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A Progress Report on the Canadian Bill of Rights

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When the Parliament of Canada enacted the *Canadian Bill of Rights*¹ in 1960 it injected fresh authority into the judicial power of interpretation of federal laws. The process of interpretation of the *Bill of Rights* itself has been difficult for a judiciary trained to accept law as given and to take for granted the great creative periods and personalities of English law without regard to the fact that much if not most of the civil liberties tradition in English (and therefore Canadian) law was triggered by declaratory statutes like *Magna Carta*² and the English *Bill of Rights*.³

The decade and a half of existence of the *Canadian Bill of Rights* has seen the important questions of interpretation go before the Supreme Court of Canada. A survey of where we have come along the path of a Canadian human rights jurisprudence, the reasons for the direction taken, and the possibilities for the future may be useful at this time.

Two recent decisions of the Supreme Court of Canada, *Hogan v. The Queen*⁴ and *A-G for Canada v. Canard*⁵ show where we are, and the path from 1960 is marked by such milestones as *R. v. Drybones*,⁶ *Smythe v. The Queen*,⁷ *Lavell v. A-G Canada*,⁸ and *Curr v. The Queen*.⁹ I propose to look for trends in these cases, consider alternative directions open in 1975, and to project present trends ahead for another decade and a half in order to assess the relative merits of the alternatives that remain open to the Supreme Court of Canada.

Why bother? Surely, some will assert, the things the *Canadian Bill of Rights* stands for have become luxuries we can no longer afford as we face common threats in areas like energy supplies and

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1. S. C. 1960, c.44.

2. 25 Edward 1 (1297).

3. Statutes of the Realm VI, 142-143, 1 Will & Mary, Sess. 2, c.2.

4. (1975), 48 D.L.R. (3d) 427; 2 N.R. 343; 18 C.C.C. (2d) 65.

5. [1975] 3 W.W.R.1; 52 D.L.R. (3d) 548; 4 N.R. 91.

6. [1970] S.C.R. 282; 9 D.L.R. (3d) 473; 71 W.W.R. 161.

7. [1970] S.C.R. 680; (1971), 19 D.L.R. (3d) 480; 71 D.T.C. 525.

8. [1974] S.C.R. 1349; (1973) 38 D.L.R. (3d) 481.

9. [1972] S.C.R. 889; 26 D.L.R. (3d) 603.

costs, environmental protection, unemployment and inflation, and trends towards violence and social breakdown in both the domestic and international contexts. If the Bill is seen as a tool to help criminals “beat the rap”, such a response is understandable, but there will be urged here a broader conception of the Bill as setting out the fundamental values of Canadian society in a way that can provide some guidance in approaching all our common problems. That is, if we can learn to “think Bill of Rights” we may acquire a deeper understanding of our current troubles and a greater capacity to formulate and pursue approaches to them which, if successful, will lead to results that please us.

Beyond that, it is possible that our apparent inability to cope with the world of future shock flows from our failure to approach that world with a mental set built around the fairly simple set of human values which our history suggests are truly fundamental to a healthy society. The *Canadian Bill of Rights* was intended to provide the base for the necessary re-education toward such a mental set. It speaks not just to courts of law, but to legislators, to governments and their agents, and to the people. Legislators and governments can do much to promote and protect the values set out in the Bill, but the task of interpretation belongs to the courts, giving the courts an important educative role to perform. It is not that the courts can make law. That is for legislators. But what the courts can and must do, I suggest, is to show how the *Canadian Bill of Rights* allows us to interpret the world, through specific issues, in terms of the basic values that have produced the best of what we have in institutions and practices.

An attempt will be made to illustrate the kind of interpretation that would make the *Bill of Rights* useful in this way, using a few of the cases that have come before the Supreme Court of Canada.

The *Hogan* case¹⁰ is a good starting point. The outcome in the Supreme Court of Canada was that the common law rule that evidence is admissible if relevant even though illegally obtained stands unaffected by the requirement of section 2 of the Bill that every law of Canada shall be so construed and applied as not to deprive a person who has been arrested or detained of the right to retain, and instruct counsel without delay. Hogan was detained and taken to police station to undergo a breathalyzer test. Hearing his lawyer outside the breathalyzer room, Hogan asked to be allowed to

10. *Supra*, note 4.

see his counsel before taking the test, but was refused. He then submitted to the test and was subsequently convicted, on the breathalyzer evidence, of driving with an excessive blood alcohol content.

The Court did not face a *Drybones* issue. There was no suggestion that any law of Canada should be held inoperative. The question was what sanction, if any, the courts should use where there is a clear denial of the right to counsel by a person exercising delegated power in the enforcement of criminal law.

Ritchie J. speaking for the majority, found that there was no causal connection between the denial of the right to counsel and the obtaining of the breathalyzer certificate that led to Hogan's conviction. This served to distinguish *Brownridge v. The Queen*¹¹ where the Court held that denial of the right to counsel was justification for refusal to submit to a breathalyzer test so that *Brownridge* was not guilty of "refusing to blow".¹² Ritchie J. in *Hogan* went on to describe the *British North America Act, 1867*,¹³ as "The Constitution of Canada" in order to refute the dissenting view of Laskin, C.J.C. that the *Canadian Bill of Rights* is a quasi-constitutional instrument and to reject as an acceptance of the American rule of absolute exclusion the conclusion of the Chief Justice that the appropriate sanction in the case was a ruling that the breathalyzer test was inadmissible. Ritchie J. concluded,

. . . I cannot agree that, wherever there has been a breach of one of the provisions of that Bill, it justifies the adoption of the rule of "absolute exclusion" on the American model which is in derogation of the common law rule long accepted in this country.¹⁴

The remarkable feature of the majority judgement is that it fails even to consider how section 2 of the Bill affects the application of the common law rule on admissibility of illegally obtained evidence, which is itself a "law of Canada" within the meaning of section 5(2) of the Bill. The legislative directive given the courts by

11. [1972] S.C.R. 926; 28 D.L.R. (3d) 1.

12. Sub-section (2) of section 235 of the *Criminal Code*, R.S.C. 1970, c.C-34 makes it an offence to refuse, without reasonable excuse, to comply with a peace officer's demand for a sample of breath for analysis. The section, which was added to the Code in 1969 by S.C. 1968-69, c.38, requires that the peace officer have reasonable and probable grounds to believe that the subject of the demand was impaired by alcohol or a drug while driving or having care and control of a motor vehicle.

13. 30 and 31 Victoria, c.3.

14. *Supra*, note 4 at 434; 2 N.R. at 353; 18 C.C.C. at 72.

section 2 of the Bill requires at least a re-consideration of the common law rule, and could without difficulty be taken, along with the Bill's preambular recital of Parliament's desire that the Bill shall "ensure the protection of these rights and freedoms in Canada", as requiring a construction and application of the rule that is different to that which prevailed before 1960. That is, Parliament has given legal status to a due process value — the right to counsel — which must now be weighed against the law enforcement value which prevailed in the pure common law.

The explanation for this crucial omission in the majority reasons seems to be that the Bill's interpretation has developed in the context of federal *statutes* and it did not occur to the Court that federal areas of common law are as much subject to the legislative direction of section 2 as are federal statutes.

It is important to emphasize that the argument being put forward here is *not* that Parliament has indirectly repealed the common law rule in question. Rather, it is urged that Parliament has inserted a new consideration into the judgemental process through which the outcome required by authority is determined, requiring something more than a repetition of what was done before that new consideration was injected. This does not necessarily lead to a different result, but it does involve a re-consideration of underlying legal principles and policies.

Perhaps the most interesting aspect of this decision is the obvious confusion about the meaning of the word "policy" when used in legal analysis. Laskin C.J.C. refers in his judgement to his preference for a policy of exclusion over the policy underlying the admissibility of relevant evidence, then goes on to explain his preference. It seems obvious that he is referring here to *legal* policy, that is, to the authoritative principles that provide the substructure, or rationale, of the law. He cannot be speaking of social policy or of some personal predilection. However, this seems not to be the majority's understanding of what the Chief Justice means by "policy", for Ritchie J. states that in characterizing the *Canadian Bill of Rights* as a quasi-constitutional instrument" Laskin C.J.C. "would adopt as a matter of policy for Canada, apart from and at variance with the common law position, the rule of absolute exclusion of all evidence obtained under circumstances where one of the provisions of the *Canadian Bill of Rights* has been violated."

The obvious inference that the Chief Justice has been guided by policy *instead of* law indicates an equating of legal policy, or the

policy of the law, with the broader, unstructured social policy which all would agree cannot serve as the basis for judicial decision. More is involved here than a failure of meeting of minds as to what the law is, and an understanding of where the difference lies is essential to the development of a coherent theory of Canadian law to guide judicial decision at all levels.

Ritchie J. obviously believes that his dissenting brethren have rejected the law in favour of what they consider a desirable policy. This view, however, begs the very question before the Court in *Hogan*, that is, whether Parliament has, by enacting the *Canadian Bill of Rights*, altered the law which requires courts to admit evidence that it is relevant even though obtained through illegal acts. One cannot answer this question simply by laying the common law formulation beside the *Canadian Bill of Rights* because the two sources speak at different levels of generality, the common law rule being a specific formulation. One must first inquire beyond the surface formulation of the rule in order to determine what policy the law is pursuing through that rule, then weigh that policy against the policy implicit in section 2(c) (ii) of the *Canadian Bill of Rights*. The legal reasoning required is similar to that used by the House of Lords in the case of *Conway v. Rimmer*,¹⁵ involving the question whether the Home Secretary's assertion of privilege for departmental documents on a "class" basis is conclusive and therefore not subject to judicial review. The House of Lords described the judicial responsibility as one of weighing the public interest in the confidentiality of the internal processes of government against the public interest in the due administration of justice. In the result, the House ruled that a court of law could inspect the documents in question and decide which of these public interests should prevail in the circumstances. This was a case of weighing competing legal policies, one of them being derived from the common law rule laid down by the House itself in the then-leading case of *Duncan v. Cammell Laird & Co.*¹⁶

Applying similar reasoning to the *Hogan* case, as Laskin C.J.C. did, leads to a weighing of the legal policy favouring judicial access to all relevant evidence against the legal policy favouring access to competent legal advice on the part of citizens whose liberty has been threatened by the coercive power of the state. Does the *Bill of Rights* indicate that the latter is to prevail? In all circumstances or just in

15. [1968] A.C. 910; [1968] 1 All E.R. 874 (H.L. (E.)).

16. [1942] A.C. 624; [1942] 1 All E.R. 587 (H.L. (E.)).

some? If just in some, by what standards are the favoured cases identified?

This was the judgement the Supreme Court had to make, and the majority chose the legal policy underlying the common law rule as the dominant one in all cases, but not by weighing one articulated legal policy against the other. Instead, the majority simply asserted the continuing vitality, totally unaffected by this Act of Parliament called the *Canadian Bill of Rights*, of the legal policy enacted by judges through formulation of the common law rule in the course of judicial decision.

The important point is that the majority decision also was based on a policy choice, preferring one legal policy over another. However, by expressing it as a preference for law over policy Ritchie J. avoided the important weighing process required by a conflict between a legal policy prescribed by the courts and another legal policy prescribed by Parliament. He also gave the impression, in all good faith, that the dissenting judges were importing an alien policy from the United States whereas in fact the dissenting judgement simply purports to give effect to the objects of the *Canadian Bill of Rights* as those judges understand those objects in the context of the facts in *Hogan*.

The difference, in the end, is not as to what the law is on the matter in question. That is too simple. The difference goes rather to the most basic question of legal theory: “what is law?”, and the different conceptions of law held by the two groups of judges appear to be such that the *Canadian Bill of Rights* is to the majority like a radio communication on a frequency that lies outside their receiving band while the conceptual framework of the minority is such as to accommodate the *Bill* as a source of authority for judicial decision that is complementary to the common law.

This is not to suggest that the dissenting judgement is necessarily sounder in law, but simply that it accords authority to both the common law rule and the legislative imperative of the *Canadian Bill of Rights*. Since the majority perceived the matter as one calling for a choice between the common law and the *Bill of Rights* they necessarily accorded no authority to one or the other in the case. In the result, they gave no weight to the *Canadian Bill of Rights*.

The Impact of Drybones

The decision in the *Drybones* case¹⁷ was hailed as a breakthrough in

17. *Supra*, note 6.

Canadian law, and in one sense it was. However, the benefit of hindsight allows us to see that the case has come to symbolize a notion of judicial supremacy in the thinking of many judges and has served to obscure the fact that the main purpose and use of the *Canadian Bill of Rights*, as an interpretation statute, is the judicial supervision of administrative action, not judicial nullification of legislation.

This effect has followed mainly because of judicial failure to make use of the Bill as a guiding authority in interpreting federal laws. Even without the *Bill of Rights* the power of interpretation in the Canadian common law system is an important tool in protecting individual rights and freedoms.

Parliament, by enacting the *Canadian Bill of Rights*, sought to broaden the base of the judicial power of interpretation to enable courts of law to resolve questions about the proper meaning to be given to federal laws in favour of the protection of the fundamental rights and freedoms of all individuals, whatever their social or economic status. I submit that the failure of the *Bill of Rights* to achieve even its minimum objects is a result of the failure of the majority of judges on the Supreme Court of Canada to perceive the Bill in these rather modest terms and to engage in the process of infusing the interpretative process with the values set out in the Bill, in the best tradition of the common law. *Drybones* seems to have created a mental block, leading to a belief that vigorous development of the *Bill of Rights* will lead to judicial invasion of the proper domain of the elected legislature.

It has been Laskin C.J.C. who has shown that this fear is unfounded, in his perceptive dissenting judgements in *R. v. Burnshine*¹⁸ and *A-G Canada v. Canard*.¹⁹ In both of these cases provincial appellate courts held provisions in federal statutes to be inoperative on the authority of *Drybones*, and in both cases Laskin C.J.C. used the *Bill of Rights* as authority for arriving at interpretations of those statutory provisions which avoided offending section 2 of the Bill and thus avoided the *Drybones* outcome of inoperativeness while giving effect to parliament's will that the bill "shall ensure the protection of these rights and freedoms."

A brief look at each of these cases will illustrate the point being made. In *Burnshine* the appellant had been convicted of causing a

18. (1974), 44 D.L.R. 584; [1974], 4 W.W.R. 49; 2 N.R. 43; 25 C.R.N.S. 270.

19. *Supra*, note 5.

disturbance, an offence carrying a maximum sentence of six months' imprisonment under the *Criminal Code*. However, as a young offender Burnshine was subject to the provisions of the *Prisons and Reformatories Act*,²⁰ a federal statute designed to accommodate corrections policies and practices in the various provinces to the extent that the provinces have jurisdiction over persons convicted of offences under the *Criminal Code*.²¹ This Act authorizes the use in British Columbia and Ontario of indeterminate sentences tacked on to minimum fixed sentences, providing for a minimum of three months definite followed by an indeterminate period not exceeding two years less a day. Instead of the maximum of six months prescribed by the *Criminal Code*, Burnshine was sentenced to three months definite plus two years less a day indefinite. His loss of liberty would last anywhere from three months plus a day to twenty seven months less a day, depending upon the opinion of corrections personnel as to his readiness for release.

The provision which authorized this disposition is section 150 of the *Prisons and Reformatories Act*,²² which reads as follows:

Every court in the Province of British Columbia, before which any person apparently under the age of twenty-two years is convicted of an offence against the laws of Canada, punishable by imprisonment in the common goal for a term of three months, or for any longer term, may sentence such person to imprisonment for a term of not less than three months and for an indeterminate period thereafter and for an indeterminate period thereafter of not more than two years less one day

- (a) in the case of a male person apparently under the age of eighteen years, in Haney Correctional Institution
- (b) in the case of any other male person to whom this section applies, in Oakalla Prison Farm or in New Haven, or
- (c) in the case of a female person to whom this section applies, in a place designated by the Lieutenant Governor for any such female persons

instead of the common gaol of the county or judicial district where the offence was committed or was tried, and such person shall thereupon be imprisoned accordingly until he is lawfully discharged or paroled pursuant to section 151 or transferred according to law, and shall be subject to all the rules and

20. R.S.C. 1970, c.P-21.

21. R.S.C. 1970, c. C-34.

22. *Supra*, note 20.

regulations of the institution as may be approved from time to time by the Lieutenant Governor in that behalf.

The Court of Appeal for British Columbia, by a majority of two to one, held section 150 to be inoperative because it authorized harsher treatment of Burnshine by reason of age and location in Canada, thus depriving of his right to equality before the law. The majority thought section 150 incapable of an interpretation that was not discriminatory. Maclean J.A. dissenting, found that the differential treatment contemplated by section 150 is related to the proper legislative objective of allowing those provinces with special facilities for young offenders to use the indeterminate sentence to make use of them and therefore does not infringe the right of equality before the law.

The majority of six judges in the Supreme Court of Canada adopted the theory of Maclean, J.A. that section 150 differentiates in the pursuit of a proper legislative objective. Laskin J. (as he then was) speaking for the minority of three, did not, however, adopt the view of majority below that section 150 necessarily infringes the right of equality before the law and is therefore inoperative. Instead he observed that the "primary injunction of the Bill . . . is to determine whether a challenged measure is open to a compatible construction that would enable it to remain an effective enactment."²³ Since he agreed that the sentence imposed on Burnshine did infringe his right to equality before the law, Laskin J. (as he then was) directed his initial Bill-of-Rights analysis at the sentencing judge, not at Parliament, asking whether that judge had interpreted section 150 properly in light of the direction given by section 2 of the *Bill of Rights*. He then concluded that this was where the fault lay, and that the sentencing judge was required by section 2 of the Bill to avoid the offending inequality by reading section 150 as though it contained the proviso that the total of definite and indeterminate sentences should not exceed the maximum sentence prescribed for the offence by the *Criminal Code*.

Very neatly, the will of Parliament in enacting the *Bill of Rights* is thus reconciled with that Parliament's supremacy in law. The *Drybones* outcome is avoided. The obvious criticism is that the learned judge has really added an amending clause to the statute, thus invading the exclusive realm of the legislature. Another

23. *Supra*, note 18 at 599; 4 W.W.R. at 65; 25 C.R.N.S. at 286.

interpretation, however, is that he has simply overlaid one Act of Parliament on another, giving particular expression in the context of section 150 of the *Prisons and Reformatories Act* to the general legislative standard found in the *Canadian Bill of Rights*, thus avoiding the less desirable outcome of holding section 150 inoperative. By directing the main force of the Bill at the process of administration of laws of Canada rather than their enactment he has demonstrated the viability of the Bill in the Canadian constitutional system.

There is an interesting precedent for this approach in *Klippert v. The Queen*,²⁴ where Cartwright J., dissenting, drew authority from the *Interpretation Act*²⁵ for interpreting the *Criminal Code* provision as to dangerous sexual offenders as not contemplating sexual offenders who, on the evidence, are not dangerous in the ordinary sense of that word, although the plain words of the provision appeared to include such a person. In so doing, Cartwright J. sought to avoid what he considered a serious and unintended infringement of Klippert's personal liberty.

The second case in which Laskin C.J.C. used the new dimension of the power of interpretation conferred by the *Bill of Rights* to avoid an outcome of inoperativeness is *A-G Canada v. Canard*.²⁶ A unanimous bench of three judges in the Manitoba Court of Appeal had held that sections 42, 43 and 44 of the *Indian Act*²⁷ are inoperative. Mrs. Canard applied for and received letters of administration appointing her administratrix of her deceased husband's estate and commenced an action on behalf of the estate against the driver of the vehicle which had struck him, causing his death. Unknown to Mrs. Canard, the District Superintendent of Indian Affairs had already been appointed administrator of the estate pursuant to sections 42 and 43 of the *Indian Act* and had also commenced an action against the driver of the car. To resolve this conflict Mrs. Canard brought an action against the District Superintendent and others for a declaration that these provisions of the *Indian Act* are either inapplicable or, if applicable, *ultra vires* or inoperative.

24. [1967] S.C.R. 822; 65 D.L.R. (2d) 698; 61 W.W.R. 727.

25. R.S.C. 1952 c.158 (since repealed and replaced by S.C. 1967-68, c.7, now R.S.C. 1970, c.I-23).

26. *Supra*, note 5.

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

The impugned provisions are as follows:

S.42 (1) Unless otherwise provided in this Act, all jurisdiction and authority in relation to matters and causes testamentary, with respect to deceased Indians, is vested exclusively in the Minister, and shall be exercised subject to and in accordance with regulations of the Governor in Council.

(2) The Governor in Council may make regulations for providing that a deceased Indian who at the time of his death was in possession of land in a reserve shall, in such circumstances and for such purposes as the regulations prescribe, be deemed to have been at the time of his death lawfully in possession of that land.

(3) Regulations made under this section may be made applicable to estates of Indians who died before, on or after the 4th day of September 1951.

s.43 Without restricting the generality of section 42, the Minister may

- (a) appoint executors of wills and administrators of estates of deceased Indians, remove them and appoint others in their stead;
- (b) authorize executors to carry out the terms of the wills of deceased Indians;
- (c) authorize administrators to administer the property of Indians who die intestate;
- (d) carry out the terms of wills of deceased Indians and administer the property of Indians who die intestate; and
- (e) make or give any order, direction or finding that in his opinion it is necessary or desirable to make or give with respect to any matter referred to in section 42.

S.44(1) The court that would have jurisdiction if the deceased were not an Indian may, with the consent of the Minister, exercise, in accordance with this Act, the jurisdiction and authority conferred upon the Minister by this Act in relation to testamentary matters and causes and any other powers, jurisdiction and authority ordinarily vested in that court.

(2) The Minister may direct in any particular case that an application for the grant of probate of the will or letters of administration shall be made to the court that would have jurisdiction if the deceased were not an Indian, and the Minister may refer to such court any question arising out of any will or the administration of any estate.

(3) A court that is exercising any jurisdiction or authority under this section shall not without the consent in writing of the Minister enforce any order relating to real property on a reserve.

Matas J. of the Manitoba Court of Queen's Bench held the *Indian Act* provisions inapplicable to the case, but the Manitoba Court of Appeal disagreed and went on to hold the provisions inoperative because they denied Mrs. Canard equality in the right to apply to a court of law for letters of administration by reason of race alone, contrary to the *Canadian Bill of Rights*. Here the reasoning becomes a bit circular, however, for the objection that the *Bill of Rights* cannot apply to inequalities that arise as between federal law (Indians) and provincial law (non-Indians) has a solid base where Indians as a group are by the Constitution committed to exclusive federal jurisdiction. Dickson J.A. asserted that the inequality arises through conflict between the *Bill of Rights* and the *Indian Act*, and on appeal to the Supreme Court of Canada Laskin C.J.C. adopted this interpretation in his dissent. An attempt will be made to unravel the apparent circularity of reason when the *Lavell*²⁸ case is considered. But for now the point of interest is how Laskin C.J.C. avoided the outcome of inoperativeness while reaching a conclusion favourable to Mrs. Canard.

First, the Chief Justice found no constitutional objection to Parliament's enacting the impugned provisions, then concluded that sections 42 and 43 of the *Indian Act* did not contemplate an Indian becoming an administratrix of her deceased spouse's estate. He disposed of counsel's argument that nothing in those sections prevents such an event by describing it as a completely illusory possibility in view of the Indian Estates Regulations and the fact that Mrs. Canard had not even been notified by the Department of the appointment of the District Superintendent as administrator of her husband's estate.

Finally, and most importantly, Laskin C.J.C. agreed with the Manitoba Court of Appeal that to deny an Indian widow the right to apply for letters of administration for her deceased spouse's estate is to deny her equality before the law by reason of her race. However, since section 43 of the *Indian Act* did not clearly prohibit such a thing (only the regulations and the practice did), the Chief Justice did not hold that section 43 is inoperative. Instead he stated that section 43 must be applied consistently with section 1 (b) of the *Bill of Rights*, that is, so as to permit an Indian widow to apply and to be appointed administratrix. The regulation, however, was inoperative because it did purport to exclude the Indian widow.

28. *Supra*, note 8.

Once again, then, Laskin C.J.C., having found a violation, directed the force of the *Bill of Rights*, not at the legislation but at those responsible for its administration, to strike down as inoperative the *subordinate legislation* of one such administrative authority, and to strike down as contrary to the *Bill of Rights* the *action* of another.

It should be noted, however, in relation to this dissent, that if equality before the law requires that an Indian be permitted to be appointed administrator of his or her deceased spouse's estate, it might be difficult to resist the claim of a reserve Indian to partition or sale of the reserve. While there are obvious differences between a band's relationship to a reserve and joint tenants' relationship to land held in fee simple, these differences could be seen as simply manifestations of a racial discrimination that became unlawful with the enactment of the *Canadian Bill of Rights*. Perhaps it is this slippery-slope character of the application of equality before the law to the *Indian Act*, leading ultimately to Osler J's ruling in *Isaac v. Davey*²⁹ that the Act is *ultra vires in toto*, that makes the Supreme Court majority hesitant to follow through on *Drybones*.

To summarize the point being made at some length here, the *Canadian Bill of Rights* is an interpretation statute that is directed primarily at the exercise of power delegated by Parliament to the administrative branch of government. The courts are given authority to strike down or correct administrative decision or action for failure to respect the human rights and fundamental freedoms described in the Bill. Only if Parliament has failed to allow sufficient lee-way to respect these rights and freedoms, a rare event given the complexity of the law and the flexibility of the art of interpretation, does a court have to resolve a conflict between two Acts of Parliament. A *Drybones* situation will not happen often, and for the Supreme Court to avoid all such conflicts by giving a restrictive interpretation to the rights and freedoms in the Bill is to stultify the necessary growth of a sound human rights jurisprudence in order to preserve intact the misconception that Parliament cannot create repugnancy between two of its own enactments and delegate to the judiciary the power to resolve the repugnancy.

The legacy of *Drybones* does not end there, however, for so great was judicial concern for the doctrine of parliamentary supremacy that not enough attention was paid to the language of section 1 of the

29. [1973] 3 O.R. 677; 38 D.L.R. (3d) 23 (subsequently reversed by the Ontario Court of Appeal: (1975), 5 O.R. (2d) 610; 51 D.L.R. (3d) 170).

Canadian Bill of Rights. (It must be admitted that all of this comes with the benefit of hindsight, after *Lavell* and other cases have clarified the problem).

Let us assume we are facing *Drybones* for the first time. The accused has been penalized for an offence which only an Indian can commit, a special liquor offence enacted in the *Indian Act*. His claim is that he has been discriminated against by reason of his race, and thus denied equality before the law. On referring to the *Canadian Bill of Rights* we find that it prohibits discrimination in two ways: first, by enacting that the rights and freedoms shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex; second, section 1(b) recognizes the right of the individual to equality before the law and the protection of the law.

Why are there two forms of prohibition of discrimination? The apparent reason is that the first constitutes an *absolute* prohibition against discrimination by reason of race, national origin, colour, religion or sex when it comes to the enumerated rights and freedoms. Parliament is saying in effect, that there can never be a rational justification for violating one of these rights and freedoms. The second prohibition, on the other hand, stated by way of an affirmative right to equality before the law, would prevent discrimination for any reason in the application of *any* law of Canada (not just in relation to the rights and freedoms found in section 1) *unless* some rational legislative purpose can be shown which justifies differential treatment.

The second form of protection is clearly the more difficult one to apply and calls for a judicial consideration of all the facts and all relevant law and its purposes, followed by a judgement as to whether there is an inequality that is proscribed by the *Bill of Rights*. The Supreme Court treated *Drybones* in terms of equality before the law, thus maximizing the difficulty and the scope for disagreement among judges.

Was this the proper approach? I submit that it was not and that we are paying heavily for the wrong choice.

Drybones' complaint was one of racial discrimination, which is prohibited absolutely with respect to the enumerated rights and freedoms. Therefore, the court should have enquired whether one of the other enumerated rights and freedoms had been abrogated, abridged, or infringed by reason of race before resorting to the more general ground of equality before the law.

What had been done to Drybones in the name of a law of Canada? He had been fined ten dollars, that is, he had been deprived of the enjoyment of property by reason of his race. This is easily tested by asking whether in the same circumstances a non-Indian could be deprived of the enjoyment of property. The unqualified negative response supports the conclusion that Drybones' deprivation of property occurred by reason of race, contrary to the *Bill of Rights*. The separate right not to be deprived of the enjoyment of property without due process of law was not in issue. Presumably Drybones was given a fair trial, with full respect for his procedural rights. His complaint was that the convicting magistrate had, in fining him for contravening section 94 of the *Indian Act*, applied that section so as to infringe Drybones' right to the enjoyment of property without discrimination by reason of race.

This way of interpreting section 1 of the *Canadian Bill of Rights* may seem strained to those accustomed to the equality-before-the-law rationale used in *Drybones* but its value becomes apparent when it is applied to the *Lavell*³⁰ case, for the analysis that was applied in *Lavell* by the Supreme Court had the effect of denying Mrs. Lavell the potential benefit of the Bill's absolute ban on discrimination by reason of sex by submerging that ban in the more tenuous right to equality before the law. The Court asked itself whether these women had been denied equality before the law by reason of sex. This was the wrong question to ask. It had the effect of reversing the order of priority of the absolute and conditional bans on discrimination contained in the *Canadian Bill of Rights*, and it enabled the majority to avoid facing the question of discrimination by choosing an interpretation of equality before the law that excludes inequalities within the statute and covers only inequalities in the *application* of a statutory provision.

This interpretation of equality before the law might well be appropriate, indeed might be essential to judicial restraint, *if* equality before the law were treated separately from the absolutely-prohibited discriminations stated in the opening paragraph of section 1 of the Bill as a kind of second line of defence against discrimination for *any* reason. However, it is not an appropriate interpretation when it is applied to a fused application of the two prohibitions against discrimination in a manner that permits denial of one of the Bill's rights or freedoms by reason of sex. And that is what happened in *Lavell*, as I will now try to show.

30. *Supra*, note 8.

Mrs. Lavell's complaint was that she had been subjected to discrimination by reason of sex when she was struck off the Band List following her marriage to a non-Indian. The appropriate question for the Supreme Court to ask was whether she had been denied one of the rights or freedoms set out in section 1 of the *Canadian Bill of Rights* as a result of that discrimination (assuming, as was the case, that the differential treatment for women was established). If this question receives an affirmative answer without resort to the right to equality before the law, there is no need to go on to that back-up provision, for an abrogation, abridgment or infringement has been shown in terms of an absolutely-prohibited discrimination and the Court must search for a construction of the provision in question (section 12 (1) (b) of the *Indian Act*, reproduced below) which does not result in such discrimination for the guidance of the person charged with the administration of this part of the *Indian Act*. If none can be found, the provision is to be held inoperative on the authority of *Drybones*.

The Supreme Court asked only whether Mrs. Lavell had been denied equality before the law by reason of her sex, and on the majority's Dicean interpretation of "equality before the law" there had been no such denial. There is much to be said for the majority's interpretation of "equality before the law", *provided* this bar to discrimination is seen as a supplementary one, directed at the exercise of administrative power, leaving the protection against legislative discrimination to a proper application of the opening paragraph of section 1 of the *Canadian Bill of Rights*.

I will try to show how this application of the *Canadian Bill of Rights* might work.

Mrs. Lavell, while a registered Indian, married a non-Indian, resulting in her name being struck off the Indian Register pursuant to section 12(1) (b) of the *Indian Act*, which provides:

The following persons are not entitled to be registered, namely,

- (b) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11.

Indian men who marry non-Indian women do not suffer a similar loss of status.

Since there is obviously discrimination by reason of sex in this situation, the first question is whether any of the human rights and fundamental freedoms set out in section 1 have been thereby

abrogated, abridged, or infringed. Even a person not familiar with Indian ways should appreciate that loss of status, without which a person cannot be on a reserve as of right, must have an adverse effect on the security of the person. Because exile has largely disappeared as a legal sanction we tend to take for granted that part of personal security that goes with our freedom of movement. Just consider, for example, how it would affect any of us if a law were enacted that took away our freedom to go back to our home towns to visit our families, relatives or friends. This is what the application of section 12(1) (b) did to Mrs. Lavell, and it should not be difficult for a court of law to equate it to an infringement of the right of security of the person.

Secondly, given the fact that the Crown in right of Canada holds title to Indian reserves for the use and benefit of the various bands, it is not difficult to grasp that the reserve is the common castle of all the members of a band. It is a form of communal property, adapted to the system of English land law imposed as to all public lands in Canada. Therefore, Mrs. Lavell's status as a registered Indian carried with it a right of enjoyment of property in common with the other members of the band. This right has been abrogated by section 12(1) (b), as applied by the Registrar.

There is a red herring to be disposed of here. It might be argued that the various rights set out in section 1(a) of the *Bill of Rights* are all subject to being taken away or altered by due process of law and that Mrs. Lavell has had due process through the fair and proper application of section 12 (1) (b) of the *Indian Act*.

Due process is not an issue in this situation. Section 1 does not say that one's right against discrimination by reason of race or sex, etc. can be taken away by due process of law. Analytically, section 1 means that all persons, whatever their race, sex, etc. have the following two sets of rights:

1. the right to life, liberty, security of the person and enjoyment of property,
2. the right to due process of law (i.e. fair and lawful procedures) before being deprived of any of the rights listed in 1.

That is, paragraph (a) of section 1 makes up a package of rights, and the whole package is subject to an overriding protection against those forms of discrimination considered by Parliament to be inherently wrong.

Mrs. Lavell's complaint was not one of denial of due process. It was one of discrimination by reason of sex, and it is a prior requirement to due process of law that the law being applied should not, by reason of one's race or sex, etc., deny the right to, say, enjoyment of property.

Applying section 2 of the *Canadian Bill of Rights*, we find Parliament ordering that every law of Canada shall be so applied as not to abrogate, abridge or infringe the right of the individual to security of the person and enjoyment of property without discrimination by reason of sex ("liberty" could easily be added since exile to the white man's world can be a form of imprisonment to a reserve Indian).

It seems clear that the Registrar's application of section 12(1) (b) is in violation of this mandate. The next question, then, is whether the Court can provide the Registrar with a legal construction of the *Indian Act* which will avoid this effect. The value of the dissent in *Burnshine*³¹ is that it shows how Parliament, by enacting the *Canadian Bill of Rights*, has broadened the judicial power of interpretation so that courts of law may avoid some injustices that would otherwise occur in some cases. That is, Parliament, by enacting the Bill, has infused all laws of Canada with some overriding policies based on fundamental values, from which judges are entitled to draw a few more inferences about legislative policies than they were previously able to do. But the added judicial power is limited and a judicial finding of inoperativeness is preferable to an interpretation that strains judicial credibility. In *Burnshine* there were three federal statutes interacting — the *Prisons and Reformatories Act*, the *Criminal Code* and the *Canadian Bill of Rights*. The proviso inferred in the *Prisons and Reformatories Act* by Laskin C.J.C. in his dissent, was capable of being supported by the *Criminal Code's* prescription of a maximum of six months for the offence in question. In *Lavell* there seems to be nothing in the *Indian Act* to support a construction of section 12(1) (b) that would avoid the abrogation of one human right (the enjoyment of property) and the infringement of another (security of the person) by reason of sex. The conclusion, then, is that Parliament has suspended the operation of section 12(1) (b) as of 1960, and the court should accordingly have held it inoperative.

If this result is not consistent with present Indian values, and there is plenty of evidence both in the *Indian Act* and in Indian ways

31. *Supra*, note 18.

that Indian culture still sets basically different roles for men and women, then perhaps a *non obstante* clause for the whole *Indian Act* would be the best way to free the development of the *Canadian Bill of Rights* of these nearly insoluble problems until a new, modern Indian Act becomes politically feasible.

Cases arising under the *Indian Act* are distorting and stunting the growth of a human rights jurisprudence in Canada, because of understandable judicial reluctance to embark on a virtual re-enactment of that Act. This is the obvious lesson of the majority judgement of Ritchie J. in *Lavell*. The Constitution itself sets aside Indians as a race for special treatment. In view of this fact, it would be rather surprising if the laws of Canada did not discriminate against Indians, even as to human rights and fundamental freedoms. The *Indian Act* is inherently repugnant to the opening paragraph of section 1 of the *Bill of Rights*, and many of its provisions no doubt abrogate, abridge or infringe the Bill's declared rights and freedoms quite apart from the right to equality before the law. Judicial awareness of this inherent conflict has led the Supreme Court to treat Indian cases in terms of equality before the law, thus permitting the court to avoid the question of racial discrimination by giving a narrow interpretation to "equality before the law." And beyond this awareness lies the deeper concern, expressed in *Lavell*, that it is the Constitution itself that commands differential treatment by reason of race. Absent the right to equality before the law, the conflict could be resolved by asserting that Parliament has declared its intention to stop differential treatment of Indians only in relation to human rights and fundamental freedoms. But the right of an Indian to equality before the law without discrimination by reason of race leads either to the narrowing of "equality before the law" to the Dicean form seen in *Lavell* or to Osler J's conclusion that the whole *Indian Act* is contrary to the *Canadian Bill of Rights* and therefore inoperative.

If the federal government had the courage to remove the *Indian Act* from the force of the *Canadian Bill of Rights* and to undertake a program of affirmative action to end the worst racial discriminations, the Supreme Court would be able to apply its interpretative skills to realizing some of the fundamental values the *Bill of Rights* was designed to secure more fully in Canadian law.

It is worth considering one more case involving the *Indian Act*, and the *Canard*³² case is a good one because of the judicial

32. *Supra*, note 5.

disagreement as to the proper outcome. It will be recalled that Mrs. Canard obtained under the Manitoba law letters of administration for her deceased husband's estate and commenced an action arising from his death, only to learn that the Minister had appointed the District Superintendent as administrator pursuant to the *Indian Act*.

It is worth noting the underlying wrong done to Mrs. Canard, which flowed not so much from the law itself as from the way she was treated by the responsible government official and which is stated simply by the Manitoba Court of Appeal as follows:

Mrs. Canard was not told by the Department that Mr. Rees had been appointed administrator of the estate of her late husband, nor was she told that an action had been commenced on behalf of the estate to recover from those allegedly responsible for the death of Mr. Canard.³³

All judges in the Supreme Court of Canada agreed that sections 42, 43 and 44 of the *Indian Act* are *intra vires* as enactments in relations to Indians, but from there they divided. The majority decided that those provisions applied and did not offend against the *Canadian Bill of Rights*, so that Mrs. Canard was not free to obtain letters of administration under provincial law. Laskin C.J.C. dissented, with Spence J., finding that nothing in these provisions forbade the Minister to appoint Mrs. Canard administratrix and that her right to equality before the law without discrimination by reason of race compelled this application of the *Indian Act*.

The dissenters have, I suggest, repeated the *Drybones* confusion of the absolute ban on racial discrimination in the opening paragraph of section 1 of the Bill with the qualified ban on discrimination on any ground based on the right to equality before the law. The result is a blunting of the *Bill of Rights* as a tool for judicial protection of human rights and fundamental freedoms.

If we can unravel the confusion in the *Canard* dissent it will help to clarify the foregoing analysis and to indicate the best prospects for future development of the *Canadian Bill of Rights*.

First, however, we should try to clarify the legal position of Indians in Canada. Indians, as persons, are committed to the legislative authority of the Parliament of Canada. This means, apparently, that Parliament could enact a comprehensive code of Indian law which would subject Indians to laws that are totally different to the fused federal and provincial laws that apply to other

33. *Canard v. A-G Canada* (1973), 30 D.L.R. (3d) 9 at 13 (Man. C.A.).

Canadians. At least, this must be true to the extent that the separate laws or the differences between them and other laws go to the Indian-ness of Indian people. That is, the fact that a law applies to Indians and to Indians only may not by itself make it a law in relation to Indians. The law might have to be shown to relate somehow to the special character of Indians in order to qualify as a law in relation to Indians.

Whether Parliament has a comprehensive authority to regulate the affairs of Indians or only authority to provide for their special needs as Indians is in part academic since Parliament has engaged in wholesale adoption of provincial laws to fill whatever gaps in Indian law are left by the *Indian Act*. Section 88 of the Act provides:

Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

Thus, in the absence of sections 42, 43 and 44 of the *Indian Act* the law of Manitoba would have applied, either in its own right or by virtue of federal adoption as part of the Indian Act. The British Columbia Court of Appeal has, by a majority, taken the view in *Re Adoption Act*³⁴ that section 88 merely defines the obligation of Indians to observe provincial law. This suggests that a law in relation to Indians means any law enacted by Parliament that Applies to Indians only.

In *Canard* the minority in the Supreme Court of Canada found that application of sections 42, 43 and 44 of the *Indian Act* in the manner done in that case led to an inequality before the law between Mrs. Canard and other persons in Manitoba by reason of race. They concluded that the Minister was bound, therefore, to apply those sections by appointing Mrs. Canard administratrix. As in *Burnshine*,³⁵ this approach has the virtue of avoiding the *Drybones* outcome of inoperativeness. However, I suggest it is mistaken and that the error originated in *Drybones*.

Mrs. Canard's complaint is one of differential treatment because of race. That is not necessarily the same as racial discrimination in

34. (1974), 44 D.L.R. (3d) 718 (B.C.C.A.).

35. *Supra*, note 18.

the wrongful sense, for as Ritchie, J. pointed out in *Lavell* the Constitution calls for differential treatment of Indians.

The first question, then, is whether Mrs. Canard has by reason of her race, been denied any of the rights and freedoms set out in section 1 of the *Bill of Rights*. It would strain judicial credibility to hold that right to be eligible for appointment as administratrix of the estate of one's spouse is included in the right to life, liberty, security of the person and enjoyment of property. This seems to leave only the right to equality before the law and the protection of the law.

Here we encounter a qualified ban on discrimination, for if it can be shown that differential treatment is based on some rational legislative objective and is justified by differing circumstances, it would require a doctrinaire interpretation of "equality before the law" to find the differential treatment contrary to the *Bill of Rights*.

Since sections 42, 43 and 44 of the *Indian Act* were enacted in good faith for an obviously legitimate purpose, I suggest, it is best to leave out discrimination by reason of race in considering the *Canard* case and concentrate on equality before the law. This narrows the question to a manageable one. The *Indian Act* puts the administration of Indians' estates in the discretion of the Minister, for the same paternalistic reasons as motivate not only the whole *Indian Act* but head 24 of section 91 of the *B.N.A. Act* as well. However, the Act does not forbid the appointment of an Indian as administratrix of the estate of her deceased spouse. The Act thus permits the Minister to consider *in each case* those factors that go to the justification of the general paternalism of sections 42, 43 and 44 (e.g. ability to manage one's affairs, competence to instruct legal counsel and receive legal advice) to see whether it is necessary in the case. If it is not, then he is free to treat Indians in the same way as other citizens are treated in this matter.

Thus the Minister is free to appoint an Indian spouse administratrix. The question is whether the law requires him to do so in any circumstances. The only law that might so require him is the *Canadian Bill of Rights*, and the argument would be that in a case where it is shown that the circumstances that are claimed to justify differential treatment do not exist, equality before the law requires that, if possible, the law be applied so as to accord the person in question equal treatment.

The trouble with this is that it begins the process of judicial erosion of the *Indian Act*, for if the application required is not

possible within the bounds of legal interpretation, then the alternative is to hold the enactment in question inoperative. This is where the wisdom of Ritchie J's position in *Lavell* begins to emerge, however questionable his resort to Dicey may be thought to be. The use of equality before the law as a tool for supervising the administrative application of the *Indian Act* is manageable, but when applied to the legislative application of power conferred by section 91(24) of the *BNA Act* it puts the Court in the position of trying to revise the *Indian Act* according to the fundamental values of non-Indian society, a task that is perplexing the Federal Government itself because of its complexity and the absence of consensus on much other than hostility to the present Indian Affairs Administration.

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.

The most important effect of such a move would be to free the concept of equality before the law from its association with racial discrimination, permitting the Supreme Court to develop a judicial conception of equality before the law based on justified differential treatment in the pursuit of rational legislative objectives. The Court began to work towards such a conception in *Burnshine*, where it indicated that the use of varying sentencing practices in criminal justice, depending on age and province, could be seen as related to the object of allowing provinces to use their personnel and facilities designed for young offenders.

Any *non obstante* clause added to the *Indian Act* should make clear the reason why it has been added. Perhaps something like the following might be enacted by way of amendment to the Act:

Whereas Parliament is by the British North America Act, 1867, charged with the responsibility for making laws in relation to Indians and lands reserved for the Indians,

AND Whereas the promotion and protection of the human rights and fundamental freedoms of Indians can be achieved most effectively through legislative and administrative reforms carried out in consultation with Indians.

The Indian Act, Being Chapter I-6 of the Revised Statutes of

Canada, 1970, is amended by adding the following as section 1A:

1A. This Act shall operate notwithstanding the Canadian Bill of Rights.

As suggested above, such removal of Indian laws of Canada from the legal application of the *Bill of Rights* would enable the Supreme Court of Canada to come to terms with the right to equality before the law and the protection of the law.

The *Smythe*³⁶ and *Burnshine*³⁷ cases provide two illustrations of how this development might go. In *Smythe* the argument made was that equality before the law required that those charged with evasion of income tax and related offences should all be tried either on indictment or by way of summary conviction. The same offence should not carry optional procedures and minimum sanctions, depending on the election of the Attorney General. If the distinction our law makes between indictable and summary conviction offences is one that can be justified in pursuit of a rational legislative purpose, then the only remaining question is whether the delegation of a discretion to the Attorney General is necessary to the pursuit of that purpose. Most criminal offences fall into either the indictable or summary conviction category by their very nature, and the old distinction between theft under \$50 and theft over \$50 shows how the seriousness of an offence can be quantified where it is an offence against property. To justify delegating to the Executive the task of separating instances of the same offence into indictable and summary conviction categories would probably require a showing that seriousness of the offence of evasion of income tax and making false and deceptive statements in income tax returns cannot be quantified in terms of the amount of tax evaded, either alone or in combination with other factors that can be given legislative specification.

True, Parliament could have listed the factors to be considered by the Attorney General in exercising the discretion, but it seems likely that such a listing would add nothing to what can be readily inferred from the criminal law in the light of its history and purposes.

Discretions breed arbitrary action, however, and it may be that due process of law, taken together with the right to equality before the law and the protection of the law requires that Parliament enact *some* objective standards according to which the Attorney General

36. *Supra*, note 7.

37. *Supra*, note 18.

must make his decision whether to indict or to proceed by way of summary conviction.

The Supreme Court was clearly reluctant in *Smythe* even to consider holding section 132(2) of the *Income Tax Act*³⁸ inoperative, knowing as it did that a similar discretion exists with respect to a number of criminal offences. But instead of just saying that this is part of the Canadian concept of equality before the law, the Court might have considered whether the Attorney General could be required by the *Canadian Bill of Rights* to exercise his discretion differently than he did in this case.

One possible way to avoid a *Drybones* outcome without asserting that arbitrary or discriminatory treatment are part of the Canadian concept of equality before the law would have been to hold that the *Bill of Rights* requires the Attorney General to state his reasons for choosing indictment rather than summary conviction and that the reasons stated be sufficient to justify the differential treatment from those proceeded against by summary conviction. In this way Parliament's freedom to delegate wide discretions would be left untouched and the *Bill of Rights* brought to bear on the administrative exercise of those discretions in a way that is consistent with basic principles of administrative law.

This approach to reconciling judicial intervention under the *Bill of Rights* with parliamentary supremacy was followed by Laskin J. (as he the was) in *Burnshine*. Having found that Burnshine's right to equality before the law was infringed by the sentencing magistrate's application of section 150 of the *Prisons and Reformatories Act*, Laskin J. held, in effect, that the sentencing power conferred by the provision is contained within the maximum penalties provided by the *Criminal Code*. That is, on the authority of the *Bill of Rights*, Laskin J. inferred that Parliament did not intend to alter the outer limits on sentencing which form a vital part of the *Criminal Code*.

Suppose Parliament were to amend section 150 by adding the following clause:

even though the resulting aggregate of definite and indeterminate periods exceeds the maximum sentence prescribed by the Criminal Code.

This would preclude the interpretative approach taken by Laskin J., leaving as the only alternative a finding that section 150 is inoperative, as a majority in the British Columbia Court of Appeal

38. R.S.C. 1952, c. 148 (now R.S.C. 1970, c.I-5).

held it to be. But such an amendment to the Act would also make it clear beyond doubt that differential treatment is intended in the pursuit of some objective. The question then becomes whether the objective is rational (this would virtually be presumed in relation to current legislation) and whether the differential treatment is necessary to the pursuit of the objective. An affirmative response to both of these questions is at least implicit in the majority judgment in *Burnshine*.

The interesting thing is that legislative vagueness leaves room for an interpretative approach directed at administrative action, especially where the legislation pre-dates the *Canadian Bill of Rights* and is therefore subject to such inferential modification as is possible short of express reenactment and where it is not unreasonable to infer that Parliament intended judicial interpretation to serve as the vehicle for such modification. Where, however, legislation is reasonably clear in its prescription of differential treatment the courts can and should bring to bear a conception of equality before the law based on what is justified in the pursuit of rational objectives, such as to permit them to discharge the responsibility conferred on them by the *Canadian Bill of Rights* without intruding on the domain of Parliament any more than is necessary. We should not forget that it was Parliament that enacted the *Bill of Rights*, so that if some judicial intrusion on the usual legislative domain is necessary to “ensure the protection of these rights and freedoms in Canada”, in the words of the Bill’s preamble, that must be taken to be a consequence intended by Parliament itself and therefore *required* of the courts.

The removal of the *Indian Act* from judicial application of the *Bill of Rights* would greatly reduce the potential for cases where an interpretative approach, directed at administrative action, would not be enough to give effect to the bill.

We return to our starting point, *Hogan v. The Queen*,³⁹ to consider where the *Canadian Bill of Rights* might lead us if it were directed at the exercise of delegated power, as it should be, and freed by a *non obstante* provision from the inhibitions caused by a constitution that calls for separate treatment of Indians and by an *Indian Act* that fulfills those expectations by enacting special laws that apply only to Indians.

39. *Supra*, note 4.

How might the Supreme Court have disposed of the *Hogan* case? First, it might have asked who is the public authority whose exercise is claimed to have violated the *Bill of Rights*. The police officer's application of his power to arrest and detain in a way that abrogated Hogan's right to counsel is beyond recall, so that the Court's concern shifts to the trial judge whose conviction and sentence are not beyond recall. What is the law of Canada whose application by the trial judge is said to have abrogated, abridged or infringed one of the Bill's rights and freedoms? It is the common law rule that evidence is admissible in criminal prosecutions as long as it is relevant, even though it was obtained through an illegal act.

This rule pre-dates the *Canadian Bill of Rights*. Therefore, it is necessary to consider whether the Bill now requires the rule to be applied differently, in order to avoid abrogating, abridging or infringing any of the rights or freedoms for whose protection the judicial power of interpretation has been broadened by the Bill. Hogan was wrongfully denied his legal right to retain and instruct counsel without delay. He then submitted to a breathalyzer test, which provided evidence of a criminal offence.

It is important to identify accurately the right or freedom affected by the admission in evidence of the result of the breathalyzer test. Due process of law is an attractive generality but is not, I submit, the appropriate formulation here. Rather, it is Hogan's right to the protection of the law, specified in section 1(b) of the *Bill of Rights*.

The analysis is as follows: the police officer has infringed Hogan's right to counsel, a right specified by the *Bill of Rights* itself. The trial court, by admitting in evidence the result of the breathalyzer test, has abrogated Hogan's right to the protection of the law, one of the Bill's enumerated human rights, for the only effective protection against illegal conduct by police is, I suggest, the withholding of judicial support of that conduct.

The protection of law is what courts of law are about. Many violations of human rights never come to the attention of the courts and are therefore immune from any kind of judicial sanction, so that when a clear and deliberate official denial of a basic human right does come to a court's attention in a case there should be no reluctance to use judicial power to ensure the protection of the law. Can the judicial power of interpretation be used in a case like *Hogan* to give effect to the individual's right to the protection of the law that entitles him to access to legal counsel? The basic legal rule being applied is the rule that admissibility of evidence is based on

relevance. Absent the *Canadian Bill of Rights* this rule has been construed as operating without regard to the legality of the evidence-gathering activities. If this construction of the rule results in denial of the right to the protection of the law by refusing the only effective sanction to ensure such protection, then it must be taken that Parliament in 1960 enacted basic standards with which the old common law rule on admissibility of illegal evidence cannot stand. If this is sound, then the evidentiary rule of relevance must now be taken to be qualified by the *Canadian Bill of Rights* in favour of a prior rule of construction in favour of the individual's right to the protection of the law.

This need not lead to an absolute rule of exclusion of illegal evidence, but rather an assessment in each case of whether, in the circumstances, the judicial sanction of refusing admission of evidence is necessary to secure the right to the protection of the law. This approach at least opens the door to the possibility of applying judicial sanctions to protect the rights and freedoms of the *Bill of Rights* where it is appropriate to do so. The majority in *Hogan* seem to have said that the common law rule must prevail because it has been around for a long time. This interpretation of the *Bill of Rights* looks more like a non-application and seems an odd way to show judicial respect for the supremacy of Parliament, which has expressed its desire that its *Bill of Rights* "shall ensure the protection of these rights and freedoms in Canada."

The majority, I suggest, made no attempt to construe the law of Canada on admissibility of evidence according to section 2 of the *Bill of Rights*. They simply re-affirmed the authority of that rule in spite of the *Bill of Rights*.

The time has come for a summing up of this rather lengthy analysis. This will be done in two stages: first, I will list the rights and freedoms set out in section 1 of the Bill, trying to give each its full description; second, I will list the various propositions that have been made in this analysis about the *Canadian Bill of Rights* and its development up to 1975.

- A. *The Human Rights and Fundamental Freedoms Recognized and Declared by section 1 of the Canadian Bill of Rights*
 1. The right to *life* without discrimination by reason of race, national origin, colour, religion or sex (hereafter race, etc.)
 2. The right to *liberty* without discrimination by reason of race, etc.

3. The right to *security of the person* without discrimination by reason of race, etc.
 4. The right to *enjoyment of property* without discrimination by reason of race, etc.
 5. The right to *due process law* before being deprived of any of 1 to 4.
 6. The right to *equality before the law* without discrimination by reason of race, etc.
 7. The right to the *protection of the law* without discrimination by reason of race, etc.
 8. *Freedom of religion* without discrimination by reasons of race, etc.
 9. *Freedom of speech* without discrimination by reason of race, etc.
 10. *Freedom of assembly and association* without discrimination by reason of race, etc.
 11. *Freedom of the press* without discrimination by reason of race, etc.
- B. *Summary of Propositions Concerning the Canadian Bill of Rights and its Development*
1. The *Bill of Rights* is authority primarily for judicial protection of rights and freedoms from interference through *administrative* action. *Drybones* is an exceptional case because an impasse in the interpretative process was reached.
 2. The *Indian Act* is likely to yield many such exceptional cases, since it enacts special laws for members of a racial group, and should therefore be declared to operate notwithstanding the *Canadian Bill of Rights* in order to free judicial development of the Bill of the nagging sense of impropriety the judges obviously feel.
 3. The Indian Affairs Branch should be charged with responsibility for bring Indian laws and practices into harmony with the values expressed by the *Canadian Bill of Rights* by bringing forward legislative amendments, enacting subordinate legislation and taking administrative action.
 4. The judicial approach taken in *Drybones* was misguided. It was not necessary to invoke the difficult concept of equality before the law. *Drybones'* complaint was that the imposition of a fine was an infringement of his "right to enjoyment of

property without discrimination by reason of race.” It is worth noting that the *Indian Act* runs afoul of the *Bill of Rights* on this basis of racial discrimination only when it is one of the Bill’s section 1 human rights and fundamental freedoms that is being prejudiced.

5. The *Lavell* case also did not require consideration of the concept of equality before the law. Mrs. Lavell’s complaint was that she had been subjected to a substantial abridgment, if not abrogation, of her right to security of the person and her right to the enjoyment of property by reason of her sex. If equality before the law is to be applied to *Lavell*, the way to do it is to assert a denial of equality before the law by reason of race. That is, it is only because of her race that Mrs. Lavell is denied equality with men in relation to the consequences of marrying a non-Indian. Which is to say nothing more than that the law in question is found in the *Indian Act*, a statute that applies exclusively to a single race. Since the offending provision takes its colour from its surroundings (a racial statute), it is probably more consistent to formulate Mrs. Lavell’s case as one of infringement of the “right to equality before the law without discrimination by reason of race.” That is, different rights for men and women are part of Indian policy, for better or for worse, and find their origin in section 91 (24) of the *BNA Act*. This eliminates racial discrimination. However, when we move on to the rights to security of the person and the enjoyment of property without discrimination by reason of sex we encounter an absolute legislative prohibition and the conflict is to be resolved, I submit, by inferring that the *Bill of Rights* was meant to override such discrimination even where it is authorized by the *Indian Act* as part of special laws for Indians.
6. *Canard* did not involve one of the human rights and fundamental freedoms set out in the *Bill of Rights*. The claim to equality before the law is strained beyond credibility because, as the majority point out, the Constitution itself removes Indians from being subject to provincial laws as a matter of course. Therefore, there is no denial of a human right by reason of race. Is there then a direct infringement of the right to equality before the law? This, too, seems strained, since the Constitution decrees that that kind of equality before

the law shall not exist as of right. The Bill's application is thus re-directed to the lowest level of generality, that is, to the particular case. If, on all the facts, no justification for differential treatment exists in the instant case, the administrative authority can be required to accord the broadest kind of equality before the law if the statute will bear the necessary interpretation. If it will not, the court faces the kind of quandary which leads to the suggestion that the *Indian Act* be removed from the purview of the *Bill of Rights*.