

1-1-1977

Equality before the Law and the Indian Act: In Defence of the Supreme Court

Patrick N. McDonald

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Constitutional Law Commons](#)



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Recommended Citation

Patrick N. McDonald, "Equality before the Law and the Indian Act: In Defence of the Supreme Court" (1976-1977) 3:3 DLJ 726.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

I. Introduction

The *British North America Act*¹ declares in section 91(24) that the exclusive legislative authority of Parliament extends to "Indians, and Lands reserved for the Indians". The *Canadian Bill of Rights*² provides that no law of Canada shall be applied so as to abridge the right of the individual to equality before the law without discrimination by reason of race, national origin, colour, religion or sex. Three recent decisions of the Supreme Court of Canada have grappled with the reconciliation of constitutional authorization and statutory proscription. The trilogy has evoked a virtually unprecedented volume of critical comment, the common feature of which is the view that the first of the three cases has been overruled or limited severely in application by the second, and the principle of the second applied wrongly in the third.³

*Patrick N. McDonald, Associate Professor of Law, University of Alberta

I am heavily indebted to Wilbur F. Bowker, Q.C., formerly Dean of the Faculty of Law, University of Alberta, and now Director Emeritus of the Institute of Law Research and Reform, who read and made extensive comments upon an earlier draft of this paper and whose insight brought to light the instructive work of American courts in the area of Indian legislation.

1. 30 & 31 Vict., c. 3 (as amended) (U.K.); R.S.C. 1970, Append. II, No. 5

2. S.C. 1960, c. 44; R.S.C. 1970, Append. III

3. The three cases are *R. v. Drybones*, [1970] S.C.R. 282; 9 D.L.R. (3d) 473; 71 W.W.R. 161; [1970] 3 C.C.C. 355; 10 C.R.N.S. 334, *Attorney-General of Canada v. Canard*, [1976] 1 S.C.R. 170; 52 D.L.R. (3d) 548; 4 N.R. 91; [1975] 3 W.W.R. 1, *Attorney-General of Canada v. Lavell*, [1974] S.C.R. 1349; 38 D.L.R. (3d) 481. Chronologically, of course, *Lavell* is second and *Canard* third, but I have described them otherwise because the result in *Canard* was anticipated before *Lavell* was decided and because the latter is a more extreme application of the principle articulated in the former. Critical comment is to be found in R.W. Kerr, *The Canadian Bill of Rights and Sex-Based Differentials in Canadian Federal Law* (1974), 12 Osgoode Hall L.J. 357; P.W. Hogg, Comment (1974), 52 Can. B. Rev. 263; 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. 1; D.W. Elliott, *Canard: A Triad Returns* (1975), 25 U. Toronto L.J. 317; V.S. MacKinnon, *Booze, Religion, Indians and the Canadian Bill of Rights*, [1973] Pub. Law 295, where reference is made at 315 to the "persuasive logic" of Laskin J's dissent in *Lavell*; D. Phillips, *Indians and Inequality: A Commentary on*

Following the same course as American jurisprudence under the equal protection and due process clauses, the Supreme Court of Canada has determined in substance that equality before the law does not set an absolute standard. It does not require equal treatment of dissimilar cases. To use Justice Frankfurter's language, Parliament has been held competent to treat persons with precisely "that separateness which their distinctive characteristics and functions in society make appropriate".⁴ What is a common characteristic of the jurisprudence in the context of Indian legislation, and not generally appreciated by its Canadian detractors, is the nature of the role played by the constitution's distribution of legislative authority in shaping this limit to the egalitarian precept.

II. *Canard*

As part of a "comprehensive testamentary code in respect of Indians", section 43 of the federal *Indian Act*⁵ has the effect of denying to an Indian spouse the right to administer the estate of his or her deceased spouse. In *Attorney-General of Canada v. Canard*, the Manitoba Court of Appeal found the provisions inoperative under the *Canadian Bill of Rights* as constituting a denial of a right enjoyed by non-Indians and therefore a denial of equality before the law by reason of race.⁶ The point of the unanimous judgment was that Parliament could not single out Indians for the purpose of special provisions regarding administration of estates.

... In the present case we have a situation in which the Parliament of Canada has said in effect 'because you are an Indian you shall not administer the estate of your late husband'. Parliament has thereby in a law of Canada placed a legal road-block in the way of one particular racial group, placing that racial group in a position of inequality before the law.⁷

Although Dickson J.A. (as he then was) said flatly that the *Bill of*

A.-g. *Canada v. Canard* (1975), 13 Osgoode Hall L.J. 368; I. F. Kelly, *The Bill of Rights, the Indian Act, and Equality Before the Law: the Need for, and the Development of, a "Reasonableness" Test* (1974), 2 Queen's L.J. 151; W.S. Tarnopolsky, *The Supreme Court and the Canadian Bill of Rights* (1975), 53 Can. B. Rev. 649; B.J. McCourt, Comment (1974), 6 Ottawa L.R. 635

4. Quoted in J. Tussman and J. ten Broek, *The Equal Protection of the Laws* (1949), 37 Cal. L. Rev. 341 at 368

5. R.S.C. 1970, c. I-6

6. (1973), 30 D.L.R. (3d) 9; [1972] 5 W.W.R. 678 (Man. C.A.)

7. *Id.* at 23; [1972] 5 W.W.R. 678 at 691

Rights proclaims an egalitarian doctrine,⁸ he doubtless accepted that the right to equality before the law does not involve the proposition that all federal statutes must apply equally to all individuals.⁹ It seems clear, however, that for him no group or class to which legislation is applied specially may be distinguished by race. He would not entertain the suggestion that Indians have throughout been in a state of dependency and pupillage, for under the *Bill of Rights*, he said, "no racial group shall be deemed inferior to any other racial group".¹⁰

But the very presence in the *BNA Act* of section 91(24) shows that Indians and their lands, as objects of legislative action, are possessed of distinctive characteristics. True, the enumeration does not suggest inferiority, but it suggests difference. Rand J. has expressed the point this way:

. . . The language of [the *Indian Act*] embodies the accepted view that these aborigines are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation.¹¹

The position under the American Constitution is similar. In the leading case of *United States v. Sandoval*,¹² the Supreme Court said:

. . . Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders

The Indian classification then is quite unlike other racial classifications, which are usually "perceived as a stigma of inferiority and a badge of opprobrium".¹³ The Indian classification,

8. *Id.* at 20; [1972] 5 W.W.R. at 688

9. Tarnopolsky suggests that Dickson J.A. in fact applied the principle he (Tarnopolsky) calls "reasonable justifiability". *The Canadian Bill of Rights* (2d, revised ed. Toronto: McClelland and Stewart Ltd., 1975) at 308

10. (1973), 30 D.L.R. (3d) 9 at 21; [1972] 5 W.W.R. 678 at 689

11. *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211 at 219; [1950] 2 D.L.R. 225 at 232, quoted in the *Lavell* case by Ritchie J. See [1974] S.C.R. 1349 at 1360; 38 D.L.R. (3d) 481 at 491. See also cases cited in L. C. Green, *North America's Indians and the Trusteeship Concept* (1975), 4 Anglo-Am. L. Rev. 137, especially at 147

12. (1913), 231 U.S. 28 at 45-46

13. Note, *Developments in the Law: Equal Protection* (1968-69), 82 Harv. L. Rev. 1065 at 1127

if adopted by legislation enacted pursuant to the Indian power, is an expression of special regard.

It is not possible simply to ignore the distinctiveness attributed to Indians by the constitution, because the *Bill of Rights* question is not reached until the court has determined that the legislation represents an exercise of Parliament's exclusive authority under section 91(24). That determination makes it equally difficult to find under the *Bill of Rights* that the particular kind of legislative treatment is not made appropriate by the distinctive characteristics recognized constitutionally. This Dickson J.A. would appear to have done for he does concede that the latter part of section 91(24), "Lands reserved for the Indians", would support special legislative restrictions on the right of Indians to alienate lands. In my view, there is necessarily involved in a determination of validity under section 91(24), the conclusion that the legislative treatment is appropriate to the distinctive characteristics underlying the special Indian power. This is so because, constitutionally, it is not enough that the legislation prescribes a rule applicable only to Indians. In *Re Insurance Act of Canada*¹⁴, the Privy Council struck down provisions of the *Insurance Act* of Canada which required aliens to obtain a federal licence on the basis that this was not alien legislation in the true sense of the word. The provisions did not "deal with the position of an alien *as such*" [emphasis added].¹⁵ Similarly, provincial legislation which denied the franchise to Chinese, Japanese and Indians was upheld in *Cunningham v. Tomey Homma*¹⁶ on the basis of a distinction drawn between what is *necessarily involved* in a particular status and its *incidental consequences*. The point of these cases is that legislation will be held an exercise of power described in terms of a particular class of persons only if it is related to the peculiar attributes of that class; section 91(24) "confers legislative authority over the Indians *quâ* Indians and not otherwise".¹⁷

14. [1932] A.C. 41; [1932] 1 D.L.R. 96 (P.C.) (Que.)

15. *Id.* at 51; [1932] 1 D.L.R. at 105

16. [1903] A.C. 151 (P.C.) (B.C.)

17. *R. v. Drybones*, [1970] S.C.R. 282 at 303; 9 D.L.R. (3d) 473 at 489; 71 W.W.R. 161 at 178; [1970] 3 C.C.C. 355 at 370; 10 C.R.N.S. 334 at 352 (*per* Pigeon J.). See K. Lysyk, *The Unique Constitutional Position of the Canadian Indian* (1967), 45 Can. B. Rev. 513 at 533-34: "The sole fact that a statute is one of special application made applicable only to a class or classes of federal 'persons' does not in itself warrant the conclusion that it lies within federal competence." See also *Natural Parents v. Superintendent of Child Welfare* (1976), 60 D.L.R.

Not surprisingly, there is much in the judgment of Dickson J.A. to suggest that he doubted any reasonable connection between section 91(24) and the administration of estates. He said of Mrs. Canard that section 43 "denies her a civil right", suggesting that section 43 is a property and civil rights law and not an aboriginal law.¹⁸ He would not accept any argument that equates Indians with children and mental defectives, meaning that Indians do not possess those characteristics which make appropriate a law limiting their freedom of disposition.¹⁹ He noted that control of testamentary capacity is not a necessary incident to the control of Indian reserve lands.²⁰ These were considerations which Dickson J.A. might have used to support the conclusion that section 43 is not supportable under section 91(24) of the *BNA Act*. But feeling himself bound by precedent to find otherwise, Dickson J.A. could not use those same considerations to deny in effect any reasonable connection between the distinctive characteristics and the special treatment. The reasonable connection was established by the constitutional determination.

The error in the Manitoba Court of Appeal was corrected by the Supreme Court of Canada. Noting benevolently that the judgments

(3d) 148 at 154; 6 N.R. 491 at 498 (S.C.C.), where Laskin C.J.C. says that the exclusive power of Parliament under section 91(24) does not extend to all legislation which applies to Indians, but only to legislation which touches their "Indianness". The consequences of a failure to see that the power under section 91(24) is so limited are considerable. In his *Progress Report on the Canadian Bill of Rights* (1976), 3 Dalhousie L.J. 39, Professor Lyon notes the decision of the British Columbia Court of Appeal in *Re Adoption Act* (1974), 44 D.L.R. (3d) 718; [1974] 3 W.W.R. 363 (*sub nom. Re Birth Registration No. 67-09-022272*) to the effect that an Indian law means any law enacted by Parliament that applies to Indians only. It was this aspect of the decision with which the majority in *Natural Parents* disagreed. Because he is prepared to accept the position of the Court of Appeal, Professor Lyon does not see that the question whether differential treatment of Indians is based on "some rational legislative objective and is justified by differing circumstances" (at 60), is a question that is answered by the constitutional determination. He suggests that the narrow definition of equality before the law is the result of "the inhibitions caused by a constitution that calls for separate treatment of Indians" (at 64), when in truth the constitutional mandate is made compatible with a definition of equality that Lyon himself advocates, namely one based on justified differential treatment. Finally, Professor Lyon does not stop to consider whether *Drybones* might be exceptional as not involving "Indian" legislation, and concludes that the whole *Indian Act* is contrary to the *Bill of Rights* unless "equality before the law" is narrowed to "the Dicean form seen in *Lavell*" (at 57).

18. (1973), 30 D.L.R. (3d) 9 at 20; [1972] 5 W.W.R. 678 at 688

19. *Id.* at 21; [1972] 5 W.W.R. at 689

20. *Id.* at 22; [1972] 5 W.W.R. at 690

of the Supreme Court in *Attorney-General of Canada v. Lavell* and in *R. v. Burnshine*²¹ came after the decision of the Manitoba Court in the instant case, Martland J. pointed out that the *Bill of Rights* does not preclude federal legislation which applies to a particular group or class of persons.²² If it must be shown that the legislative class is rationally distinctive and not selected arbitrarily,²³ how, asked Ritchie J. can the court ignore the special status so clearly attributed to Indians by the *British North America Act*? As the *Bill of Rights* states that it reflects the respect of Parliament for its constitutional authority, surely the Bill is not to be applied in disregard of the special legislative classes recognized in the constitution.²⁴ Nor does the relevance of the constitution stop with its recognition of a group appropriate for special treatment. If section 43 is valid under the Indian power, the constitution has recognized Indians as distinctive for the very purpose of testamentary legislation. In pointing out that section 43 is an exercise of Parliament's exclusive legislative authority under section 91(24), and that the testamentary rights of non-Indians are beyond federal jurisdiction, Martland and Ritchie JJ. recognize the constitutional line drawn between the estate assets of Indians and the estate assets of others. Being valid legislation under section 91(24), the provision found inoperative by the Court of Appeal treats Indians with exactly that separateness which the constitution recognizes as appropriate to their distinctive place in the community.

21. *R. v. Burnshine*, [1975] 1 S.C.R. 693; 44 D.L.R. (3d) 584; 2 N.R. 53; [1974] 4 W.W.R. 49; 15 C.C.C. (2d) 505; 25 C.R.N.S. 270. This case involved not the *Indian Act* but section 150 of the *Prisons and Reformatories Act*, R.S.C. 1970 c. P-21, which authorized special punishment for young offenders in British Columbia.

22. [1976] 1 S.C.R. 170 at 188-89; 52 D.L.R. (3d) 548 at 561; 4 N.R. 91 at 122-23; [1975] 3 W.W.R. 1 at 14

23. In *Burnshine*, Martland J. liked Jackett C.J.'s description of a "law that, for sound reasons of legislative policy, applies to one class of persons and not to another class" ([1975] 1 S.C.R. 693 at 701; 44 D.L.R. (3d) 584 at 589; 2 N.R. 53 at 60; [1974] 4 W.W.R. 49 at 55; 15 C.C.C. (2d) 505 at 510; 25 C.R.N.S. 270 at 276, quoting from *Re Prata and Minister of Manpower and Immigration*, [1972] F.C. 1405 at 1414; 31 D.L.R. (3d) 465 at 473). On appeal in the latter case, *sub nom. Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376 at 382; 52 D.L.R. (3d) 383 at 387, Martland J. said that "[l]egislation dealing with a particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective".

24. This is "class consciousness" of a different sort from that described by Professor A.S. Abel, *The Neglected Logic of 91 and 92* (1969), 19 U. Toronto L.J.

Precisely the point being made here has formed the basis for the acceptance by the United States Supreme Court of federal legislative provisions applicable only to Indians. Although the equal protection clause of the Fourteenth Amendment does not apply to the federal government, it has been decided that, if a classification in federal legislation would be invalid under that clause as discriminatory, it is inconsistent with the due process requirement of the Fifth Amendment, which does apply to Congress.²⁵ The Court spoke as follows in *Morton v. Mancari*:

On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment . . . As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.²⁶

The unique constitutional obligation furnishes a rational basis for the discrimination.²⁷ Notice was taken by W. F. Bowker, in his comment upon *Drybones*, that the United States Supreme Court has refrained from striking down Acts of Congress dealing specifically with Indians because Indians are in a state of pupillage or wardship.²⁸ This supported his suggestion that protective legislation is not discriminatory. My point here is different only in emphasis. Legislation protective of Indians survives challenge in the United States not because it is benign, but because, being benign, it is an exercise of the federal Indian power. I emphasize that it is the existence of that power which stamps protective legislation as in pursuance of a valid federal objective.

In a word, section 43 was upheld because it did not deny equality before the law, in the sense of treating differently persons similarly situated, and not because section 91(24) will sustain legislation that

487. Beetz J. said ([1976] 1 S.C.R. 170 at 207; 52 D.L.R. (3d) 548 at 575; 4 N.R. 91 at 106-07; [1975] 3 W.W.R. 1 at 29-30):

The *British North America Act, 1867*, under the authority of which the *Canadian Bill of Rights* was enacted, by using the word 'Indians' in s. 91(24), creates a racial classification and refers to a racial group for whom it contemplates the possibility of a special treatment.

25. See *e.g. United States v. Antelope* (1975), 523 F. 2d 400 (U.S. C.A., 9th Circ.)

26. (1974), 417 U.S. 535 at 554-55

27. See *e.g. United States v. Analla* (1974), 490 F. 2d 1204 (U.S. C.A., 10th Circ.)

28. Comment (1970), 8 Alberta L. Rev. 409

denies equality. This is the first step towards a proper understanding of the cases under discussion.

Writing in 1971, Professor Tarnopolsky predicted the Supreme Court result in *Canard* on the ground that the *Bill of Rights* "cannot apply to an inequality which arises because of the operation of a federal law and a provincial law".²⁹ Similarly, Professor Hogg has expressed the view that the decision of the Manitoba Court of Appeal is wrong in that it ignored the federal character of Canada by finding inequality in the rules of the *Indian Act* because harsher than the provincial rules.³⁰ In the same vein, Professor Elliott sees as the only essential difficulty with federal-provincial comparison "the practical difficulty that provincial statutes will inevitably differ from comparable federal legislation, and from each other".³¹ The first writer bases his view on the narrow premise that "the law" before which one is entitled to equality is law within the jurisdiction of Parliament, and the second on the somewhat broader notion that legislative diversity is the essence of federalism. Both would, I think, see their views as in harmony with the American principle that "equal protection of the law" applies only to equal protection before the laws of the same sovereign body.³² Professor Elliott sees his practical difficulty overcome when a body of common rules has emerged from among provincial statutes.³³ Although I agree with Hogg and Tarnopolsky that *Canard* was decided correctly, I think that all three have missed the essential point of the case.³⁴

If these writers recognize that the state of provincial law must be irrelevant, they fail to see that it is the fact of *provincial jurisdiction* as the badge of a different legislative class which denies the inequality. What the Bill of Rights does not require is equal treatment of dissimilar cases; what *Canard* excludes from its operation is not equal treatment by different legislative bodies of

29. *The Canadian Bill of Rights from Diefenbaker to Drybones* (1971), 17 McGill L.J. 437 at 456

30. *Supra*, note 3 at 267-68

31. *Supra*, note 3 at 326

32. See P. Cavalluzzo, *Judicial Review and the Bill of Rights: Drybones and its Aftermath* (1971), 9 Osgoode Hall L.J. 511 at 534

33. *Supra*, note 3 at 326

34. Interestingly, Laskin C.J.C. has the same understanding of the majority result in *Canard* for he said, in dissenting, that it treats the "mere grant of legislative power as itself authorizing Parliament to *offend against* its generally stated protections in the *Canadian Bill of Rights*" [emphasis added] ([1976] 1 S.C.R. 170 at 184; 52 D.L.R. (3d) 548 at 557; 4 N.R. 91 at 131; [1971] 3 W.W.R. 1 at 10).

similar cases. The testamentary rights of Indians and others are constitutionally, and therefore rationally dissimilar.

Although Professor Hogg seems closer to the point than does Professor Tarnopolsky, it is clear that he too is wide of the mark. He suggests that inequalities between the laws of different legislative bodies should be "deemed" not to be inconsistent with equality before the law, and later that, where a law employs a classification used by the constitution to confer jurisdiction, it does not have to meet the test of equality.³⁵ Significant also is Professor Hogg's footnote answer to a suggestion made by Leslie Katz, who agrees with Tarnopolsky and Hogg in rejecting a comparison of federal and provincial laws in equality cases, and also with them in failing to see the fundamental reason for doing so.³⁶ Where, as in *Canard*, Parliament has no power to enact similar federal laws for non-Indians, Katz suggests that the *Indian Act* provision be compared with the laws of the federal territories on the matter.³⁷ To this, Hogg responds that the absence of a similar provision respecting non-Indians would be attributable not to Parliament but to the local Territorial Council, with whose decisions Parliament is politically unable to interfere.³⁸ In other words, it would be "unrealistic", *albeit* legally proper, to regard the territorial laws as laws enacted by Parliament. The answer ought to have been that, in comparing Indian legislation with such territorial ordinances as "only the provinces could have enacted in respect of persons or "unrealistic", *albeit* legally proper, to regard the territorial laws as laws enacted by Parliament. The answer ought to have been that, in comparing Indian legislation with such territorial ordinances as "only the provinces could have enacted in respect of persons or lands in the provinces",³⁹ one is comparing legislation on constitutionally distinct matters, and *Canard* applies.⁴⁰ Whether the

35. Professor Hogg of course recognizes that this last proposition is inconsistent with the Supreme Court decision in *Drybones*. He concludes that *Drybones* was wrongly decided (*supra*, note 3 at 268). It is hoped that analysis later in this paper will show that a proper understanding of *Canard* casts no doubt upon the validity of that landmark case.

36. L. Katz, *The Indian Act and Equality Before the Law* (1973), 6 Ottawa L. R. 277

37. *Id.* at 281-82

38. Legally, the Territorial Council legislates at the sufferance of Parliament. *North British Canadian Investment Co. v. St. John School District Trustees* (1904), 35 S.C.R. 461

39. *Supra*, note 36 at 278

40. For reasons that will appear, this statement does not involve a rejection of

legislative body responsible for the other law is Parliament or a territorial legislature is quite beside the point.

While Hogg and Tarnopolsky reject, for the wrong reasons, a comparison of federal and provincial laws, Phillips suggests that a “reasonable discrimination qualification” of the type employed in *Burnshine* should be applied where the comparison is made,⁴¹ and Elliott suggests that the majority decision in *Canard* does not support the “valid federal objective” approach taken in *Burnshine*.⁴² They do not see reflected in the very need to compare federal with provincial law a rational basis for discrimination. There is no inconsistency whatever in Ritchie J.’s *Canard* judgment and his concurrence in the majority *Burnshine* decision.

III. *Drybones*

If *Canard* is understood to mean that the *Bill of Rights* will not permit a comparison to be made between federal and provincial law, so that a law which employs a classification used by the constitution to confer jurisdiction does not have to meet the test of equality, it will be concluded that *R. v. Drybones* was wrongly decided,⁴³ or, at best, that it is limited in application to the operation of the *Indian Act* in the Northwest Territories.⁴⁴

It is surprising to see *Drybones* set beside *Canard* in this way, because the critical fact about the first case is that it was there unnecessary to make the finding that was, in my view, essential to the result in the second. Arising as the case did in the Northwest Territories, it was not necessary to test section 94(b) of the *Indian Act*, making it an offence for an Indian to be intoxicated off a reserve, against the limitations upon federal authority deriving from the distribution of powers. The question whether section 94(b) is valid Indian legislation under section 91(24) of the *BNA Act* did not have to be considered.⁴⁵ Beyond that, *Drybones* tends to affirm

Drybones. This is not Tarnopolsky’s answer either. Tarnopolsky, *supra*, note 3, 7 Ottawa L.R. at 21

41. *Supra*, note 3 at 375, 376, 379

42. *Supra*, note 3 at 321

43. Hogg, *supra*, note 3 at 268

44. *Id.* at 268 n. 23; Tarnopolsky, *supra*, note 29 at 456

45. The authority of Parliament in the Northwest Territories “to legislate for the future welfare and good government of the said territory” (Order of Her Majesty in Council Admitting Rupert’s Land and the North-Western Territory Into the Union, June 23rd, 1870) represents precisely the aggregate of federal and provincial jurisdiction within a province.

what has been said above, because section 94(b) was found in conflict with the *Bill of Rights* for the very reasons which would undermine its constitutional validity under the Indian power.

It is reasonable to conclude from *Drybones* that the Supreme Court did not regard section 94(b) as valid Indian legislation. As argued earlier, the fact of the legislation's limited application to Indians is not a sufficient condition of validity. As Professor Sanders says, the activity proscribed "must have some connection with the fact that the person is an Indian".⁴⁶ Ritchie J. held 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".⁴⁷ In saying this, he was not bothered by the dissenting opinion of Pigeon J. expressing a point of view which he (Ritchie J.) later adopted in *Lavell*⁴⁸ and *Canard*.⁴⁹ Pigeon J. said in dissent that the *Bill of Rights* should not be interpreted to preclude special class legislation enacted pursuant to section 91(24) of the *BNA Act*. Section 94(b), then, was not considered to be of this type.⁵⁰ The distinction is expressed by Ritchie J. himself in *Lavell*:

. . . [T]here is a wide difference between legislation such as s. 12(1) (b) [which denies Indian status to women who marry non-Indians] governing the civil rights of designated persons living on Indian Reserves to the use and benefit of Crown lands, and criminal legislation such as s.95 [formerly 94(b)] which creates an offence punishable at law for Indians to act in a certain fashion when *off* a Reserve. The former legislation is enacted as part of the plan devised by Parliament, under s. 91(24) for the regulation of the internal domestic life of Indians on Reserves. The latter is criminal legislation exclusively concerned with behaviour of Indians *off* a reserve.⁵¹

46. D.E. Sanders, *The Indian Act and the Bill of Rights* (1973-74), 6 Ottawa L.R. 397 at 412

47. [1970] S.C.R. 282 at 297; 9 D.L.R. (3d) 473 at 484; 71 W.W.R. 161 at 173; [1970] 3 C.C.C. 355 at 365-66; 10 C.R.N.S. 334 at 347

48. [1974] S.C.R. 1349 at 1361; 38 D.L.R. (3d) 481 at 491

49. [1976] 1 S.C.R. 170 at 192; 52 D.L.R. (3d) 548 at 563; 4 N.R. 91 at 119; [1975] 3 W.W.R. 1 at 16

50. [1970] S.C.R. 282 at 304; 9 D.L.R. (3d) 473 at 489; 71 W.W.R. 161 at 179; [1970] 3 C.C.C. 355 at 370 - 71; 10 C.R.N.S. 334 at 353. This explains why Ritchie J., according to Professor Hogg, *supra*, note 3 at 269, "did not attempt to answer" the proposition that the very object of section 91(24) is to enable the Parliament of Canada to make legislation applicable only to Indians as such and therefore not applicable to Canadian citizens generally. The key words here are "as such".

51. [1974] S.C.R. 1349 at 1370; 38 D.L.R. (3d) 481 at 498. Ritchie J. has been

Sanders has observed that there was no argument in *Drybones* suggesting some fundamental difference between Indians and non-Indians that justified a continuing discrimination in relation to alcohol, and that there was accordingly no attempt to justify section 94(b) on the basis of an American style doctrine of reasonable classification.⁵² Given the parameters of the reasonable classification doctrine as applied to Indian legislation, this is tantamount to an observation that the lack of support for section 94(b) under the Indian power was conceded. Sanders recognizes later in the same article that in describing section 94(b) as criminal legislation, Ritchie J. was saying, in *Lavell*, that “it was not legislation justified, constitutionally, as flowing from section 91(24) of the British North America Act”.⁵³ It is now apparent why Ritchie J., in deciding *Drybones*, did so in terms which emphasized the penal nature of section 94(b).⁵⁴ Laskin C.J.C. did not perceive that *Drybones* was distinguishable as not involving Indian legislation; as a consequence, he was compelled to dissent in *Canard*.

Notwithstanding the arguments of those who hold a contrary view,⁵⁵ it is my opinion that, in *Drybones*, the Supreme Court denied the power of Parliament under section 91(24) to enact legislation dealing with the public drunkenness of Indians.⁵⁶

taken to task for reading section 91(24) as if it said “Indians on lands reserved for the Indians”. See Tarnopolsky, *supra*, note 3, 7 Ottawa L.R. at 8; Hogg, *supra*, note 3 at 269-71. Whether or not the criticism is apt, this preoccupation tends to obscure the vital point that Ritchie J. did not regard the *Drybones* provision as valid Indian legislation. Beetz J. in *Canard* cast doubt on the validity of section 94(b) under the Indian power without distinguishing between conduct on and off a reserve ([1976] 1 S.C.R. 170 at 208-09; 52 D.L.R. (3d) 548 at 577; 4 N.R. 91 at 108; [1975] 3 W.W.R. 1 at 31).

52. *Supra*, note 46 at 402

53. *Id.* at 411

54. Tarnopolsky, *supra*, note 3, 7 Ottawa L.R. at 10, dismisses out of hand the suggestion that the basis of the authority for the liquor provisions in the *Indian Act* is section 91(27) and not section 91(24) of the *BNA Act*. As a result, he has great difficulty in reconciling the trilogy of cases. If Ritchie J. is understood to be drawing a distinction between criminal sanctions and civil disabilities, and nothing more, his reasoning appears unsupportable. That is how Laskin J. (as he then was) and Abbott J. understood him. See [1974] S.C.R. 1349 at 1382-83 and 1374; 38 D.L.R. (3d) 481 at 507 and 484

55. D. E. Sanders, *The Bill of Rights and Indian Status* (1972), 7 U.B.C.L. Rev. 81 at 97; Hogg, *supra*, note 3 at 272; Tarnopolsky, *supra*, note 3, 7 Ottawa L.R. at 10

56. And incidentally, overruled the line of cases suggesting the contrary. See cases cited in Sanders, *id.* at 97 n. 67. It is interesting that some commentators recognize, first, how difficult it is to reconcile *Canard* and *Drybones* if the former denies that

It is interesting to observe that section 94(b) of the *Indian Act* may well have lost its character as Indian legislation upon the coming into force on July 1, 1960 of amendments to the Act by which the prohibition in section 94(a) against Indians being in possession of intoxicants off a reserve was made conditional upon the absence of a proclamation of exception. Before then, it was possible to say of section 94 that it was motivated by a concern for the welfare of Indians. As Pool P.M. stated in *R. v. Gonzales*:

. . . [T]hese 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 while drunk.⁵⁷

The new policy introduced in 1960 was designed to allow Indians off a reserve to purchase and consume liquor freely in accordance with provincial law. It is simply inconceivable that Parliament could continue to have the welfare of Indians in mind in applying to them a special penalty for intoxication while making the intoxicants freely available to them. All of the foregoing was the basis for the decision of McFadden D.C.J. in *Richards v. Cote*⁵⁸ which held section 94(b) inoperative in the Province of Saskatchewan. If valid at all in the provinces,⁵⁹ the legislation is an exercise either of the federal general power or of the power to enact criminal law under section 91(27).⁶⁰

inequality is created by laws enacted pursuant to section 91(24), and second, that there is no logical or justifiable reason why Indians off a reserve should be subject to special penal provisions, but they do not draw the obvious conclusion that section 94(b) is not Indian legislation. See Kelly, *supra*, note 3 at 171, 177

57. (1961), 34 W.W.R. 622 at 624; 130 C.C.C. 206 at 208; 35 C.R. 155 at 157 (B.C. Mag. Ct.), *aff'd* (1961), 35 W.W.R. 703 (*sub nom. Re Indian Act*); 130 C.C.C. 400; 35 C.R. 320 (B.C.S.C.), *aff'd* (1962), 32 D.L.R. (2d) 290; 37 W.W.R. 257 (*sub nom. Re Indian Act*); 132 C.C.C. 237; 37 C.R. 56 (B.C.C.A.)

58. (1962), 40 W.W.R. 340; 39 C.R. 204 (Sask. D.C.)

59. There is the suggestion in *R. v. Whiteman* (No. 2) (1971), 13 C.R.N.S. 356 at 358 (Sask. D.C.), that intoxication in public places is a matter of property and civil rights under section 92(13).

60. Ritchie J. seems to favour the latter, as does Beetz J., who offered this as one explanation of *Drybones*:

. . . [T]he attaching of a particular consequence to Indian status would not be characterized as a provision in pith and substance relating to Indians and lands reserved for the Indians but as the use of other federal powers such as the power to enact penal laws for the promotion of temperance and the prevention of drunkenness . . .

([1976] 1 S.C.R. 170 at 208; 52 D.L.R. (3d) 548 at 577; 4 N.R. 91 at 108; [1975] 3 W.W.R. 1 at 31). Katz suggests that Parliament's paramount legislative power in

This conclusion is consistent with the disposition by American courts of cases involving legislation which treats Indians more harshly than non-Indians. In *United States v. Antelope*⁶¹ and *United States v. Big Crow*,⁶² United States Courts of Appeals struck down as violative of due process provisions of the federal *Major Crimes Act*⁶³ which had the effect, respectively, of dispensing with proof of premeditation and deliberation where an Indian is charged with killing a non-Indian on a reservation and of subjecting Indians to a sentence ten times greater than that of non-Indians for assault and burglary on a reservation. In each case, it was held that the discriminatory treatment could not be justified under the wardship concept of the federal Indian power. This led directly to the conclusion that the provisions denied equal protection and consequently violated the due process clause of the Fifth Amendment. The Courts did not strike down the legislation on the basis of the distribution of powers because Article IV, section 3 and Article I, section 8 of the Constitution give Congress full authority, quite independently of the Indian power, to punish all crimes committed on Indian reservations.⁶⁴

It is evident that on any understanding of the *Canard* decision, there is nothing to contradict it in *Drybones*. It may be said of the former that Parliament had not limited the testamentary rights of non-Indians because it could not, and the equality guarantee was qualified to accommodate "the federal principle of diversity between legislative jurisdictions".⁶⁵ However, we now know that nothing in the distribution of powers *requires* Parliament to limit to Indians legislation directed against intoxication, for that is a matter with which Parliament may deal, if at all, under powers embracing Indians and non-Indians alike. If the *Canard* principle is understood to excuse the use of a racial classification only when it is essential to the validity of laws under the *BNA Act*,⁶⁶ then it has no application to criminal legislation in which use of the classification is constitutionally gratuitous. It is further apparent that *Drybones*

respect of temperance, arising under the general power, is involved. *Supra*, note 36 at 280

61. (1975), 523 F. 2d 400 (U.S.C.A., 9th Circ.)

62. (1975), 523 F. 2d 955 (U.S.C.A., 8th Circ.)

63. 18 U.S.C. #1153

64. C.J. Antieau, *Modern Constitutional Law* (Rochester, N.Y.: Lawyers Co-operative Pub. Co., 1969) at 408-09

65. Hogg, *supra*, note 3 at 268

66. *Id.*

would be applicable to the operation of section 94(b) of the *Indian Act* in any of the provinces of Canada, for the inequality was manifest as much in the discriminatory operation of law within federal jurisdiction as in the operation of federal law and law within provincial jurisdiction. It is significant that Ritchie J. said nothing limiting the applicability of his decision to the Northwest Territories, and decided the case in terms which provide no support for so limiting it.⁶⁷ Incidentally, then, *R v. Whiteman (No. 2)*⁶⁸ and *Richards v. Cote*⁶⁹ would appear to have been decided correctly to the extent that they found section 94(b) to be inoperative in the Province of Saskatchewan.⁷⁰ Where, as in *Drybones*, Parliament has limited to Indians the application of legislation upon a matter in respect of which Indians and non-Indians alike fall within federal jurisdiction, it is the absence of similar legislation for non-Indians which proves the inequality.⁷¹

There is error, however, in this analysis. As it would have it, there is nothing of real consequence in the finding that section 94(b) of the *Indian Act* is not Indian legislation; the important conclusion

67. On a related matter, Tarnopolsky, *supra*, note 29 at 457, would limit the application of *Drybones* to an inequality which arises by operation of "two or more" provisions in federal statutes. Again, this is not supported by the *ratio* of the case, in the expression of which reference is made to the contrast between prohibition and impunity. Laskin C.J.C. agrees that the *Drybones* case would not have been decided differently if section 94(b) of the *Indian Act* stood alone (*Attorney-General of Canada v. Canard*, [1976] 1 S.C.R. 170 at 183; 52 D.L.R. (3d) 548 at 557; 4 N.R. 91 at 130; [1975] 3 W.W.R. 1 at 9) and Ritchie J. himself later lends support to that interpretation when in the same case (*id.* at 192; 52 D.L.R. (3d) at 564; 4 N.R. at 119; [1975] 3 W.W.R. at 16) he said that Indians may be denied equality before the law in provisions of the *Indian Act* "standing alone". As Laskin C.J.C. points out in *Canard* (*id.* at 178; 52 D.L.R. (3d) at 553; 4 N.R. at 125; [1975] 3 W.W.R. at 5) the American Bill of Rights has never been limited in application to a discordance between statutory provisions. It is one of the more unfortunate conclusions drawn by Elliott from *Canard* that, because it does not permit a comparison to be made of federal and provincial law, "the discrimination prohibited by the Bill of Rights [can] derive only for inequality between two provisions of a federal statute, or from inequality between different federal statutes". *Supra*, note 3 at 325

68. (1971), 13 C.R.N.S. 356 (Sask. D.C.)

69. (1962), 40 W.W.R. 340; 39 C.R. 204 (Sask. D.C.)

70. As explained later, it does not follow that the apparently inconsistent ruling in *R. v. Whiteman (No. 1)*, [1971] 2 W.W.R. 316; 13 C.R.N.S. 178 (Sask. D.C.), was wrong. Tarnopolsky finds the cases irreconcilable, *supra*, note 9 at 305, and Katz suggests that *No. 1* was decided wrongly. *Supra*, note 36 at 280-81

71. Here, Katz agrees. *Supra*, note 36 at 280. In rejecting this approach as unrealistic, Hogg, *supra*, note 3 at 268 n.22, does not see that it is the very point of *Drybones*.

is that, with respect to intoxication, federal jurisdiction includes Indians and others. To reconcile *Canard* and *Drybones*, it appears necessary only to find that the right or freedom restricted is one that Parliament may control generally. On this basis, it is possible to persist in the view that the *Canard* principle is one only of exception, a reluctant avowal of the division of power between legislative bodies, and to say of *Drybones* that the principle does not apply where the restricted application of an enactment to Indians does not exhaust federal power on the matter in question.⁷² *Drybones*, it may be insisted, would not have been decided differently had section 94(b) been Indian legislation.

But all of this takes *Drybones* too far, and it will not accommodate *Lavell*. It leaps over the determination that section 94(b) is *not* Indian legislation, as preliminary only to a conclusion of some consequence. In truth, the critical feature of the decision is the conclusion respecting section 91(24) of the *BNA Act*, and not that federal jurisdiction includes Indians and others. Remember that Ritchie J. was later to affirm the logic of the dissenting opinion of Pigeon J. who said in *Drybones* that section 91(24) authorizes special class legislation;⁷³ if Ritchie J. agreed, he must have decided differently if he thought section 94(b) was of that type. When it came time to explain his earlier decision, Ritchie J. said that section 94(b) was not Indian legislation;⁷⁴ his point was not that Parliament may control the drunkenness of anyone but the testamentary rights only of Indians. Finally, there is the telling comment of Martland J. in *Canard*, that this was a case of Indian legislation and not one “in which federal legislation dealing with a subject matter within s. 91 of the *British North America Act* has permitted certain acts or conduct by non-Indians and prohibited Indians from doing the same thing”.⁷⁵

72. This is the point at which I again part company with Katz. Because he would interpret the *Canard* principle to allow a comparison of federal law and territorial law within provincial jurisdiction, he is prepared to compare Indian legislation and legislation (or the absence of legislation) under other federal powers. *Supra*, note 36 at 278 and 280-81

73. [1970] S.C.R. 282 at 304; 9 D.L.R. (3d) 473 at 489; 71 W.W.R. 161 at 179; [1970] 3 C.C.C. 355 at 370-71; 10 C.R.N.S. 334 at 353

74. *Attorney-General of Canada v. Lavell*, [1974] S.C.R. 1349 at 1372; 38 D.L.R. (3d) 481 at 498

75. [1976] 1 S.C.R. 170 at 189; 52 D.L.R. (3d) 548 at 561; 4 N.R. 91 at 123; [1975] 3 W.W.R. 1 at 14. An example of which is furnished in Laskin C.J.C.'s dissenting judgment (*id.* at 179; 52 D.L.R. (3d) at 553; 4 N.R. at 125; [1975] 3 W.W.R. at 5) as to which, see *infra* at 744

What does it mean to suggest that *Drybones* would have been decided differently had section 94(b) been found valid under the Indian power? It means that it is the characterization of legislation for constitutional purposes as appropriate to the distinctive characteristics of a federal class of persons that denies inequality in a law of limited application, and it is not the need to accommodate “diversity between legislative jurisdictions”.⁷⁶ It proves the point made earlier about *Canard*. To sustain a law under section 91(24) is to find that it treats Indians with precisely that discrimination which their unique constitutional status makes appropriate, and thereby to defeat a *Bill of Rights* attack. In the result, what distinguishes *Canard* and *Drybones*, or makes them consistent, is nothing more or less than the disparity in conclusions respecting support for the enactments under the Indian power.

Although McFadden D.C.J. did not say so in so many words, his judgment in *Richards v. Cote*⁷⁷ represents an application of the point being made here. Before July 1, 1960, section 94(b) could not have been inoperative under the *Canadian Bill of Rights*, had it then been in force, because the subsection was part of a larger scheme conceived for the protection of Indians and hence valid under section 91(24). However, after the date, it became an anachronism, nothing more than a special penalty without any benign foundation, and as a result it was no longer valid under section 91(24) and inoperative for denying equality before the law.

What then of a law which, like the enactment in *Canard*, is constitutionally valid under section 91(24), but, like that in *Drybones*, one which Parliament might have applied to a larger group. To take an example, a provision which denies to Indians the capacity to make a promissory note is one which could be supported under section 91(24),⁷⁸ but it is one which Parliament could apply as well to other persons in exercise of its Promissory Notes power. In my view, such a provision is not inoperative under the *Bill of Rights*.⁷⁹ A determination of the constitutional question is a determination that Indians fall into a distinct class for the purposes

76. Hogg, *supra*, note 3 at 268

77. (1962), 40 W.W.R. 340; 39 C.R. 204 (Sask. D.C.)

78. Like section 43 of the *Indian Act*, it has to do with disposition of property

79. Thus, I do not agree with Professor Driedger, who suggests that Parliament violates the *Bill of Rights* in legislation made specially applicable to Indians unless Parliament has not the power to extend the legislation to non-Indians. E. A. Driedger, *The Canadian Bill of Rights and the Lavell Case: A Possible Solution* (1973-74), 6 Ottawa L.R. 620 at 620-21

of that kind of provision. If a restriction upon the capacity of Indians to make a promissory note were not related to the characteristics which give Indians a special place in the constitution, the enactment could be supported only as a Promissory Notes law, and would be inoperative. Thus, the Saskatchewan District Court ruled correctly in *R. v. Whiteman (No. 1)*⁸⁰ that section 96 of the *Indian Act*, which makes it an offence to be intoxicated on a reserve, is not rendered inoperative by the *Bill of Rights* because it is constitutionally valid under section 91(24). It matters not that federal authority to make intoxication an offence is limited neither to Indians nor to Indian reserves.⁸¹ A racial classification need not be *essential* to the validity of the law under the *British North America Act* in order to survive a *Bill of Rights* challenge.⁸²

The American equivalent of *R. v. Whiteman (No. 1)* is *Gray v. United States*,⁸³ a decision of the United States Court of Appeals, Ninth Circuit, involving federal legislation, applicable on Indian reservations, by which an Indian who rapes an Indian woman is exempted from the possibility of the death penalty, while no exemption is granted to a non-Indian who rapes an Indian woman or to an Indian who rapes a non-Indian. Because of Congress' plenary authority over all persons on Indian reserves, the special exemption in favour of Indians did not in any sense reflect the limits of federal power. However, the exemption was nonetheless proper legislation under the Indian power, rather than the Indian reservation power, because mitigation of penalty in favour of Indians is an obvious expression of the wardship concept. In the result, the legislation was upheld.⁸⁴

80. [1971] 2 W.W.R. 316; 13 C.R.N.S. 178 (Sask. D.C.)

81. *R. v. Whiteman (No. 1)* (*id.*) may be said to be not directly on point because section 96 is an exercise of the "Indian reserve" part of section 91(24). But just as the Indian power will support special rules for Indians, the Indian reserve power will support special rules "[the practical effect of which] is to discriminate against Indians who, with rare exceptions, are the only persons living on reserves". *Id.* at 317; 13 C.R.N.S. at 179. If, as Sanders suggests, *supra*, note 46 at 412, the basis of jurisdiction for the liquor sections dealing with activity on reserves is power over reserves, not power over Indians, then *Whiteman (No. 1)* is distinguishable from *Antelope v. United States* (1975), 523 F. 2d 400 (U.S.C.A., 9th Circ.) and *Big Crow v. United States* (1975), 423 F. 2d 955 (U.S.C.A., 8th Circ.) and is correctly decided because section 96 applies to "persons".

82. *Contra* Hogg, *supra*, note 3 at 268 and Kerr, *supra*, note 3 at 363 n.22: "Discrimination may be valid under the Bill of Rights where it is a necessary incident of the exercise of federal power, but invalid where it is not."

83. (1967), 394 F. 2d 96 (U.S.C.A., 9th Circ.)

84. It should be noted that the decision of the Court may have been based as much

Of a different sort altogether is the illustrative provision posed by Laskin C.J.C. in his dissenting judgment in *Canard*: "a provision in federal railway legislation prohibiting Indians alone from travelling in first class accommodation".⁸⁵ If, as the Chief Justice implies, the provision is railway legislation and not Indian legislation,⁸⁶ it denies equality before the law in the same way as the *Drybones* provision. It is not enough that the class afforded special treatment is recognized as distinctive by the constitution; the particular treatment must be related to the distinctive characteristics, as it is not if characterized constitutionally as railway rather than Indian law. Indians are recognized as distinct constitutionally only for the purpose of legislation which is supportable under the Indian power.⁸⁷

Precisely the kind of legislation instanced by the Chief Justice came before the United States Courts of Appeals in the *Antelope*⁸⁸ and *Big Crow*⁸⁹ cases cited earlier. Here, provisions of the *Major Crimes Act* placed Indians at a disadvantage relative to non-Indians in respect of crimes committed on Indian reservations. The government argued that no complaint could be made of discrimination which is a consequence of the federal Indian power. The Court answered in each case that when Indians are put at a serious racially-based disadvantage, the discriminatory treatment cannot be justified by the wardship concept of the federal Indian power. Still, Congress had full power to enact criminal legislation limited in application to Indian reservations and other federal territories. Congress had singled out Indians for special treatment, not under the Indian power, but under powers embracing Indians and others. What result? The provisions were held to deny equal protection and struck down on the basis of the due process clause. Because the legislation was not Indian law, Indians and others were situated similarly with respect to it. Said the Ninth Circuit in

on the legislation's benefit to those who attacked it as on the principles here considered.

85. [1976] 1 S.C.R. 170 at 179; 52 D.L.R. (3d) 548 at 553; 4 N.R. 91 at 125; [1975] 3 W.W.R. 1 at 5

86. Not because it deals with the conduct of Indians off a reserve, but because it is hardly a fulfilment of any trust obligation to aborigines

87. *Contra* Hogg, *supra*, note 3 at 271, where he argues that a law which employs a classification used by the *BNA Act* to confer jurisdiction need not meet the test of equality.

88. (1975), 523 F. 2d 400 (U.S.C.A., 9th Circ.)

89. (1975), 523 F. 2d 955 (U.S.C.A., 8th Circ.)

Antelope:

. . . Indians' rights to due process and equal protection under the Fifth Amendment require that they not be treated worse than similarly situated non-Indians.⁹⁰

The Eighth Circuit in *Big Crow* said simply that special treatment which is not "tied rationally to the fulfillment of Congress' unique obligation toward the Indians"⁹¹ cannot be sustained in the face of the requirement of equal protection. *Antelope* is now on appeal to the Supreme Court, *certiorari* having been granted on February 23, 1976.⁹² If the decision is upheld, as I think it should be, there will be complete harmony in the Canadian and American jurisprudence.

It cannot escape notice that, for *Bill of Rights* purposes, the courts must engage in an exercise of constitutional characterization which is unnecessary for constitutional purposes; they must isolate the particular head of power in section 91 to which an enactment is attributable.⁹³ The exercise is not contrary to the spirit of the constitution, however. Professor Abel has demonstrated that the individual classes of subjects in section 91 do not overlap; what is authorized by one is not authorized by any other.⁹⁴ Indian legislation, for example, is not the same as any other kind of legislation within section 91.⁹⁵ There is support for Professor Abel's position in *Citizens Insurance Co. v. Parsons*⁹⁶, where the Privy Council denied to section 91(2) a meaning which would embrace the contents of other sub-sections of section 91, and in the *Local Prohibition* case⁹⁷, where the same Court suggested that a provincial enactment authorized by one or the other of two classes of subjects in section 92 could not logically be held to fall within both.

90. (1975), 523 F. 2d 400 at 406

91. (1975), 523 F. 2d 955 at 959, quoting from *Morton v. Mancari* (1974), 417 U.S. 535 at 555

92. (1976), 96 S. Ct. 1100

93. "Which among the enacting government's specifics validates legislation is of little practical moment." Abel, *supra*, note 24 at 511

94. *Id.* at 508ff.

95. Though under the aspect doctrine, which, says Abel, applies logically within section 91, similar or identical measures may flow from distinct powers. This is the American expression of the rule, which is preferred by Dr. Alexander Smith, *The Commerce Power in Canada and the United States* (Toronto: Butterworths, 1963) at 37-38

96. (1881), 7 App. Cas. 96 (P.C.) (Can.)

97. *Attorney-General of Ontario v. Attorney-General of Canada*, [1896] A.C. 348 (P.C.) (Can.)

IV. *Lavell*

Awareness of the decision in *Re Eskimos*⁹⁸ leaves a nagging doubt about one aspect of the decision in *Canard*. The meaning of the word "Indians" in section 91(24) is wider than the definition by Parliament of the term in the *Indian Act*. Is it not one thing to say that Parliament may limit the testamentary rights of the persons described in section 91(24) and another to permit special restrictions for certain only of those persons? The class of persons recognized as constitutionally distinct is broader than the class to which the legislation applies. Though not expressed in those terms, this was essentially the argument raised and rejected in *Attorney-General of Canada v. Lavell*⁹⁹ challenging the validity of section 12(1) (b) of the *Indian Act*, which denies Indian status to a woman who marries a non-Indian.

Professor Hogg, among others,¹⁰⁰ is severely critical of the judgment on the basis that it justifies a difference in legislative treatment of men and women in reliance upon Parliament's power under section 91(24).¹⁰¹ In other words, the Court is said to have disposed of an argument of discrimination by reason of sex as if the classification were racial and therefore built into the *BNA Act*.

I think, however, that the approach of the Supreme Court of Canada was correct, and consistent with a proper understanding of the later *Canard* decision. The issue to be determined is whether the class of persons singled out for special legislative treatment is rationally distinct for the purposes of that legislation. If it is, it matters not what criteria are used to distinguish members of the class. The point is simply that equality before the law does not demand equal treatment of dissimilar cases. The Court was able to say, quite properly I think, that the legislation was a valid exercise of the power under section 91(24), notwithstanding that persons who might have been included as "Indians" were excluded by the particular legislative classification.¹⁰² The persons included in the

98. [1939] S.C.R. 104; [1939] 2 D.L.R. 417

99. I do not consider here the independent basis for decision in *Lavell* which is founded on Dicey's concept of equality before the law. It is worth noting, however, that this alternative basis was not used in the more recent *Canard* case. Phillips, *supra*, note 3 at 380, says that the failure to reaffirm that narrow concept of equality before the law "seems to indicate a weakening of its hold on the Court".

100. See also Kerr, *supra*, note 3 at 366-68

101. *Supra*, note 3 at 272

102. This was the conclusion drawn by D. E. Sanders, *supra*, note 57 at 97, 105

classification were constitutionally distinct. Having reached that conclusion, it followed necessarily that the class was rationally distinct; the constitutional determination compelled the conclusion if the philosophy later adopted in *Canard* was to be employed.

The entire point here is made clearly by Beetz J. in his *Canard* opinion:

The *British North America Act, 1867*, under the authority of which the Canadian Bill of Rights was enacted, by using the word "Indians" in s. 91(24), creates a racial classification and refers to a racial group for whom it contemplates the possibility of a special treatment. It does not define the expression "Indian". This Parliament can do within constitutional limits by using criteria suited to this purpose but among which it would not appear unreasonable to count marriage and filiation and, unavoidably, inter-marriages, in the light of either Indian customs and values which, apparently were not proven in *Lavell*, or of legislative history of which the Court could and did take cognizance.¹⁰³

There is no doubt that the provisions of the *Indian Act* treat men and women differently. To that extent the Act exhibits "discrimination by reason of sex". Accordingly, it was a necessary part of the majority decision in *Lavell* to hold that the existence of any of the prohibited forms of discrimination referred to in the opening words of section 1 of the *Bill of Rights* is not a sufficient condition of invalidity; there must be a denial of one of those guaranteed rights and freedoms which include the right to equality before the law.¹⁰⁴ Moreover, discrimination by reason of sex, or by reason of any other characteristic, does not necessarily constitute a denial of equality before the law.¹⁰⁵ In this interpretation of section 1, Ritchie J. is supported, I think, both by the grammatical structure of sections 1 and 2 and by the need to avoid any redundancy in the operative effect of section 1.¹⁰⁶

The challenge in *Lavell* was directed at an aspect of the *Indian*

103. [1976] 1 S.C.R. 170 at 207; 52 D.L.R. (3d) 548 at 575; 4 N.R. 91 at 106-07; [1975] 3 W.W.R. 1 at 29-30

104. [1974] S.C.R. 1349 at 1363-64; 38 D.L.R. (3d) 481 at 493-94

105. *Id.*; 38 D.L.R. (3d) at 493-94

106. See Kelly, *supra*, note 3 at 157-60 and Tarnopolsky, *supra*, note 9 at 300, developing the first point, and Lyon, *supra*, note 17 at 51-55, who agrees that discrimination runs afoul of the *Bill of Rights* "only when it is one of the Bill's section 1 human rights and fundamental freedoms that is being prejudiced" (at 68), but who develops the interesting notion that an attack on legislation as discriminatory need not involve the equality guarantee at all.

Act which in American jurisprudence would be called "under-inclusive" classification: "the classification does not include all who are similarly situated with respect to the purpose of the law".¹⁰⁷ Furthermore, the disposition of the challenge by our Supreme Court is compatible with the tolerance by the American judiciary of under-inclusive classifications for which there is some "fair reason".¹⁰⁸ What is peculiar about this notion in the context of the *Indian Act* is that the question of reasonableness is determined *before* the *Bill of Rights* issue is reached. Legislation cannot be sustained under section 91 (24) unless the exclusion of persons who qualify as "Indians" is seen to reflect some legitimate constraint upon the development of Indian policy or to express some valid federal objective in relation thereto. Ritchie J. was able to justify the exclusion of women of Indian birth who marry non-Indians simply by isolating the essential purpose of the classification, which was "to specify how and by whom Crown lands reserved for Indians are to be used".¹⁰⁹ The exclusion for that purpose was reasonable, and the legislation could accordingly be held an exercise of the power under section 91(24).

Indeed, it is more appropriate to say, given the narrow purpose of the law, that it was not under-inclusive at all. A classification is not under-inclusive if it includes all persons who are similarly situated *with respect to the purpose of the law*: to narrow the purpose is to narrow the range of persons who are similarly situated.¹¹⁰ The Supreme Court has said in effect that not all persons of Indian birth are similarly situated with respect to a law which makes provision for the use and enjoyment of lands reserved for the Indians. Such a law may therefore exclude certain persons of Indian birth without losing its status as Indian legislation. If it does, it is not truly under-inclusive.

The Indian power of Congress, like that of Parliament, will support legislation that does not apply to all who are Indians by birth. It is for Congress to judge whether, to what extent, and for how long any of such persons shall be recognized as requiring the protection of the United States.¹¹¹ Furthermore, due process does not require any more extended legislative application than is

107. Tussman and ten Broek, *supra*, note 4 at 344

108. *Id.* at 348, 349. See also Note, *supra*, note 13 at 1084 ff.

109. [1974] S.C.R. 1349 at 1372; 38 D.L.R. (3d) 481 at 500

110. Tussman and ten Broek, *supra*, note 4 at 348-351

111. See *U.S. v. Sandoval* (1913), 231 U.S. 28; Bowker, *supra*, note 28

supportable under the Indian power. Indeed, apparent under-inclusiveness in American Indian legislation has worked in its favour. In *Morton v. Mancari*,¹¹² non-Indian appellees argued that a racial classification was involved in the employment preference given by the *Indian Reorganization Act*¹¹³ to those members of federally-recognized tribes with one-fourth or more degree Indian blood. Racial classifications are said to be “suspect”, and there is an exceptionally heavy burden of justification imposed on the government.¹¹⁴ However, the Supreme Court denied that any racial classification was involved in the employment preference.

The preference is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally-recognized’ tribes. This operates to exclude many individuals who are racially to be classified as ‘Indians.’ In this sense, the preference is political rather than racial in nature.¹¹⁵

As a result, the court had only to find a rational basis for the classification; it did not have to find a compelling justification.¹¹⁶ Of course, the rational basis is found in Congress’ unique obligation toward the Indians.

V. Conclusion

It remains only to observe in conclusion that the consternation over the decision in *Lavell* is attributable directly to what I consider a fundamental misapprehension of the principle later applied in *Canard* and a failure to see what was necessarily involved in *Drybones*. Section 91(24) does not override the equality guarantee; rather it provides a basis for recognition of a distinct class of persons appropriate for special treatment, acknowledging that the equality guarantee requires only that like cases be treated alike. What is perhaps more incredible than the general failure to understand what was done in the trilogy under discussion, is that, in the course of the criticism directed at our Supreme Court, there has been a call for adoption of the American doctrine of reasonable classification.¹¹⁷

112. (1974), 41 U.S. 535

113. (1934), 25 U.S.C. #461

114. Note, *supra*, note 13 at 1088

115. (1974), 417 U.S. 535 at 553 n. 24

116. See *United States v. Big Crow* (1975), 523 F. 2d 955 at 960

117. See Hogg, *supra*, note 3 at 279; Tarnopolsky, *supra*, note 3, 7 Ottawa L.R. at 22-23 and *supra*, note 9 at 302-304; Kelly, *supra*, note 3

In truth, the application of that doctrine to the Indian legislation of Congress has produced decisions adhering to the very same principles as have been applied by our Court.¹¹⁸

118. Professor Elliott does recognize that Martland J. in *Canard* proposed a test that is the essential equivalent of the American doctrine of reasonable classification. *Supra*, note 3 at 321 n. 35