made by Lord Pearce who wrote the decision of the committee which would deserve to be re-produced here. However, one of his concluding paragraphs will adequately reflect the position of the Judicial Committee.

No question of sovereignty arises. A Parliament does not cease to be sovereign whenever its component members fail to produce among themselves a requisite majority, e.g., when in the case of ordinary legislation the voting is evenly

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(271) Id. 174-175.

divided or when in the case of legislation to amend the Constitution there is only a bare majority if the Constitution requires something more. The minority are entitled under the Constitution of Ceylon to have no amendment of it which is not passed by a two-thirds majority. The limitation thus imposed on some lesser majority of members does not limit the sovereign powers of Parliament itself which can always, whenever it chooses, pass the amendment with the requisite majority. (272)

Conclusion:

There is, as has been seen, an impressive support for the proposition that a legislative body can bind itself as to the manner and form of its future legislation. Applying this proposition to the Canadian Bill of Rights, we are in a position to conclude that Parliament has bound itself to enact laws inconsistent with the Bill of Rights only in a specified manner and form - which is the inclusion of an express declaration that the statute "shall operate notwithstanding the Canadian Bill of Rights". If a later inconsistent Statute does not contain the 'non obstante' clause it cannot operate. For all practical purposes the Bill

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(272) Bribery vs. Ranasinghe, Supra note 259 at P200.

still is as good as being entrenched in the constitution - as that term is popularly understood.

This does not mean to say that Parliament cannot amend the Bill of Rights itself and (say) change or do away with the 'non obstante' clause. It could do this even if the Bill were entrenched in our written constitution - provided it went through the manner and form procedural restraints which the written constitution might place upon it and which would admittedly be more demanding than merely a simple majority of votes in Parliament. However, for so long as the Bill is in its present form and for so long as there is no exemption (non obstante) clause in another inconsistent federal enactment the provisions of the Bill should prevail. Tarnapolsky puts the point well when he writes:

Thus, the mere fact that the Canadian Bill of Rights can be amended in the ordinary manner by the Canadian Parliament, in no way detracts from its overriding power while it is in existence. It is true that Parliament can repeal the Canadian Bill of Rights tomorrow by simple majority. However, until it does so, it has now provided a "manner and form" requirement under which no law of Canada can operate if "abrogates, infringes or abridges" those civil liberties enumerated in the Bill of Rights, and does not have the non-obstante clause required by the opening paragraph of s. 2. Parliament seems to have recognized this fact when enacting the Public Order (Temporary Measures) Act. 1970, because

s. 12 of this Act explicitly included the non-obstante clause. (273)

It has been argued that the only way to ensure that the Bill is given proper recognition and at the same time be binding on Parliament, and hence less of a burden for our highest Court, is to entrench it in the written constitution. (274) Tarnopolsky states:

"The matter of entrenchment has been confused as being necessarily bound up with the doctrine of Parliamentary sovereignty. It has to be emphasized that entrenchment is nothing more nor less than a matter of procedure. Of itself it does not place substantive limitations on the power of parliament, but rather procedural limitations." (275)

Perhaps it is not too late to define what is meant by the word "entrench" when speaking of legislation. It means simply that an enactment is by legislation made difficult to amend - more difficult than by majority vote of Parliament required for an ordinary enactment. That is to say the "manner and forms" to which Parliament must submit before or during any proposed amendment to the enactment is more onerous. We have seen some examples in the Commonwealth cases such as the requirements of a referendum of the electors, or two thirds vote of all members

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(273) W.S. TARNOPOLSKY, Op. cit., note 35 at P 143.

(274) Emmett E. HALL, Freedom Under the Law, (1975) 19 Gazette Law Soc of U.C. 105.

(275) W.S. TARNOPOLSKY, The Canadian Bill of Rights from Diefenbaker to Drybones, Loc. cit., note 125 P 452.

of both Houses, sitting separately or perhaps together. If these obstacles are overcome, Parliament can enact whatever it chooses with impunity (as far as the judicial process is concerned). There can be little doubt that entrenchment of the Bill of Rights in the written constitution of Canada (the B.N.A. Act) would be the best way to ensure that it is not easily changed. But does that fact make the bill any less effective as long as it stands as it is in the statute books? The answer must be that it does not - and the Supreme Court of Canada, by every implied indicator, has said so.

Leigh supports Tarnopolsky's view that we are now entering the era of formal limitations to the supremacy of Parliament, which is in the nature of a manner and form restraint only. He writes:

"...Section 2 of the Canadian Bill of Rights does provide machinery by which Parliament can declare that a statute overrides the Bill of Rights. The limitations to Parliament's competence is thus "formal" in character. It would appear that the Supreme Court has modified its theory of Parliamentary Supremacy, though within bounds no wider than those which obtain in some Commonwealth jurisdictions, and, conceivably, the United Kingdom. And yet it is surprising that no member of the Court explicitly refers to a debate which has now endured for twenty years." (276)

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(276) L.H. LEIGH, The Indian Act, the Supremacy of Parliament, and the Equal Protection of the Laws. (1970) 16 McGill L.J. P. 393.

It is respectfully submitted that if more legal practitioners and judges were aware of the irresistible conclusions which we have come to in this part of this work, the Canadian Bill of Rights would be given greater pre-eminence in our legal system - as seems to have been intended by the Canadian Parliament - and not be considered as cause for a judicial headache.

CHAPTER IV

IN SEARCH OF A FORMULA

OF INTERPRETATION.

CHAPTER IV

In Search of a Formula of Interpretation

A. The Need of a Formula:

The difficulty with the Supreme Court's treatment of the Canadian Rights is that no direction has been given in terms that are decipherable by those with legal training let alone members of the public. The decisions of the Court are made on an ad hoc basis in which each of the Judges expresses his own views on the meaning and interpretation of the Bill.

It has been suggested that the Court has purposely decided to proceed on a case to case basis thus avoiding general principles which might later have to be explained away. This is a strategy that the common law has developed and it has an honourable history in common law jurisdiction: at some later stage it will become practical to make the leap from the particular to general. (277)

It has been argued, as well, that while the performance of the Court does not suggest dramatic applications of the Bill of Rights such approach is understandable in a broader context of a legal tradition of Parliamentary Supremacy extending over hundreds of years and a statutory

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(277) R.N. McLAUGHLIN, The Att. Gen. of Can. v. Lavell and Equality Before the Law, Loc. cit., note 171 at P 286.

Bill of Rights which has had such a short existence. (278)

It certainly must be recognized that the Supreme Court is venturing into new areas with a Bill of Rights which leaves something to be desired in its precision. Tarnopolsky makes the point when he states that the U.S. Supreme Court took twelve years after the adoption of the American Bill of Rights to decide that it had power of judicial review over legislation. It was not until after the Civil War and more particularly after World War II that that Court began to protect civil liberties through the medium of the Bill of Rights and the Fourteenth Amendment. (279) This does not mean to suggest, however, that criticism should not be constructively advanced when reviewing the decisions of the Court.

It has to be recognized at the outset that it is necessary for the law to make distinctions between individuals or between groups of individuals and to define different rights, duties and liabilities to different persons. Statutes are replete with laws which accentuate such distinctions - laws which deal with infants, the aged, the insane, motorists, pedestrians, tax assessments and endless other subjects - all designed to put order in our society by establishing both rights and disabilities. Do these laws violate the right of equality before the law -

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(278) E. RATUSHNEY, Defence Counsel and the Canadian Bill of Rights, (1973) 23 Crim. R. (N.S.) 265 at 272.

(279) See TARNOPOLSKY, Op. cit., note 35 at P 151.

more particularly Sec. 1(b) of the Bill?

The question could perhaps be readily answered if inequality before the law were equated with discrimination by reason of race, national origin, colour, religion or sex - and this only. Where the distinctions were not related to any of these heads then there would not be a breach of the right of equality. It will be remembered, however, that Laskin J. in his majority decision in the Curr case (280) held that this right is not limited to situations where there has been discrimination on the basis of one of the enumerated criteria in the Bill. We must ask, however, if the Court had limited itself to the interpretation that there could be inequality only where there was discrimination by reason of any one of the criteria enumerated in this Bill whether it would declare a federally impugned section inoperative? The answer was yes in the Drybones case where an Indian was found to have been discriminated against by reason of race where he was more harshly treated in comparison to his fellow Canadians. The answer was no in the Lavell case where there was discrimination on the basis of sex - and as well no in the Canard case where there was discrimination on the basis of race.

The question arises then - what is the test which the Court applies to make the decisions which it has?

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(280) Supra note 140 at P 493.

The answer is that no test as such has been adopted by the Court. As indicated in the opening paragraph of this Chapter, the members of the Court have gone different directions and each has, by and large, given his own reasons for his decision predicated on somewhat narrow grounds with no over-all principle being recognized or applied.

Distinctions between persons drawn in federal enactments are considered invalid in one instance and valid in another. Is there no way of determining when and on what basis distinctions may be valid or invalid?

B. The Reasonable Classification Approach:

Legal scholars have, since the enactment of the Bill of Rights, been asking this question - looking for some yardstick by which legislation should be measured to determine, where distinctions are drawn, whether there has been a denial of equality before the Court. In reviewing Canadian legal writing we find, as early as 1962, the suggestion that the Supreme Court should have close regard to the test of reasonable classification formulated by the American Courts to separate valid and invalid discrimination under the 'Equal Protection' clause. (281)

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(281) This is the fourteenth Amendment to the American Bill of Rights which reads as follows:

"...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction on the equal protection of the laws..."

Many authors since that date have supported the need for the use of the test but the vast majority who have done so have given their support to the test in a somewhat superficial way. (282) However, four legal commentators have examined the proposal closely and having done so are enthusiastic about its efficacy. (283)

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(282) Foremost amongst these are:

- 1-G.G. CIONI: Bill of Rights - failure of courts to apply substantive due process (1962-64).  
2-3 Alberta L.R. 147.
- 2-John A. MacDONALD: The Canadian Bill of Rights: Canadian Indians and the Courts  
(1967-68) 10 Crim. L.Q. 305.
- 3-K. LYSYK: Canadian Bill of Rights - Irreconcilable conflict with another federal enactment. (1968) 46 Can. Bar Rev. at 141.
- 4-W.F. BOWKER: The Canadian Bill of Rights, Sec. 94(b) of the Indian Act - Irreconcilable Conflict - Equality Before the Law - Drybones - (1970) 8 Alberta L.R. 407.
- 5-W.S. TARNOPOLSKY: Op. cit note 35 at 161.

(283) The four more complete analyses are found in:

- J.G. SINCLAIR: The Queen vs. Drybones: The Supreme Court of Canada and the Canadian Bill of Rights. (1970) 8 O.H.L.J. 599 at 616.
- P. CAVALLUZZO: Judicial Review and the Bill of Rights - Drybones and its Aftermath (1971) 9 O.H.L.J. 511 at 544.
- J.L. KELLY: The Bill of Rights: The Indian Act and Equality Before the Law: The need for, and Development of, a Reasonableness Test - (1974) 2 Queen's L.J. 151.
- R.M. M'GONIGLE: The Bill of Rights and the Indian Act. Either? Or? (1977) 25 Alberta L.R. 292.

Our purpose at this stage will be to examine the test so frequently referred to as the "reasonableness" test but often called the "valid legislative purpose" test, or the "reasonable classification approach." Thereafter we shall consider its merit having in mind the comments of both its supporters and detractors.

I. The origin of the test.

As has been observed the provision of equality before the law and protection of the law in the Canadian Bill is essentially similar to the Fourteenth Amendment of the U.S. Constitution. There can be little doubt that the draftsmen of the Canadian Bill borrowed a number of phrases from the U.S. Constitution. In considering the Fourteenth Amendment, the U.S. Supreme Court has held it does not invalidate special laws that:

"may press with more or less weight upon one than upon another so long as they are designed to impose unequal or unnecessary restrictions upon any one, but to promote, with as little inconvenience as possible, the general good." (284)

To determine where laws violate the right to equal protection of the law the "reasonable classification" test is applied. It requires that laws which distinguish one group from another be based upon classifications that

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(284) Barbier vs. Connolly (1885) 113 U.S. 27 at 31. See also Loving et ux vs Virginia (1966) 388 U.S. 1.

are reasonable and that a reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law, the purpose not being discriminatory per se. (285)

This suggests that while the ideal of equality would demand the same laws for all persons and their applications equally to everyone the attainment of this end would be impossible. It recognizes that things which are different in fact cannot be made the same in law. (286) Discrimination is inevitable but this does not mean to say, for that reason alone, it is acceptable. It is only acceptable, as a matter of law, if the classification upon which it is based is itself reasonable. Unless some legitimate legislative purpose can be discerned the enactment will be deemed one which entails arbitrary discrimination and will be struck down.

## II. The application of the test.

How is this test applied in practice? There are essentially three distinct steps to be taken:

1. The first step, is for the Court to determine the legislative purpose of the impugned section or sections.

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(285) J. Tussman and J. ten Broek, The Equal Protection of the Laws (1949) 37 3 Calif. L. Rev. 341. This article gives an excellent review of the doctrine with close references to American decisions.

(286) Id. at P 344.

This can be done by reading the Act as a whole using at the same time the three rules of Statutory Construction with particular emphasis on the third. (287) In final analysis, the Court will arrive at this conclusion upon a thorough reading of the statutes and by a process of inferential reasoning. The process is not new to the courts. It has been held that it is the duty of the Courts "to ascertain the real intention of the legislature by carefully regarding the whole scope of the statute to be construed". (288) This assessment should be objective in nature focussing on the terms of the statute, its operation and its context, both legal and practical in which it was passed. (289)

One legal commentator has suggested that to properly carry out this enquiry the Courts must liberalize their Rules regarding admissibility to allow in background information available to its legislators at the time of the enactment of the impugned legislation and as well

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(287) No Court has to be reminded of the Plain Meaning Rule (words are to be given their ordinary (dictionary) meaning unless otherwise defined) or the Golden Rule by which clauses should not be read in isolation but in the whole context. The third rule, known as the Mischief Rule has particular relevance here for by this rule the Court looks to determine what "misbelief" the legislature wished to overcome by its legislation. See Maxwell On Interpretation of Statutes, London, Sweet and Maxwell (1969) P 28-45.

(288) Morrison vs. M.N.R. 1928 Ex. C.R. 75, Audette J. at P 77.

(289) Developments in the Law, Equal Protection 1969 82 Harv. L.R. 1065 at 1091. (name of author not indicated).

the record of parliamentary debates and reports of official committees. (290) It is submitted that this is not necessary to assist the Courts in determining statutory purpose and only clouds the issue. The records of the Supreme Court of Canada (and of the lower courts) demonstrate that it can determine the legislative purpose with the use of the tools presently available to it.

2. The second step is the evaluation by the Court of the legitimacy of the statutory purpose to determine whether to goal the legislature has set itself is a reasonable one. Here the Court must consider the legislative history of the enactment coupled with an analysis of the social and historical facts which underlie the legislative purpose of the statutes with a view to deciding whether that legislative purpose is valid on the basis of its reasonableness. It seems clear that the Court should not embark upon an enquiry as to whether there are alternative methods which the legislature could have adopted to effect its purpose. To do that would be to encroach on the legislative function. The Court is merely looking at the subject legislation to see if it infringes equality before the law.

In Canada a sovereign Parliament placed upon the Court, by the enactment of a Bill of Rights, the duty to

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(290) P. CAVALLUZO, Loc. cit., note 283 at 548. He urges the implementation of the approach advanced by Hart and Sacks, The Legal Process (tenth ed. 1958) PP 1243-1286. — In step one, we are concerned only with determining the legislative purpose. In step two, the Court is concerned with the validity of that purpose and it is only at this point that the Court should have available to it all relevant information to assist it in making such assessment.

make such an assessment. As long as the Court refrains from weighing alternative theories the doctrine of parliamentary sovereignty is not violated. (291) Canadian Courts have been called upon to do this on numerous occasions whether considering whether legislation was ultra vires. Thus it is not a new phenomenon and not one which should startle an informed student of constitutional law. It is all very well for the Courts to say that they are not concerned with the policy in legislation but only its constitutional validity (292) when their approach on occasion has defied such a pretense. (293) This is not to say that judicial review made pursuant to the Bill of Rights is similar in all respects to constitutional judicial review carried out by our Courts since confederation but the differences are not substantial.

The question if properly asked: how will the Courts assess or evaluate the social facts or circumstances said to underlie an enactment?

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(291) Ian F. KELLY, (Loc. cit., 283 at P 180) properly puts the proposition this way: "Thus, as long as the Courts refrain from weighing the merits of alternative policies, the doctrine of parliamentary sovereignty is not violated. Instead it is explicitly affirmed."

(292) See Bora LASKIN, Canadian Constitutional Law, Carswell Company, Toronto, 1966 (3rd Ed.) "Colourable Legislation" 189-191.

(293) See: Fort Frances Pulp and Paper Co. Ltd. vs. Manitoba Free Press Co. 1923 A.C. 695. Co-Operative Committee on Japanese Canadians vs. A.G. Canada 1947 A.C. 87. In Lower Mainland Dairy Products Board et al vs. Turner's Dairy Ltd. et al 1941 D.L.R. 209. A.G. Alberta vs. A.G. Canada et al 1939 A.C. 117.

It it defers to the legislative judgment and assumes validity of purpose then of course it need go no further with the consideration of step two. If it is not satisfied on this point there is no reason why it cannot allow evidence to be led of whatever nature will assist it. At the present time, the Canadian Court does not appear to admit this information as relevant but proceeds to make assumptions on the facts which are to apply. (294) Evidence would have to be admitted if necessary to assist the Court to make this evaluation. It is not the function of counsel to give evidence nor should counsel be encouraged to make submissions on facts not clearly before the Court. An American court allowed such submissions on one occasion when it allowed a brief to be presented which included not only submissions on law but over 100 pages of facts obtained by independent enquiry. This is the famous "Brandeis Brief"

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(294) In Drybones one commentator argues that the Court should have considered that the legislation was beneficial for the Indians in that it was intended to protect them against the evil of liquor. See W.F. Bowker. The Can. Bill of Rights, Loc. cit. Note 282 at 415. In reply to that contention another legal commentator quite properly states that the Court had no facts before it on which to make that assessment. See HERBERT MARX: Federal Liquor Legislation is Hardly Justifiable as Protective of Indians - A Reply to Prof. Bowker (1972-73) 37 Sask. L.R. 101.

which won such favour with the Court and which had tremendous impact on equal rights cases in the United States.<sup>(295)</sup> It is submitted that if the reasonable test is to be used, the proper and more acceptable method would be for the trial judge to admit by way of viva voce evidence, the social, cultural, biological or other aspects which are germane and of assistance to the court to make the evaluation contemplated in this step of the test.

3. The third step involves an evaluation of the means of effecting the legislation, assuming that the Court has found that its purpose is valid, to determine whether the social goal gained by its implementation is greater than the social value lost through an infringement of the right to equality. To put it another way: does the purpose of the statute rationally justify infringing a civil liberty?

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(295) This Brief has been referred to many times by Canadian commentators but seldom with a citation. The Brief was presented by Mr. Louis D. Brandeis (later Mr. Justice Brandeis) and referred to in the case of Muller vs. The State of Oregon, (1907) 208 U.S. 412. He argued that Oregon legislation limiting working hours of workmen was not unconstitutional since it had as its object or purpose public health safety and welfare. The Court, which found in his favour, took judicial notice of the facts set forth in his brief - quite an unusual (though significant) departure from usual court procedure.

This involves the determination of whether the persons or groups affected by the legislation in their loss of equality fall into a reasonable classification.- hence the origin of the name of the test. It becomes the most difficult step in the Court's application of the test and it is thus necessary to deal with this aspect at greater length.

For an excellent analysis of this aspect of the American approach we refer again to Tussman & ten Broek. They state that the contrast here is between "general" legislation which applies without qualification to "all persons" and "special" legislation which applies to a limited class of persons. We thus arrive at the point at which the demand for equality confronts the right to classify for it is the classification which determines the range of persons affected by the special burden or benefit of a law which does not apply to "all persons". (296) There is an obvious paradox: the equal protection of the law is a "Pledge of the Protection of Equal Laws" but since laws may classify "the very idea of classification is that of inequality". The Courts, the authors state, have neither abandoned the demand for equality nor denied the legislative right to classify - they have taken a middle course and attempted to resolve the contradictory demands by a doctrine of reasonable classification. (297)

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(296) TUSSMAN and ten BROEK, Loc. cit. Note 285 at P 344.

(297) Id. at P 344.

To define a class is to designate a quality, a characteristic or trait or relation - the possession of which, by an individual, determines his membership within the class. A legislature "classifies" when it enacts legislation, for instance, to apply to all aliens ineligible for citizenship or all persons between certain ages - and does so allegedly to eliminate some mischief or to achieve some positive public goal. Tussman and ten Broek give an indication of the problem of the Courts arising out of the designation of the class. Assuming the legislative purpose is held valid there will be little difficulty when the class defined coincides with the trait and the mischief intended to be repressed (or the good to be achieved). A problem occurs when the class is "under-inclusive" leaving those affected to claim that others who have the "same trait" and equally productive of the mischief are not reached by the statute and thus there is a failure of equality. The same type of problem occurs where the class is over-inclusive, when persons who may have the "same traits" are not productive of the mischief (or good) aimed at but are nevertheless covered in the legislation. Here again, there arises the allegation that right of equality has been denied. (298)

The American courts have had to wrestle with these problems and it demonstrates to what extent the Fourteenth

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(298) See: Legislative Purpose, Rationality and Equal Protection (1972) 82 Yale L.J. 123 (name of author not indicated).

See also: Alan D. GOLD. Equality Before the Law, 20 C.R.N.S. 280; This Canadian legal writer has thoroughly reviewed the many aspects which must be closely considered in designating the class.

Amendment has been resorted to in the United States. Undoubtedly the time will come in Canada when the Canadian Bill of Rights will be utilized in similar fashion - where the leading cases will not only concern the rights of the Canadian Indian or the enumerated heads of discrimination contained in the opening paragraph of Sec. 1 of the Bill.

There are two "types" of classification which should be mentioned to complete this analysis. Reference is made by American commentators that there exists a forbidden or non-permissive classification. This is to be taken to mean there are some rights which legislature cannot impair by any process. Tussman and ten Broek contend that the courts have never really gone that far as a matter of principle. They do, however, find that there exists a "suspect" classification - wherein there is a presumption that there has been a breach of the right of equality where the statute employs certain classifying traits. Infringement of the right of equality arising out of an enactment aimed at a race would seem to fall into this category. The Courts have stated that such enactments are to be subjected to the most rigid scrutiny. This scrutiny is directed both to the legitimacy of the purpose and the designation of the class.

In dealing with legislation which is alleged to be discriminatory, that is to say aimed at a minority group based on prejudice, hostility or antagonism, whether arising out of racial, religious, economic or political biases,

the Court will take the suspect doctrine one step further. It will, in scrutinizing the legislation, search for purity of motive. If an enactment is motivated by any one or a combination of the foregoing characteristics it will be struck down. In such a situation, the onus is on the state to justify its motive in enacting the legislation.

III. The views of the supporters.

The reasonable classification doctrine, as has already been indicated, has found much favour with Canadian legal scholars. They argue that the singling out of an individual or a group of individuals for special treatment must be "justified" rationally and this can only be done in terms of the legitimacy of the legislative purpose. (299) Parliament in its wisdom has made the decision to give the court a greater role to play in the political system by enacting a Bill of Rights. The courts must be prepared to be creative in applying the Bill, the degree of creativity open to the Court being great in light of the general terms in which the Bill is couched. By a yardstick similar to the reasonableness test used in the United States and developed over years of experience the Court has a responsible collaborative role to play with the legislature by offering a system of checks and balances which need not

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(299) J.G. SINCLAIR, Loc cit. Note 283 at P 617.

interfere with the legislative function itself. The Court is limited by certain institutional limits of adjudication but this does not rule out its opportunity (and responsibility) to exercise a creative role by the use of the suggested formula. (300)

It has been further argued that some sort of "reasonableness" test is necessary if Canadian Courts are to give effect to the idealistic and undefined guarantee of equality before the law contained in the Bill of Rights. It is no longer possible or permissible for our judges to engage in purely philosophical dissertations (going in all directions) about the meaning of equality before the law. Since it is now a basic human right guaranteed by Act of Parliament, they must establish some limits as to its meaning in Canadian law. (301) Specifically in treating of the Indian Act the use of the reasonable test would result in decisions which would be offensive to neither the Bill of Rights nor the British North America Act. By attacking the problem in an incremental fashion, chaos would be avoided and orderly, rational development encouraged. The Courts would not be "trenching" upon the Parliamentary function although the Courts would certainly stimulate that body to remedial action in an area of blatant discrimination. (302)

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(300) P. CAVALLUZO, Loc. cit. Note 283 at PP 545, 546.

(301) I.F. KELLY, Loc. cit. Note 283 at P 182.

(302) R.N. M'GONIGLE, Loc. cit. Note 283 at P 312.

Dealing with the Supreme Court's treatment of the Bill of Rights and the Indian Act another commentator writes: (303)

"Rather, it would seem that the only rational interpretation to be given to the clause (Sec. 1(b)) is that offered by the American courts, which is: 'Whether the challenged classification rests on grounds wholly irrelevant to the achievement of a valid state objective'. To restate in light of the particular issue involved, I would suggest that the test might be: 'is the law reasonably justifiable in a liberal democratic state which is committed to a policy of non-discrimination?' "

#### IV. The views of the critics.

But the reasonable test has its critics amongst legal scholars. It has been argued that the Canadian Bill of Rights, by its reference, in the opening paragraph of section 1, to discrimination 'by reason of race, natural origin, colour, religion or sex' has provided an absolute prohibition where such discrimination arises in a federal enactment and that this must therefore oblige the Court to declare such offending legislation (or part thereof) inoperative. (304) This is to say that the question does not revolve around the right of equality before the law at all (Sec. 1(b)) and the Court is wrong in bringing in

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(303) W.J. TARNOPOLSKY, The Canadian Bill of Rights from Diefenbaker to Drybones 1971 17 McGill L.R. 437 at P 457.

(304) J.N. LYON, A Progress Report on the Canadian Bill of Rights (1976) 3 Dal. L.J. 39.

such consideration. Thus there is no basis for considering the validity of the legislative purpose since this would be an irrelevant consideration. In considering this proposition it must be pointed out the majority of the Supreme Court has not taken the view that discrimination along the lines indicated in the opening words of Sec. 1 is an absolute bar to a federal enactment, although Laskin C.J.C. has come closer than any judge of the Supreme Court to that position.

The difficulty with this proposition is that if the majority of the Courts did come to that view then the Indian Act, in so many of its provisions, would be declared inoperative since the Act itself, by its very nature, is deliberately aimed at a group of persons of one race. This is recognized by Professor Lyon and the remedy he suggests is that Parliament should amend the Indian Act to provide for a "non obstante clause". (305) In this way, he submits the Supreme Court could apply its interpretative skills to "realizing some of the fundamental values the Bill of Rights was designed to secure more fully in Canadian Law, unhampered by the Indian Act." (306)

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(305) Id. at P 61. He writes: "On balance, I suggest that both the reform of Indian law and practice and the sound development of the Canadian Bill of Rights would best be served by inserting in the Indian Act a provision stating that it shall operate notwithstanding the Canadian Bill of Rights. Then the spotlight could be directed where it belongs - on the Indian Affairs Branch of the Federal Government rather than the Supreme Court of Canada."

(306) Id. P 57.

Should we be so bold as to question the practicality of this proposal? Admitting that the Indian Act and the people made subject to it pose a special problem in the interpretation of the Bill, there are two difficulties which arise. Is it likely that Parliament would pass such an amendment which would have the effect on the mind of the public of down-grading the Indian race and at the same time down-playing the Bill of Rights? In the view of this writer, Parliament is not likely to take that course, rather to deliberately refrain from doing so. Secondly, are we to conclude that the Supreme Court (at least in the fullness of time) is not innovative enough to resolve the challenge faced by the special features of the Indian Act and come up with an acceptable approach? It is submitted that this proposed solution is too simplistic and defeatist - it is tantamount to throwing out the baby with the bath water. Professor Sanders, who must be acknowledged as an authority on the Indian race, its culture, customs and practices, does not go this far but suggests that the solution can be found in the application of the reasonableness classification test. (307)

Another legal commentator argues that the reasonableness test is based on the utilitarian concept of justice, explained in Benthan's terminology "as the greatest

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(307) D.E. SANDERS, The Bill of Rights and Indian Status (1972) 7 U.B.C.L. Rev. 81 at 95.

happiness of the greatest number" and is alien to democratic political theory. He proposes that the test should be whether the legislation offends the "dignity and worth of the human person". (308)

There is no doubt that the dignity and worth of the human person is an important consideration. It is one of the very reasons why the Bill of Rights was enacted - as disclosed in the preamble. Admittedly it must be uppermost in the mind of the Court when considering the Bill. But to suggest that it is the sole test or measuring stick by itself for the application to a Bill of Rights is grossly naive. Professor Conklin's thesis would seem to suggest that in a democratic state it is never proper to consider the national interest or the public interest and that when this is considered and given paramountcy it must imply that a person is being treated like a thing with no regard for his worth or dignity. Consider legislation, which in the public interest, confers benefits on older persons - such as old age pensioners. Are younger people who do not receive these benefits entitled to redress because they have been treated differently by reason of age and no regard has been had for their worth as human beings? The list of examples could be endless. But it could be said that many of the examples might be, in fact, benign legislation.

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(308) W.E. CONKLIN, The Utilitarian Theory of Equality Before the Law (1976) 8 Ottawa L. Rev. 485.

That statement does not resolve the problem, for benign legislation creates an inequality before the law on the part of those not similarly favoured in receiving the benefits.

One can acknowledge that the concept of the worth of the human person would have an impact on any tribunal where persons were treated as lesser beings on grounds of (say) race, colour, sex or religion. But discrimination arises not only from these sources but can exist, as our Supreme Court has declared, where there is inequality quite unrelated to the enumerated heads in the opening paragraph of Section 1 of the Bill. The ingenuity of the American legal profession has demonstrated how the inequality clause in the Fourteenth Amendment can be resorted to in areas very far removed from that kind of discrimination referred to in the first few lines of Sec. 1 of our Bill. It is only a question of time before Canadian legal practitioners follow suit.

How are our Courts going to decide (for instance) whether a difference in rates of taxation amongst different persons, which creates an inequality of treatment, is or is not demeaning of a person's human worth? How can such a general concept give a basis for any conclusion which has the compelling force of logic. Further, the very moment such a test permits distinctions to be made that very moment one must recognize that all persons cannot be treated similarly all of the time. The basic premise of the reasonable

classification approach is that what is different in fact cannot be made similar in law although an attempt must be made to control distinctions (and hence inequality) on the basis of what is reasonable.

It is submitted that the concept of human worth, though important, cannot alone be the yardstick to measure human rights for it suggests of itself no inherent characteristics by which to assess human conduct in all its variables. It is just too general a notion to be meaningful. The question which it would pose, in the final analysis, is whether any apparent inequality which is alleged to demean human worth is reasonable? Is reasonableness not the measure of the propriety of human conduct - whether in or outside of Courts of Law? Hence, the application of such a test as worth of the human person leads us directly to the door of the reasonable classification approach. It is submitted that between the two tests the latter is far more realistic. It relies on the highest attributes of man - his reason. Surely his reason would embrace many considerations in addition to worth of the human person when considering whether a man's rights are to be respected or violated.

V. Has the Court been following the reasonable classification approach all along?

While most legal scholars in Canada support the reasonableness test and have urged the Supreme Court to

adopt it (or a facsimile) one commentator takes the view that the Supreme Court has been operating on that basis all along. (309) One by one he takes to task legal scholars who have been so bold as to suggest that the Court was not applying the reasonable classification test and at times he becomes convincing. It will be interesting to read the counter arguments to his treatise but unfortunately, to the time of this writing, there has been no reply by those whom he has criticized.

There is little doubt that the Supreme Court has closely considered the circumstances in each case to see if there was inequality and thereafter considered the nature of the federal legislature. But has the Court really determined the validity of the purpose of the impugned section in each case and then gone on to decide if such purpose justified the apparent inequality? This is where the Court, in the view of this writer, has adhered to no known principle but has gone off in different directions.

Professor McDonald has closely studied the reasonable classification test and has then rationalized (or perhaps over-rationalized) that the Supreme Court has followed the same yardstick. If this is the case, it is rather surprising that the Court has not acknowledged that

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(309) Patrick N. McDONALD, Equality Before the Law and the Indian Act: In Defence of the Supreme Court, (1977) 3 Dal. L.J. 726.

it has been doing this. (310) The fact is that the Court has gone out of its way to state that it would not give any support to the American experience. Ritchie J. in the Lavell case steered away from the American precedent in applying Dicey's definition to equality before the law. He wrote:

"In considering the meaning to be attached to 'equality before the law' as those words occur in section 1(b) of the Bill, I think it important to point out that in my opinion, this phrase is not effective to invoke the egalitarian concept exemplified by the 14th Amendment of the U.S. Constitution as interpreted by the courts of that country." (311)

Even Laskin J. who is not regarded as being indifferent to American decisions particularly in areas where English or Canadian law has been incapable of giving him a proper result, (312) when in dissent in Lavell, wrote:

"It was urged, in reliance in part on history, that the discrimination embodied in the Indian Act under s. 12(1)(b) is based upon a reasonable classification of Indians as a race, that the Indian Act reflects this classification and that the paramount purpose of the Act to preserve and protect the members of the race is promoted by the statutory preference for Indian men. Reference was made in this connection to various judgments of the Supreme Court of the United States to illustrate the adoption by that Court of reasonable classifications to square with the due process clause of the Fifth Amendment. Those cases have at best a marginal relevance because the Canadian Bill of Rights itself enumerates prohibited classifications

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(310) An exception may be the judgment of Martland, J. in the Burnshine case (Infra at P 197).

(311) A.G. Can. vs. Lavell Supra Note 147 at P 1365.

(312) See Murdoch vs. Murdoch 41 D.L.R. (3rd Ed.) 367 at P 377.

which the judiciary is bound to respect; and, moreover, I doubt whether discrimination on account of sex, where as here it has no biological or physiological 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." (313)

It is submitted that Professor McDonald is clearly in error when he asserts that the Supreme Court has been applying the reasonable classification approach in arriving at its decisions when considering the Bill of Rights. (314) The Court would be astonished to discover that this approach, as fully analyzed in this text, was being applied by it, for example, in the Drybones, Lavell-Bedard and Canard decisions, for it made no such acknowledgment. In fact, in the Lavell case, as we have just indicated, two judges expressly disavowed any intention of following the line of reasoning of American Court. This is not to say that the Supreme Court in the majority decision of Martland J. in the Burnshine case may have attempted to apply the approach, but as will be shown below, it fell short of the mark. (315) A more correct assessment would be that the Court is gradually coming to the realization that the reasonable classification approach is not to be regarded with indifference. (316)

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(313) A.G. Can. vs Lavell, Note 147 at PP 1386-1387.

(314) Supra Page 186.

(315) See further review of the Burnshine case, infra P 197.

(316) See view expressed by Laskin, C.J.C. in the Morgentaler case, supra note 206.

C. The Reasonable Classification Approach put to the test:

Let us now consider how the Court would have gone about applying the reasonable classification test in at least the four above-mentioned cases. In doing so, the writer is not going to be so presumptuous as to assume what the results would have been. Rather, we will indicate what the decision might well have been in the result - not so much what it should have been. In other words, we are more concerned here with the means or method of arriving at a decision than the decision itself.

At the risk of being over-simplistic, it can be admitted, surely, that the Court's main concern in the cases of Drybones, Lavell and Canard, was how far the Court would go in declaring a federal enactment inoperative as a matter of a general principle and then how far the Court would go in rendering inoperative provisions of the Indian Act.

This comment is not out of idle criticism. It is understandable that in the major cases following the enactment of the Bill of Rights that these concerns should be uppermost in mind. Had the Bill been drafted differently the Court would have had less difficulty with the basic interpretation of the Bill and been able to consider, more directly, the aspects of inequality which were before them.

1. Drybones.

In Drybones the Court did not consider the purpose

for which the legislation required a greater sanction for Indians who were intoxicated off the reserve. Not having considered this, they did not, naturally enough, go on to determine whether that purpose was valid. They did not, of course, get to the third step and determine whether the difference in treatment of Indians was reasonable in the light of a valid legislative purpose. They found that there was discrimination based on race wherein a person of the Indian race was treated more harshly than other Canadians and that was the end of the matter. Is it any wonder why lawyers and Judges have difficulty reconciling Drybones with Lavell and Canard. However, one tries to rationalize Drybones, after a reading and a re-reading of the majority views, one reaches the inescapable conclusion that the Court was exercised over the apparent discrimination and wanted to give vent to its indignation regardless of the fact that it was the Indian Act with which it was dealing. This writer takes no objection to the result - but it was the method which was used, especially since the Court found it necessary to back away from its approach in later decisions.

As touched on earlier, the Court had no evidence before it that there was a physiological or biological reason for obliging Indians to desist from alcohol by enforcing of harsher treatment. It is likely that there is no such evidence available. If this is so, what was the reason for the provision in the Indian Act in the first

place? Was it the reason as expressed by the judge of first instance in the Conzales case that:

"these prohibitions, contained in the Indian Act were, unquestionably, instituted, at least in part, to prevent the Indian from being cheated of his property in the course of barter for liquor or subsequently when drunk." (317)

If this is the reason, are Indians in any worse position than other Canadians who may have a propensity for over-indulgence in alcohol?

There is every reason to feel that if the Court had looked at the reasons for the legislation it could have found that there was no basis for this provision at all. Therefore the enactment, even though within the competence of Parliament to enact, would not be allowed to operate in the light of the inequality arising out of the discrimination on the basis of race. The result would have been the same but the means to that end would have been entirely different. On the other hand, if the Court held, upon making a full enquiry, that the legislation had a valid purpose, in that it afforded protection to the Indian against his own weaknesses, then it likely would have found that the legislation, though resulting in inequality, was justified as reasonable - it being in fact benign.

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(317) Pool P.M. in Regina vs. Gonzales 1961 130 C.C.C. 206 at 208.

2. Lavell and Bedard.

In A.G. Canada vs. Lavell (and Bedard) the Court became concerned about chipping away at the Indian Act - the exclusive jurisdiction of Parliament under the B.N.A. Act. There can be little doubt that they found that there was discrimination on account of sex. But why did that inequality exist - so contrary to the standards which apply to other Canadians of the same sex who have no restrictions upon them because of their sex to return to their families in the event of marriage breakdown? It is recalled that Indian bands were allowed to intervene in the appeal. What was their interest? The Supreme Court did not indicate precisely what their concern was. Professor Sanders gives us a good account of the reasoning behind this legislation which was intended to suit the wishes of the Indian bands to preserve, not racial purity, but to ensure kinship in the Indian bands. (318)

If the Court had considered this as the purpose of the legislative provision they would likely have found that it was a valid object since it satisfied the peculiar requirements of Indians. If they were to come to that decision then the Court would still have to consider whether the discrimination was reasonable. If they came to the conclusion that the discrimination was reasonably

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(318) D.E. SANDERS, The Bill of Rights and Indian Status  
Loc cit note 307 at P 103.

justified then the result would have been the same as it was. If, on the other hand, they found that the discrimination on basis of sex was not justified by the social goals of the Indian bands, as represented, then the legislation would have been declared inoperative and struck down. In the view of this writer, the Court would likely have found that the discrimination should be tolerated for the good and sufficient needs of the Indian people.

### III. Canard.

In the Canard case, the Court spent much time and used many words to satisfy itself that sections 42 to 44 of the Indian Act was not ultra vires the Parliament of Canada since it purported to deal with Indians and land reserved for Indians - a matter on which all the Judges agreed. As an offshoot of that finding it can be assumed that they found a valid legislative purpose. The difficulty is, however, that they did not appear to consider whether the refusal to allow Mrs. Canard to administer the estate of her late husband was justified as reasonable. They found that Parliament was legislating for Indians in the same way as it legislates for juvenile delinquents (by way of example) and such provisions cannot be considered infringement of the principle of equality before the law since Parliament has the right to pass such legislation. This is the closest that the majority came to discussing the aspect of legislation effecting a class or group of persons with similar

traits. It has been suggested that the majority of the Court in *Canard* did apply the reasonable classification test. (319) With great respect, this writer disagrees.

It is not good enough to speak about the legislation being *intra vires* and designed for a valid purpose. The Court must also look closely at the alleged inequality to see if it is reasonably justified. The Court said that since Parliament had the right to legislate and did so for a valid purpose there could not be discrimination. Indians have been designated as a special class and that was the end of the matter.

Of course the Court became caught up in the additional problem posed by comparing a federal enactment with a right accorded by provincial legislation. The majority held that the Bill could give no relief in this kind of situation since the Bill of Rights could only compare the provisions of federal legislation with the Bill of Rights - not with provincial legislation. Laskin J. supported the view of Dickson J.A. (as he then was) who, in his judgment in the Manitoba Court of Appeal, held that the Court was dealing with the Indian Act and the Bill of Rights and provincial rights didn't come into the picture. Laskin J. writes:

"It is said, however, that because questions of administration of estates are, generally, in the provincial domain, a consideration of the disqualification of Indians under the

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(319) McDonald, Loc. cit. note 309.

Indian Act would mean testing the operation of the Canadian Bill of Rights by reference to provincial legislation and that this is outside the scope of the Canadian Bill of Rights which applies only to federal law. In my opinion, this is to obstrude an irrelevant factor into the matter at issue. If provincial legislation respecting the administration of estates exhibited any conflict with the prescriptions of the Canadian Bill of Rights, that would be obviously no ground for challenging its operability as provincial legislation. Correlatively, I see no reason to refer to provincial legislation to test the operability of federal legislation under the Canadian Bill of Rights. The question whether any of the prescriptions of the Canadian Bill of Rights are offended by federal legislation depends on what that legislation provides and on the reach of the Canadian Bill of Rights itself." (320)

Beetz, J., it will be remembered, was of the view that there could be a number of rights accorded by all provinces which could create a sort of "jus gentium" and in respect of these federal legislation should not infringe. (321) However, he took his line of reasoning no further than that.

This aspect of the decision must be mentioned because so long as the majority held, as they did, that the Bill of Rights could not be applied to rights or privileges emanating from provincial legislation, there was no way the Court could give relief to Mrs. Canard. One only asks: why did the Court have then to consider at all the other avenues on which it embarked - namely the validity of Sec. 42 to 44 (aside from the constitutionality) of the Indian

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(320) A.G. Canada vs. Canard Supra Note 187 at P 179-180.

(321) Id. at P 211.

Act? But having done so it failed to take the consideration of such enquiry to its ultimate limit.

In the view of this writer, it was Dickson J.A., then of the Manitoba Court of Appeal, who applied the reasonableness test from beginning to end and it afforded him the basis to declare the impugned sections inoperative. He held, first of all that the provisions of the Indian Act were constitutionally valid and that it was perfectly proper for the Parliament to seek to control Indians and lands reserved for them. The question he then asked himself was: "is this provision which takes away the right of an Indian woman to act as administratrix of her deceased husband's estate reasonably justified in order to control lands reserved for Indians." He held it was not. The grant to Mrs. Canard of letters of administration granted no power in her as administratrix to do anything in respect to federally controlled Indian lands which was prohibited by the Indian Act. In other words, her appointment as administratrix of her husband's estate did not create any danger or threat to Indians or their lands - but the refusal of her appointment took away a right which she otherwise would have had (and in fact which was affirmed to her by the Manitoba Surrogate Court). This is the step which the majority failed to take in considering the fact situation in the Canard case - pre-occupied as they were in preserving intact the Indian Act without considering the true nature and effect of the inequality on the basis of its reasonableness.

Had the majority taken the same route as Dickson J.A., the result might well have been different - and the Indian Act would not have been, in any material way, affected.

IV. Burnshine.

The last case to be considered in this context is the Burnshine decision. This was the case where the 17 year old British Columbia youth was given a lengthy indeterminate sentence of two years for a rather minor breach of the law, under the authority of the Prisons and Reformatories Act, a federal statute - although such a sentence was not possible in any other province of Canada, save Ontario. In the view of the writer, the majority of the Court had every intent to apply the reasonable classification test but didn't quite make it. Martland J. speaking for the Court found that the legislative purpose of Sec. 150 was not to impose harsher punishment upon offenders in British Columbia in a particular age group than upon others but

"was to seek to reform and benefit persons within the younger age group. It was applicable because that province (like Ontario) was equipped with the necessary institutions and staff for that purpose." (322)

He then went on to hold that it is not the function of the Court to prevent the operation of a federal statute

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(322) Regina vs. Burnshine supra note 172 at p 707.

designed for the above-described purpose. Furthermore the Respondent must show that Parliament was not seeking to achieve a valid federal objective - which the respondent failed to do. (323)

The difficulty with the judgment of Martland J. was that he did not go on to consider whether the valid legislative purpose, which he found, would reasonably justify adding on the harsher sentence which did in fact result - (which he said was not the object of the legislation) to a youth in British Columbia and nowhere else (save Ontario). Had the Court looked at the circumstances more closely, it would have likely found that the inequality which existed in fact could not be justified as reasonable. The majority seemed to disregard this aspect by concluding that the purpose being a good and valid one no inequality could be considered in law. It is submitted that if the Court was applying the reasonable classification test that it failed miserably by failing to apply its collective mind to the nature of the inequality before it. In other words they did not take step no. 3 of the test at all. What the Court would have done when it considered this aspect is impossible to say. What the Court should have done is another thing.

We have reviewed in some detail how the "reasonable test", developed by the Supreme Court of the United States, is applied and how it could have been applied by our Supreme Court in the major cases before it. We have

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(323) IBID

examined the views of those legal scholars who have supported this approach as well as the comments of one legal writer who argues that the Supreme Court has been following this approach all along. We have considered the view of another scholar who holds that the test is too general and would replace it with a test based on "the dignity and worth of the human person" - a concept of even more unlimited proportions. There is one other criticism which has been advanced which will be considered later in this work.

It is obvious that the Bill of Rights contains no definitive parameters to guide the highest Court in its interpretation. Pigeon J. was on firm ground when he said:

"The meaning of such expressions as 'due process of law', 'equality before the law', 'freedom of religion', 'freedom of speech', is in truth largely unlimited and undefined. According to individual views and the evolution of current ideas, the actual content of such legal concepts is apt to expand and vary as is strikingly apparent in other countries." (324)

If nothing else the general language of the Bill does nothing to hamper the Court in setting up its own guidelines and in establishing its own rule or test of interpretation - both as an aid to itself and to the lower courts. What, therefore, at first glance is a statutory fault becomes a lever for judicial innovation, presenting

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(324) The Queen vs. Drybones, supra note 114 at 306.

a limitless challenge to a Court prepared to take up the cudgels. (325)

It can be argued that Parliament, in failing to set forth a test on the Bill of Rights which would assist the Court in its interpretation and application, made no error but deliberately did so in order to leave the final Court of the land completely unfettered in its judicial role. If this be so, then the more essential it becomes for the Supreme Court to establish its own yardstick by which to measure federal legislation against the background of the Bill of Rights. It is just as likely that Parliament did not apply itself to the difficulty and merely "dumped" the whole problem on the Court. In either event the Supreme Court is presented with the same challenge. However if Parliament had set itself the task (which it has not done to this date) to establish the yardstick, what would it have done? It is strongly urged by the writer that the chances are great that the reasonableness test would have been chosen as the guide.

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(325) One of the criticisms of the Supreme Court of Canada is that it has not seen the need to be more definitive in its decisions, unlike the English Court of Appeal or the House of Lords. It continues to deal only with the narrow issues of the case before it not recognizing that the lower courts anxiously await a definitive declaration on related issues. It is doubtful, for instance, if the Supreme Court of Canada, unless its attitude changes, would ever establish guidelines as the English courts did on the subject of voluntary statements, as a guide for the lower courts.

D. Some legislative guidance:

The fact is that when Canadian legislatures dealt with the question they chose the reasonable classification approach. The Ontario Human Rights Code permits discrimination on the basis of race, colour, creed, nationality, ancestry or place of origin where it is a "reasonable occupational qualification". (326) Recently the Code was amended to permit discrimination where age, sex or marital status was a "bona fide occupational qualification". (327) The Charter of Human Rights and Freedoms of the Province of Quebec enacted in 1975 provides that a distinction, exclusion or preference based on the aptitudes or qualifications "required in good faith" for employment or "justified" by the nature of a non-profit institution is deemed non-discriminatory. (328) The Human Rights Code of the Province of New Brunswick permits a limitation specification or preference on the basis of race, colour, religion, natural origin, ancestry, place of origin, age, marital status or sex if based on a "bona fide occupational qualification". (329)

It is particularly interesting to note that the Parliament of Canada adopted the reasonable classification

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(326) 1970 R.S.O. Chap. 318 Sec. 4(4).

(327) 1974 S.O. Chap. 73 Sec. 2.

(328) S.Q. 1975 Chap. 6 Sec. 20.

(329) R.S.N.B. 1973 Chap. H-11 Sec. 3(5) See also Secs. 4(4), 5(2) and 6(3).

approach in the Canadian Human Rights Act. (330) It is not a discriminatory practice to pay to male and female employees different wages if the difference is based on a "reasonable" factor, other than sex, that justifies the difference. (331) Also a refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment based on a "bona fide occupational requirement" is not a discriminatory practice. (332) The Canadian Human Rights Commission also can permit discrimination in any "program plan or arrangement" which is reasonably justifiable", which in turn is based on its benevolent purposes. (333)

Perhaps the most significant step was taken in the Charter of Human Rights proposed by the Federal Government at Victoria in 1971 and adopted by nine of the ten provinces. The Charter which was to have been the new entrenched Bill of Rights would have permitted "limitations on the exercise of the fundamental freedoms as are "reasonably justifiable" in a democratic society in the interests of public safety, order, health or morals, of national security, or of the rights and freedoms of others. (334)

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(330) S.C. 1977 Chap. 33 Sec.

(331) Id. Sec. 11(3).

(332) Id. Sec. 14(A).

(333) Id. Sec. 15(1).

(334) Charter of Human Rights, Article 3; Records of Victoria Constitutional Conference, June 1971, Queen's Printer, Ottawa.

The use of the words "bona fide" or "reasonable occupational qualification", "reasonable factor that justifies" and "reasonably justifiable" are words which clearly indicate that the reasonable classification approach has been favoured in the legislation (and proposed legislation) reviewed above. Such an inclusion is significant for several reasons. Not only does the legislation call upon the courts (or Commissions) to make a value judgment on the basis of reasonableness but it recognizes that there can be situations where it is not possible in our society to have equality in all circumstances - although at the same time acknowledging the desirability of ensuring equality as a matter of principle. Are these provisions counter-productive? It is more likely that by them they will recognize a fact of life - and that is that there will be occasions where the principle of equality cannot apply. The Court (or the Human Rights Commissions) must proceed on the basis of what is "reasonable" in considering where exceptions will be allowed.

E. Can the Court be trusted to determine what is reasonable?

Those who favour an absolute bar to discrimination in all circumstances or those who favour some other kind of test (such as the dignity of the human person) will argue that the reasonable classification approach is too arbitrary. One legal scholar argues that the approach is fraught with

uncertainties and arbitrariness, is complex and obscure and leaves the determination of a citizen's rights to a small elite. (obviously the judiciary). (335) This criticism deserves close review and we have deliberately reserved such consideration to this stage of this work.

First of all, we must define what is meant when the word "arbitrary" is used in this concept - for it has a number of meanings. The concise Oxford dictionary gives us one meaning which is, without question, pejorative, namely that "derived from mere opinion, not based on law, discretionary, capricious, despotic". Is this the meaning which it is intended to suggest applies to a judicial decision? One who is trained in the law will be aware that though a Court has certain discretion, that such discretion must not be exercised "arbitrarily" but it must be "judicially" exercised. This means simply that full reasons must be given for a decision: the discretion must not be exercised on a whim, a caprice, or on a frivolous basis. If on the other hand the term when used is taken to mean the making of a judgment or decision on the part of one having responsibility to do so (in this instance a judicial officer) then wherein lies the objection? So long as society requires courts to pass judgments in respect of disputes (which will be so long as human beings live and breathe) for so long will decisions have to be made.

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(335) CONKLIN, Loc. cit. note 308 at P 516.

It is important to ensure, however, that in the making of such decisions there are some decipherable rules which will apply. It is particularly essential for the Courts in the interpretation and application of the Canadian Bill of Rights to establish an acceptable yardstick, earlier than later, to avoid the present criticism that it is proceeding on no firm philosophical basis. For so long as the Supreme Court of Canada delays establishing a clear test (whatever that be) which all the Courts will apply, there can be criticism levelled that it is proceeding on an "arbitrary" basis. It will be seen that it is the adherence to a test rather than indifference to it that will make for more stability in the interpretation of the Bill of Rights.

Does the reasonable classification approach give our Courts too much scope for judicial review and thus place too much control in the "elite"? It is an important question and thus worth considering. It occurs to this writer that whatever decisions the Courts make they must reduce themselves to the basic premise of "reasonableness". Aside from this general aspect, the Courts are continuously reviewing the conduct of persons on the basis of "reasonableness" in respect of matters of private law. Witness the whole of tort law which is predicated on the measure of what the conduct of a reasonable man (now person) should be. Consider the many questions which come to the courts for determination on the basis of what is reasonable - which word is found

so frequently in statutes and is so widely used in private agreements.

The Courts are constantly called upon to determine what may be "reasonable" notice, what constitutes "reasonable" delay, what are "reasonable" steps to mitigate damages - just to mention a few examples. Although the term "reasonable" is a broad one the Courts have been able to establish parameters to their interpretation in any given situation and thus establish general rules, in separate bodies of jurisprudence, to which adherence is assured through the doctrine of stare decisis. This provides some stability in our law and gives guidelines to the public and those who serve the public as legal practitioners. If our Courts have been able to do this in the area of private law is there a danger that they would not and could not produce satisfactory results by using a similar approach in the area of public law and specifically in considering the Canadian Bill of Rights? Would there not be, in due time, a certainty in interpretation arising out of the establishment of rules which would have binding effect as precedent? If the reasonable classification approach should not be used it is submitted there would have to be a more convincing argument than that referred to above to demonstrate any alleged deficiency.

Whatever test is employed by the Supreme Court of Canada, one must be mindful not to confuse the test itself with the power of review which Parliament has given to the judiciary - which has been treated elsewhere in this work.

It has not been the Courts which have appropriated this power unto themselves but the elected representatives of the people who made this decision. So long as our Courts have this power of review it is understandable enough that many persons, both those legally trained and otherwise, will have concern that the Courts will have too much say in assessing and determining the rights of citizens. Does this concern have a rational basis having regard to the decisions thus far taken by the Supreme Court of Canada. It seems to this writer that the concern should turn on whether the Court will be prepared to assume the role assigned to it and thoroughly question any impugned legislation against the guarantees afforded in the Bill of Rights. (336) If the Court does not shrink from this duty then the Court will be enlarging, not diminishing, the rights and freedoms of our citizens. If the Supreme Court allows itself to be used as a rubber stamp by reason of a reluctance to declare inoperative a portion or all of a federal enactment which clearly offends the right of equality before the law then it will not be the Court but Parliament in the end which will present for our citizens the greatest risk to the limitation of the rights

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(336) Stanley A. COHEN, Attorney General of Canada v Lavell et al (Bedard), 39 Man B. News 197 at 202. This author is not concerned with too much power in the Court - rather too much restraint. He writes: "If one can find guidance in any one facet of Canadian judicial history it lies in the chronicle of judicial restraint which has characterized the approach of the Court in its application of the Bill of Rights since the date of the pronouncement of that Bill into law in 1960."

and freedoms of our citizens - for the Bill of Rights will be but a bit of window dressing, designed to please but not necessarily to satisfy our needs.

Conclusion.

It is in the reasonable classifications approach that we have the best assurance that the Supreme Court of Canada will recognize, in full measure, the role it must assume and which, like it or not, it has been assigned. After a thorough review of its alleged weaknesses it is submitted that the arguments in favour of the test (there is no need to repeat them) stand undiminished in their persuasiveness. The use of the test (whatever the Court may choose to call it) in all its stages as reviewed in this work affords to our highest Court, and hence to our entire judiciary, the best yardstick by which to assess federal enactments - and to ensure that the guarantees of our rights and freedoms set forth in the Canadian Bill of Rights will be honoured in all circumstances where it is reasonably possible. Our citizens can expect no higher standard of protection - but should accept no lower standard.

### CONCLUSION

From the early pages of this work we have had occasion to note the impact which the concept "equality" has had on man's political and social progress. We have also reviewed how a renewed interest in individual worth and human dignity developed after the second world war - a conflict which had seen men used as tools to satisfy personal ambitions and destroyed to satisfy nationalistic aims which were both unintelligible and indefensible. We have observed how Canadians, responding to interest on the world scene as well as incensed with the shortcomings of the Canadian record at home, began calling for legislative safeguards to ensure that human rights and fundamental freedoms were guaranteed to all. The enactment of the Canadian Bill of Rights was the natural outcome of this yearning and its existence on the federal statute books should surprise no one who had closely followed the events described in this work.

Though a Canadian Bill of Rights became a reality, following as day the night, its presence did not always make for light - for there has been much sound and fury. We have discussed the jurisdictional problems posed by a federally enacted Bill in a federal system - which can apply only to federal legislation. While this feature has disappointed many, it was not the purpose of this work to bemoan what was done under federal auspices but rather to accept

the reality as it is - a Bill of Rights with certain inherent limitations but nevertheless a Bill which does have significant purpose and effect. It is the interpretation of that Bill as it stands which has attracted our interest in these pages.

We have considered in particular the interpretation by the Supreme Court of Canada of the words "equality before the law" in the context in which they appear in the Bill. We have done so for two reasons. First, regardless how we proceed to categorize human rights and fundamental freedoms, it is the concept of "equality" which underlies all our thinking in this area. It was in the demand for assurance of equality which constituted the motivating factor in the very enactment of human rights legislation - as we have had the opportunity to demonstrate in this work. Similarly, it is with the interpretation of the concept of "equality" taken with the words "before the law" that the Supreme Court was faced with its most difficult challenge, has done its more profound work and has created, in the process, seemingly endless controversy.

In analyzing the more important decisions of the Supreme Court touching on equality before the law, it has not been our purpose to belittle the efforts of the members of the Court. Rather we have acknowledged the difficulties which faced the Court in considering so general a concept where Parliament has given no guidelines to assist. Further,

we have reminded the reader that the Court's experience is somewhat limited in the area - and commented that the record of the Supreme Court of the United States was no more impressive in the years immediately following the enactment of the Fourteenth Amendment (in 1868).

It is our duty to observe, however, that an analysis of the decisions of the Court, such as has been made in these pages, forces one to conclude that the Court has wavered - and it is this wavering which has caused the greatest concern. The Court's work can be compared to the swing of a pendulum of a faulty clock, in which though the mechanism be operating, the hands are standing still. When the pendulum swings one way it causes elation, but when it moves back and in the other direction it causes frustration - for there is no gain in time.

The problem has been twofold. The first aspect relates to what this writer perceives to be the underlying attitude of the Court arising out of two concerns, as gleaned from its decisions. First, the Court has been concerned and anxious to protect Parliament against encumbering its own sovereignty - to protect Parliament from what the Court conceives to be the folly of its ways. The second concern has been its reluctance to assume the function assigned to it by Parliament of judicially reviewing federal legislation against the manner and form provisions contained in the Bill of Rights. We have established (hopefully) in this work,

on the basis of ample authority, that Parliament can quite properly enact legislation - by which it limits itself to manner and form requirements in respect of its future legislation without impairing its sovereignty - for the simple reason that it is free to rescind the restraints it has imposed upon itself if it conforms to the manner and form requirements in so doing, which it can even then repeal. Furthermore, Parliament, as in the case with an individual citizen, must be taken to intend the consequences of its actions. When it calls on the Court to exercise the functions of judicial review it must be taken to know what it intended - both in asking for such review of its legislation and accepting the consequences of it. The Court does not have to protect Parliament against itself. The saving feature available to Parliament is that if the consequences are not to its liking then Parliament, since it is supreme, has the right to intervene by remedial legislation. It is the considered view of this writer that these two points must be clearly faced by the Court - for it has no alternative route to go without affecting its own credibility.

The second aspect of the problem is the Court's inability to establish any discernible test against which to measure "equality before the law". This is not to suggest that members of the Court are in some way lacking in initiative or ingenuity. Such an inference is neither warranted nor justified. It may be to suggest, however,

that a distinctly novel approach is not attainable.

The writer strongly urges that the Court should take a closer look at the reasonableness test which has been adopted by the U.S. Supreme Court, for the reasons thoroughly canvassed in the last chapter. This is not to say that the test will be a panacea: there will still be problems in applying it as there are in other areas of the law. It will mean, however, that there will be more certainty as to the yardstick that is being applied. Counsel in appearing before the Court will be able to apply their minds to the question of reasonableness and hence their interest, concern and learning will be available for the assistance of the Court. A body of jurisprudence will emerge in due course which will, without doubt, be of inestimable use and guidance to the Canadian legal profession, the entire judiciary and to the final appellate tribunal itself.

The application of the reasonable test is a solution which the Supreme Court would, it is submitted, arrive at in due course quite independently of the American precedent. It seems pointless to delay the application of the test just because it is of American origin. It is not a question of opting for what the English Courts have done in preference to the American Courts, since, in this instance, Britain has no comparable legislation and thus there exists no parallel situations from which we can hope to draw enlightenment. In law, as in all human activities, real progress

cannot be made without proper regard to the experiences of the past. In this case that experience is available in the United States of America. It should be looked upon as man's total collective wisdom and we should be free to borrow from it and not disregard it merely because it does not bear a "made in Canada" stamp. It should be sufficient to know that the Court would not be adopting the test because it is American but because it has developed over the years by the trial and error method and in its application has achieved a high level of acceptance. In such circumstances it ceases to be a matter of national (or judicial) pride. Bigness demands that we should closely consider it - not that we should close our judicial eyes to it.

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A P P E N D I X

CANADIAN BILL OF RIGHTS

An Act for Recognition and Protection of Human Rights  
and Fundamental Freedoms

1960, Chap.44; assented to August 10, 1960  
(R.S.C. 1970, Appendix III)  
Amended 1970-71-72, c.38, s.29;  
proclaimed in force January 1, 1972

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada:

Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

PART I

BILL OF RIGHTS

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
  - (b) the right of the individual to equality before the law and the protection of the law;
  - (c) freedom of religion;
  - (d) freedom of speech;
  - (e) freedom of assembly and association;
- and
- (f) freedom of the press.

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

- (a) authorize or effect the arbitrary detention, imprisonment or exile of any person;
- (b) impose or authorize the imposition of cruel and unusual treatment or punishment;
- (c) deprive a person who has been arrested or detained
  - (i) of the right to be informed promptly of the reason for his arrest or detention,
  - (ii) of the right to retain and instruct counsel without delay, or
  - (iii) of the remedy by way of habeas corpus for the determination of the validity of his detention and for his release if the detention is not lawful;
- (d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self incrimination or other constitutional safeguards;
- (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

- (f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or
- (g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

3. The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the Statutory Instruments Act and every Bill introduced in or presented to the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

4. The provisions of this Part shall be known as the Canadian Bill of Rights.

PART II

5. (1) Nothing in Part I shall be construed to abrogate or abridge any human right or fundamental freedom not enumerated therein that may have existed in Canada at the commencement of the Act.

(2) The expression "law of Canada" in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

(3) The provisions of Part I shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada.