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THE SUPREME COURT AND THE CANADIAN BILL OF RIGHTS

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I. *Introduction.*

In addressing oneself to this topic, one is obviously not expected merely to describe what the Supreme Court has said about, and held with respect to the Canadian Bill of Rights,¹ but to analyze and evaluate in the light of a standard or set of standards which the commentator considers most important. I have chosen not to evaluate in the light of criteria like "activist" or "passivist" because neither one stance nor the other is consistently to be desired with respect to all categories of civil liberties. To illustrate briefly, the United States Supreme Court of the first three and one half decades of the twentieth century was "activist" in applying a substantive due process interpretation, while the Warren court was "activist" in injecting procedural due process content into the Fourteenth Amendment. Different commentators have reached different conclusions as to which "activism" was desirable or to be deplored. Also, I find the categories of "liberal" and "conservative" both too subjective from the point of view of the observer, and too rigid to be applied to the same court, much less to the same judge, in all circumstances. Therefore, I have chosen instead to pose the following question: how civil libertarian has the Supreme Court been in its interpretation of the Canadian Bill of Rights?

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¹ R.S.C., 1970, Appendix III.

By "civil libertarian" I mean to what extent, within the limits of precedent, has the Supreme Court tended to promote human rights and protect fundamental freedoms? Have the judges favoured less restriction on the political civil liberties? Have they tended, where possible, to protect the legal civil liberties of the accused, or the person whose rights and obligations are being determined, rather than favouring the state? Have they tended to promote equality of access, rather than freedom of commerce, freedom of contract, and unfettered disposition of one's property?

Regardless of how objectively one attempts to assess the Supreme Court in its interpretation of the Canadian Bill of Rights, one cannot avoid one's own subjective assumptions about civil liberties and about the role of the Supreme Court in promoting them. Let me state at the outset, once again, that I am in favour of a written Bill of Rights, and therefore of judicial review. I believe this to be compatible with the supremacy of Parliament and that the two, that is, judicial review and parliamentary supremacy, are not necessarily incompatible. Although I believe that the Supreme Court should be able to declare legislation inoperative if it is inconsistent with the Bill of Rights, nevertheless I believe that Parliament, cognizant of the fact that in the opinion of the Supreme Court a certain legislative measure is contrary to the Bill of Rights, should be able to decide that the legislation should operate notwithstanding the Bill of Rights. I do not believe that a Supreme Court, even with a written Bill of Rights in the constitution, can ultimately stand in the way of a legislature determined to take certain action. All I ask of the Supreme Court and of a written Bill of Rights is that the legislature be conscious of the fact that an impartial tribunal, whose role it is to interpret and apply the law, has expressed its opinion that certain action is contrary to the Bill of Rights. Moreover, many of the cases which involve values protected by a Bill of Rights concern administrative, and not legislative, acts. Even in the United States, it is not so much Acts of Congress or the state legislatures that have been held invalid, as administrative actions taken pursuant to these Acts. Therefore, in these cases the impediment of parliamentary sovereignty on judicial review is not often at issue.

As to the role of the Supreme Court in protecting and promoting civil liberties, I favour an activist court with respect to those matters which I would include in the Bill of Rights, that is, the political and legal civil liberties, and a passivist court with respect to those civil liberties which I would exclude from a Bill of Rights, that is, the economic civil liberties. With respect

to the egalitarian civil liberties, I would favour an activist Supreme Court as regards public or official or state discrimination, while recognizing that the promotion of a policy of equality in private relationships is better administered by agencies like Human Rights Commissions. The relatively weaker position of those who suffer discrimination, the inadequacy of compensation or other remedies in many cases of discrimination, the difficulty of gathering the evidence necessary to prove one's case, the formality and costs of court procedures, and above all, the necessity for the whole community committing itself to the vindication of those wronged, requires an agency like a Human Rights Commission to be charged with the carriage of a complaint of discrimination, and requires the greater informality of administrative hearing tribunals. Besides all this, in this field, education is at least as important as enforcement, and the two are often inseparably bound up, and this kind of dual role is one that can be performed better by an administrative agency than by the courts.

Therefore, to sum up, I believe that the political civil liberties and the legal civil liberties and that part of the egalitarian civil liberties which is directed against official or state discrimination, are eminently suitable for inclusion in a Bill of Rights. At the same time, I believe that the economic civil liberties are not, and I believe that the protection of the egalitarian civil liberties from private discrimination is better handled through an administrative agency. Also, largely because the legislature will ultimately have its way over the courts, and because civil liberties are best protected if the issues are clarified in a kind of public dialogue between the legislative and judicial branches of government, I believe a notwithstanding clause like the one in the present Bill of Rights may be the only restraint we need place on the legislature. I am not much concerned with the question of entrenchment against future deletion or amendment, because I do not believe that any future Parliament would be moved to amend the Bill of Rights except to strengthen it, and if times are so changed that I am proved wrong, even the Supreme Court and a written Bill of Rights would not stop such a Parliament. The electorate will. If it does not, then we will be in such a changed situation that Bills of Rights and Supreme Courts will be irrelevant. I do believe that it is possible once again to have a Parliament (and public opinion supporting it), such as during World War II, which acted to deport the Japanese-Canadians from the west coast. However, even in the United States, the Bill of Rights and the Supreme Court did not stop such action.

One must be realistic and understand that the most one can expect from a written Bill of Rights and judicial review is control of administrative and police action and the occasional invalidation of legislative action, subject to being overridden in the latter instance by a Parliament determined to have its way even in the face of a determination that its legislative acts are in contravention of civil liberties.

Whether the courts do hold legislative or administrative action inoperative or invalid, is not always as important as the fact that they *can* do so, and as the fact that in rendering their decisions they can amplify the terse terms of a Bill of Rights and infuse them with principles to which society aspires and will compel, even indirectly, the public servants to adhere to. Even in the United States, the Supreme Court has invalidated very few Acts of Congress, but its judgments are guidance of what will be tolerated.

II.

With the enactment of the Canadian Bill of Rights in 1960, the Supreme Court of Canada was provided with an important direction by Parliament to protect civil liberties within the federal sphere. One might have expected that with this new legislative encouragement the Supreme Court would have expanded upon the civil libertarian tradition so firmly established during the 1950's, and thereby provide an answer to those critics of a written Bill of Rights who suggested that the attitudes and traditions of our Supreme Court justices were not such as to justify placing in their hands the ultimate decision-making with respect to certain categories of civil liberties. Instead, the Supreme Court seems to have lived up to the negative expectations of those critics.

Nevertheless, there is yet no need for pessimism because, as I hope to show, none of the decisions were such as to irrevocably relegate the Bill of Rights to an ineffectual instrument. Moreover, some of the reasons given by recent majorities for coming to their conclusions are either sufficiently ambiguous, or obscure, or even non-existent, that a future majority, cognizant of the expectations of the public, and prepared boldly to face up to its task as one of the major opinion-moulders of the country, will be able, with little difficulty, to overcome these decisions. We should not forget that the Bill of Rights is only fifteen years old. After all, in the United States it was not until some ten years after the passing of the Amendments which created the United States Bill of Rights that judicial review was asserted by Chief Justice Marshall in the

case of *Marbury v. Madison*,² and it was probably not until some one hundred years later, and some would say almost a century and a half later, that the American Supreme Court started to apply the Bill of Rights in accordance with what would appear to be the intentions of the framers.

Moreover, our Bill of Rights does not explicitly provide, as it could have, that "laws of Canada" which are found to be inconsistent with the Canadian Bill of Rights are to be declared invalid or inoperative. Rather, it provides in section 2 that they shall not be "so construed and applied" as to abrogate, abridge or infringe the fundamental freedoms therein recognized and declared. The result is that our Supreme Court did not have an obvious direction to assess whether legislative or administrative acts are in contravention of the Bill of Rights, nor an obvious direction to hold such inconsistent acts inoperative or invalid. Furthermore, the inclusion in section 1 of the clause that the human rights and fundamental freedoms being recognized and declared "have existed and shall continue to exist", has caused a certain ambiguity as to whether anything more was being accomplished than to codify rights and freedoms as they were in 1960, without adding anything new or different.

For the first decade the Supreme Court was extremely cautious in its interpretation of the Bill of Rights. Thus, within a year of the enactment of the Canadian Bill of Rights the Supreme Court had two occasions to define the "due process" clause, but declined to do so. The occasions were the cases of *Louie Yuet Sun v. The Queen*³ and *Rebrin v. Minister of Citizenship and Immigration et al.*,⁴ both of which involved deportation orders made under the Immigration Act⁵ against illegal entry into Canada. In both cases applications to quash the orders alleged that such action was contrary to "due process of law". In each case the judgment of the Supreme Court was delivered by Kerwin C.J.C. with only brief reference to the clause. In the *Louie Yuet Sun* case he stated that the applicant "has not been deprived of his liberty except by due process of law",⁶ and in the *Rebrin* case he declared: "There was no infringement as the appellant has not been deprived of her liberty except by due process of law."⁷ No attempt was made to discuss the possible meaning of "due process". Though the clause was obviously

² (1803), 1 Cranch. 137.

³ [1961] S.C.R. 70.

⁴ [1961] S.C.R. 376.

⁵ R.S.C., 1952, c. 325, as am., now R.C.S., 1970, c. I-2, as am.

⁶ *Supra*, footnote 3, at p. 72.

⁷ *Supra*, footnote 4, at p. 381.

borrowed by the legislative draftsmen from the Fifth and Fourteenth Amendments to the United States Constitution, there was neither an attempt to deduce a possible meaning in the light of that experience, nor even to recognize it for the purposes of deciding that it was not applicable. In fact, although minimal knowledge of the history and origins of the clause make it obvious that the Supreme Court was giving it an interpretation synonymous with the phrase "according to the law of the land", this was not explained: it was merely applied.

Since that time the Supreme Court has dealt with about a dozen cases in which the Bill of Rights has played an important role. The most important of these, not because of its facts as much as because of what was said with respect to the Canadian Bill of Rights, was that of *Regina v. Drybones*.⁸ The issue was section 94 of our Indian Act,⁹ which provided that an Indian who "is intoxicated . . . off a reserve" is guilty of an offence punishable by a minimum fine of \$10.00 (with a maximum of \$50.00) or by imprisonment for a term not exceeding three months, or by both fine and imprisonment. The allegation on behalf of Drybones was that this provision contravened section 1(b) of the Canadian Bill of Rights which guarantees "equality before the law and the protection of the law", because everyone else in the Northwest Territories, where the offence took place, was subject to a penalty only if he was "in an intoxicated condition in a public place", and in that case there was no minimum fine, and the maximum term of imprisonment was thirty days. The Supreme Court divided six to three in favour of holding that the particular provision in the Indian Act was rendered inoperative by section 2 of the Canadian Bill of Rights, because it was contrary to section 1(b) of the Bill of Rights.

The three dissenting judges could not join the majority because they seemed to be frightened by the implications of the decision. One of them (Cartwright C.J.C.) recanted¹⁰ from his views in an earlier case¹¹ in which he was the only member of the Supreme Court to come to the conclusion that the Canadian Bill of Rights would render inconsistent legislation inoperative, because he feared that this would place too onerous a task on every judge in Canada. He seems to have overlooked the fact that this had been their responsibility under the Colonial Laws Validity

⁸ [1970] S.C.R. 282.

⁹ R.S.C., 1952, c. 149, now R.S.C., 1970, c. I-6, as am.

¹⁰ *Supra*, footnote 8, at p. 287.

¹¹ *Robertson and Rosetanni v. The Queen*, [1963] S.C.R. 651, discussed further *infra*.

Act,¹² and continues to this day because of the distribution of legislative power under the British North America Act.¹³ Another of the judges (Abbott J.) felt that the delegation of authority to the courts implied in the majority decision could only be affirmed with the plainest words.¹⁴ He did not find those words in section 2. The third judge (Pigeon J.) also expressed his fear over the responsibility placed on the courts if the majority view applied.¹⁵ He appears to have been concerned with the fact that Parliament had not provided detailed definitions of the various rights and freedoms listed. But surely the judiciary is capable of providing more adequate and detailed definitions on a case-by-case basis, than is a legislative draftsman in what must be a relatively terse instrument! Moreover, he felt¹⁶ that the words in section 1, which refer to the rights and freedoms as having existed and continuing to exist, were more important than the possible effect of section 2, and indicated that no change in the application of laws was intended. Finally, he was apprehensive¹⁷ that the whole of the Indian Act might be declared inoperative as being contrary to the "equality before the law" clause in the Canadian Bill of Rights. Although the whole of the Indian Act was not before him, but merely one section of it, it would appear that what he had in mind was the fact that any distinction between Indians and others might be deemed to be contrary to "equality before the law". The more limited definition of the clause by the majority to the particular facts before them appear to me to provide an adequate answer to Mr. Justice Pigeon, but I will deal with that issue subsequently in a fuller discussion of the "equality before the law" clause.

The majority, however, felt that the meaning of section 2, in conjunction with section 5, was imperative enough to require the courts to refuse to apply any law of Canada whether enacted before or after 1960, which infringed the Canadian Bill of Rights, unless Parliament expressly declared that the law which does so infringe shall operate "notwithstanding the Canadian Bill of Rights". Mr. Justice Ritchie, who gave the majority judgment, laid considerable stress¹⁸ on the *non obstante* clause in section 2. He indicated that Parliament would not add a completely superfluous clause such as this, and asserted that a "realistic meaning"

¹² (1865), 28 & 29 Vict., c. 63 (U.K.).

¹³ (1867), 30 & 31 Vict., c. 3, as am. (U.K.).

¹⁴ *Supra*, footnote 8, at p. 299.

¹⁵ *Ibid.*, at p. 305.

¹⁶ *Ibid.*, at p. 302.

¹⁷ *Ibid.*, at pp. 303-304.

¹⁸ *Ibid.*, at p. 294.

must be given to the opening paragraph of section 2. The *non obstante* clause, he stated, was a clear indication that Parliament intended that laws which do not contain that clause, and which cannot sensibly be construed and applied so as not to abrogate, abridge or infringe the rights and freedoms enumerated in the Bill, would be inoperative.

To this date, although there are indications that they have perhaps become alarmed over the implications of the *Drybones* decision, the majority of the Supreme Court has not in any way detracted from this most fundamental principle asserted in that case, that is, that legislation, whether enacted prior or subsequent to the Canadian Bill of Rights, which can only be construed and applied in a manner inconsistent with the Bill, is inoperative to the extent of such inconsistency.

On the other hand, it should not be presumed that our Supreme Court seems at all ready to find legislative or administrative acts to be inconsistent with the Canadian Bill of Rights. In fact, in only two other decisions has the Bill been so applied as to protect the civil liberties of an accused. And in both of these, the Supreme Court was not compelled to hold that a law of Canada was inoperative, but rather was able to "construe and apply" the law in conformity with the Bill of Rights. Thus, in *Lowry and Lepper v. The Queen*¹⁹ the Supreme Court held unanimously that when a Court of Appeal allows a Crown appeal from an acquittal of an accused, it must afford the accused an opportunity to be heard before passing sentence. The decision of the court, delivered by Martland J., held that this right was affirmed by the Canadian Bill of Rights, especially the "fair hearing" clause in section 2(e).²⁰

In *Brownridge v. The Queen*²¹ the Supreme Court was concerned with compulsory breathalyzer tests in the Criminal Code. The accused was arrested for impaired driving and, when a demand was made of him for a breath sample, he asked for an opportunity to call his lawyer for information as to whether he should comply. He told the police he would not take the test unless his lawyer so advised. The opportunity was denied him and he refused to provide a breath sample. Two hours later, after having spoken with his lawyer, he requested an opportunity to give a sample of his breath but the offer was refused. He was then charged under section 223(2) [now section 235(2)] for

¹⁹ (1972), 26 D.L.R. (3d) 24.

²⁰ *Ibid.*, at pp. 228-231.

²¹ [1972] S.C.R. 926.

failing or refusing, without reasonable excuse, to comply with the police officer's request for a breath sample.

The Supreme Court, by a majority of six to three, held that the conviction should be quashed. Once again, as in the *Drybones* case, Pigeon and Abbott JJ. dissented, and this time Judson J. concurred in Mr. Justice Pigeon's dissenting judgment. Unless I misunderstand his reasons, it would appear that Pigeon J. could not see why a motorist suspected of impaired driving should have the right to retain and instruct counsel upon arrest, if there were no such right when a person is not under arrest.²² It would appear to me that the answer is that section 2(c) (ii) of the Bill of Rights does not speak of a right to counsel when a person is not under arrest, but does when he is "arrested or detained", and there was no question but that the appellant was under arrest when the request for the breath sample was made.

Mr. Justice Ritchie gave judgment on behalf of four of the justices, and concluded that:²³

... it would run contrary to the provisions of [the Bill of Rights] to hold that denial to a man under arrest of "the right to retain and instruct counsel without delay" was *incapable* of constituting a reasonable excuse for failing to comply with the demand under s. 223 of the *Criminal Code*.

Mr. Justice Laskin (as he then was) in a judgment concurred in by Hall J., agreed that the accused should be acquitted, but he felt that the case raised a larger issue, and asserted that section 2(c) (ii) of the Canadian Bill of Rights sets up a bar which is independent of the words "reasonable excuse" in the penal provision in the *Criminal Code*.²⁴ Rather, he held that the accused should be acquitted because in this particular case, on these particular facts, this was the way to enforce the provision in the Canadian Bill of Rights.²⁵

It would appear clearly that Laskin J. must be right, otherwise a mere amendment to the present *Criminal Code* section 235(2), which would delete the words "without reasonable excuse", would do away with the right to counsel provided for in section 2(c) (ii) of the Canadian Bill of Rights. Surely the *Drybones* principle of the effect of the Bill of Rights on inconsistent legislation cannot be so easily overcome.

In all other cases before the Supreme Court, both before and after the *Drybones* decision, although the Supreme Court

²² *Ibid.*, at pp. 943-944.

²³ *Ibid.*, at p. 937.

²⁴ *Ibid.*, at p. 949.

²⁵ *Ibid.*, at p. 954.

did not detract from the fundamental principle of the *Drybones* case discussed above, it was able to so "construe and apply" the laws in question as not to find a conflict with the Canadian Bill of Rights. Thus, some seven years before the *Drybones* case, in the first decision in which the Canadian Bill of Rights was a major issue, *Robertson and Rosetanni v. The Queen*,²⁶ the majority of the Supreme Court held that the Lord's Day Act,²⁷ which prohibited a person from carrying on his ordinary calling on a Sunday, was consistent with the "freedom of religion" protected by the Canadian Bill of Rights. Turning to the clause in section 1 which provided that the freedoms therein recognized and declared "have existed and shall continue to exist," Mr. Justice Ritchie, who gave the judgment of the majority, held that the freedom of religion protected and guaranteed by the Canadian Bill of Rights was the freedom of religion as understood in 1960, and at that time the Lord's Day Act was not considered to detract from it.²⁸

• However, at least in this judgment, unlike some of the subsequent majority judgments, Mr. Justice Ritchie did attempt to analyze the issues before him. Thus, he stated that one must look at the effect of the Lord's Day Act, not its purpose, in order to see whether its application results in the abrogation, abridgement, or infringement of religious freedom.²⁹ However, he concluded that its effect was a purely secular one which did not involve an infringement of the "freedom of religion" guaranteed by the Bill of Rights.³⁰

One could take issue with Mr. Justice Ritchie even on his own terms. Although he suggested looking at the effect of the legislation, it appears that this was not done except in the light of his own views. He did not, for example, request or receive evidence as to the effect of the Lord's Day Act, as would the United States Supreme Court. If he had in fact looked at the effect and not the purpose he would have had to conclude that the Lord's Day Act is a major factor in inducing Jews, Moslems, Seventh Day Adventists, and others to work on their Sabbath, since not to do so would mean closing their establishments for two days, and not just one as Christians may do.

²⁶ [1963] S.C.R. 651.

²⁷ R.S.C., 1952, c. 171, as am., now R.S.C., 1970, c. L-13.

²⁸ *Supra*, footnote 26, at pp. 654-655.

²⁹ *Ibid.*, at p. 657.

³⁰ *Ibid.*, at pp. 657-658.

Nevertheless, there is nothing in his majority judgment which would indicate any contradiction of Mr. Justice Cartwright's dissenting assertion that:³¹

The imperative words of s. 2 of the *Canadian Bill of Rights* . . . appear to me to require the courts to refuse to apply any law, coming within the legislative authority of Parliament, which infringes freedom of religion unless it is expressly declared by an Act of Parliament that the law which does so infringe shall operate notwithstanding the *Canadian Bill of Rights*. . . . in my opinion where there is irreconcilable conflict between another Act of Parliament and the *Canadian Bill of Rights* the latter must prevail.

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

This is the essence of Mr. Justice Cartwright's decision, which he relinquished in the *Drybones* case, but which the majority adopted and applied.

Some eighteen months after the *Drybones* case the Supreme Court held that a provision in the Income Tax Act³² for an election by the Attorney General for Canada to proceed by indictment rather than by summary conviction was not a contravention of the "equality before the law" clause in section 1(b) of the Canadian Bill of Rights because such a discretion, at the time of the enactment of the Canadian Bill of Rights, was part "of the British and Canadian conception of equality before the law".³³ Shortly thereafter³⁴ the court held that a statutory presumption which shifted the onus of disproof onto the accused was consistent with the definition of presumption of innocence as defined in the *Woolmington* case,³⁵ because this was the definition of presumption of innocence understood in 1960. In two decisions in 1972, both concerned with breathalyzer tests, the Supreme Court unanimously agreed that compulsory breathalyzer tests did not contravene the "due process" clause in section 1(a), or the "fair hearing" provisions in section 2(e) and (f) of the Canadian Bill of Rights,³⁶ and that failure to provide an accused with a

³¹ *Ibid.*, at p. 662.

³² R.S.C., 1952, c. 148, s. 132(2).

³³ *Smythe v. The Queen*, [1971] S.C.R. 680, at p. 686.

³⁴ *Regina v. Appleby*, [1972] S.C.R. 303.

³⁵ *Woolmington v. D.P.P.*, [1935] A.C. 462.

³⁶ *Curr v. The Queen*, [1972] S.C.R. 889.

sample of his breath was not a denial of a "fair hearing" as required by section 2(e) of the Canadian Bill of Rights.³⁷ In both cases it was held that these practices did not deny the accused an opportunity at his trial to make a full answer and defence. In effect, both cases restricted the pre-trial protections that might have been construed out of sections 1(a) and 2(e) and (f).

Perhaps the most unfortunate decision of the Supreme Court on the effect of a clear contravention of one of the provisions of the Canadian Bill of Rights came in June, 1974, in the case of *Hogan v. The Queen*.³⁸ This case arose out of a charge of driving a motor vehicle with a blood alcohol content in excess of that prescribed by the Criminal Code. After being taken to the police station, but before the breathalyzer test was conducted, the accused's girl friend called a lawyer. The accused heard his lawyer enter the police station, and requested permission to consult with him before taking the test. However, the police officer in charge told him that he did not have the right to see anyone until after the test, and that if he refused to take the test, he would be charged for refusal to comply. Thereupon, the test was administered. At the trial it was contended that this evidence was inadmissible because it was obtained in violation of section 2(c) (ii) of the Canadian Bill of Rights. However, seven of the nine members of the Supreme Court of Canada rejected that argument and confirmed the conviction.

Mr. Justice Ritchie, who once again gave judgment on behalf of the majority, ruled that the evidence was "clearly admissible at common law" and that the courts "were correct in accepting it in accordance with the rules of evidence governing the trial of criminal cases as they presently exist in this country".³⁹ Although he referred to the *Drybones* case as authority for the proposition that "any law of Canada which abrogates, abridges or infringes any of the rights guaranteed by the Canadian Bill of Rights should be declared inoperative and to this extent it accorded a degree of paramountcy to the provisions of that statute", nevertheless, he stated, "whatever view may be taken of the constitutional impact of the Bill of Rights", did not mean that a breach of one of its provisions justified the adoption of the American rule of "absolute exclusion", because this would be "in derogation of the common law rule long accepted in this

³⁷ *Duke v. The Queen*, [1972] S.C.R. 917.

³⁸ (1974), 48 D.L.R. (3d) 427.

³⁹ *Ibid.*, at p. 433.

country".⁴⁰ He said that he preferred the reasoning of Lord Hobson in *King v. The Queen*⁴¹ where, in reference to the provisions of the Jamaican constitution which provided, *inter alia*:

... no person shall be subjected to the search of his person or property or the entry by others on his premises

Lord Hobson stated:⁴²

This constitutional right may or may not be enshrined in a written Constitution, but it seems to their Lordships that it matters not whether it depends on such enshrinement or simply upon the common law as it would do in this country. In either event the discretion of the Court must be exercised and has not been taken away by the declaration of the right in written form.

Once again our Supreme Court was prepared to take the opinion of a court which does not have experience in its own country with a written constitution or a Bill of Rights, and applied it in preference to their own better judgment in entirely different circumstances.

Only Chief Justice Laskin, with Spence J. concurring, saw the issue squarely when he stated:⁴³

The present case does not involve this Court in any reassessment of the principles underlying the admissibility of illegally-obtained evidence as they developed at common law. We have a statutory policy to administer, one which this court has properly recognized as giving primacy to the guarantees of the *Canadian Bill of Rights* by way of a positive, suppressive effect upon the operation and application of federal legislation. . . . The result may be, as in *Drybones*, to render federal legislation inoperative or, as in *Brownridge*, federal legislation may become inapplicable in the particular situation while otherwise remaining operative.

Only Laskin C.J.C., as in most of the cases dealing with the Bill of Rights, went on to discuss the issues involved and the policy alternatives which were clearly before the court; which the majority just as clearly avoided.

With the greatest respect to the majority, I cannot see how, even if the Canadian Bill of Rights were deemed to be a mere statutory enactment, a Canadian court could possibly conclude that a common law rule cannot be overruled by a statutory enactment, and a subsequent one at that. Even more, can I *not* see how the majority could agree with Lord Hobson that the discretion of the courts, based upon a common law rule, "has

⁴⁰ *Ibid.*, at p. 434.

⁴¹ [1969] 1 A.C. 304.

⁴² *Ibid.*, at p. 319.

⁴³ *Supra*, footnote 38, at p. 438.

not been taken away by the declaration of the right in written form." That may be true in the United Kingdom: it just cannot be so in Canada. Besides, "the discretion of the courts" would not be taken away if the Bill of Rights were to be applied: rather it would be reaffirmed. In the first place, the courts would still have to conclude that in the obtaining of the evidence sought to be admitted the Canadian Bill of Rights was contravened. Moreover, even in *Regina v. Wray*,⁴⁴ the common law rule on admissibility of evidence recognized a discretion in the trial judge to exclude the evidence on the ground of unfairness. Surely at the very least the Canadian Bill of Rights, whether considered to be a merely statutory, or a constitutional, instrument, must lead to the conclusion that submission of breathalyzer evidence obtained in the circumstances of this case, where the lawyer was already present in the police station, and could not delay the test beyond the two hour limit, amounts to the admission of evidence in circumstances of "unfairness".

Section 2 of the Canadian Bill of Rights has clearly directed the courts not to "construe and apply" a "law of Canada", that is, the Criminal Code, the interpretation of which includes the rule on admissibility of evidence, so as to "deprive a person who has been arrested or detained of the right to retain and instruct counsel without delay". In the *Drybones* case the Supreme Court held that the word of Parliament, that is, a section in the Indian Act, was inoperative, but in the *Hogan* case the majority were not prepared to hold that an administrative act, like the act of a police officer, should be declared inoperative, at least to the extent of excluding evidence obtained in contravention of the Bill of Rights. The courts have been prepared to assert an inherent jurisdiction to review administrative agencies, without written direction, statutory or constitutional, and have asserted it even in the face of privative clauses which indicate a clear legislative preference for the opposite. In the face of quite explicit exclusionary provisions, the courts have not hesitated to quash decisions of administrative agencies which have been arrived at through contravention of judicially-developed rules of natural justice. Why should the courts not be prepared to quash evidence the obtaining of which involves the contravention of rights which have the sanction of Parliament?

Mr. Justice Ritchie did not deny that evidence in the *Hogan* case was illegally obtained because of contravention of section 2(c)(ii) of the Canadian Bill of Rights. In fact, he must have reached that conclusion because his judgment deals almost totally

⁴⁴ [1971] S.C.R. 272.

with the issue of the admissibility of illegally-obtained evidence. By not providing a remedy, which the courts have been prepared to do to enforce contravention of the law by administrative agencies in other circumstances; he has in effect condoned the police action. At most, presumably, he would leave the accused to seek his remedy elsewhere. However, Laskin C.J.C. provided a short and complete answer to the possible suggestion that the illegalities attending the eliciting or discovering of evidence must receive their sanction through means other than exclusion of the evidence.⁴⁵

They are said to have their sanction in separate criminal or civil proceedings, of which there is little evidence, either as to recourse or effectiveness; or, perhaps, in internal disciplinary proceedings against offending constables, a matter on which there is no reliable data in this country.

He stated the policy question very clearly as follows:⁴⁶

The choice of policy here is to favour the social interest in the repression of crime despite the unlawful invasion of individual interests and despite the fact that the invasion is by public officers charged with law enforcement. Short of legislative direction, it might have been expected that the common law would seek to balance the competing interests by weighing the social interest in the particular case against the gravity or character of the invasion, leaving it to the discretion of the trial judge whether the balance should be struck in favour of reception or inclusion of particular evidence.

Furthermore, Ritchie J. rejected the American exclusionary rule on the basis that its adoption since *Mapp v. Ohio*⁴⁷ turns "on the interpretation of a Constitution basically different from our own and particularly on the effect to be given to the 'due process of law' provision in the Fourteenth Amendment of that Constitution".⁴⁸ However, as Laskin C.J.C. correctly showed, the exclusionary rule was developed to enforce the guarantees not only against the states through the Fourteenth Amendment, but against Congress through the first eight, and particularly the Fourth Amendment. He went on to make some very important observations which must be quoted in full:⁴⁹

The American exclusionary rule, in enforcement of constitutional guarantees, is as much a judicial creation as was the common law of admissibility. It is not dictated by the Constitution, but its rationale appears to be that the constitutional guarantees cannot be adequately

⁴⁵ *Supra*, footnote 38, at p. 442.

⁴⁶ *Ibid.*

⁴⁷ (1961), 367 U.S. 643.

⁴⁸ *Supra*, footnote 38, at p. 434.

⁴⁹ *Ibid.*, at pp. 442-443.

served if their vindication is left to civil actions in tort or criminal prosecutions, and that a check rein on illegal police activity which invades constitutional rights can best be held by excluding evidence obtained through such invasions. . . .

It may be said that the exclusion of relevant evidence is no way to control illegal police practices and that such exclusion merely allows a wrongdoer to escape conviction. Yet where constitutional guarantees are concerned, the more pertinent consideration is whether those guarantees, as fundamentals of a particular society, should be at the mercy of law enforcement officers and a blind eye turned to their invasion because it is more important to secure a conviction. The contention that it is the duty of the Courts to get at the truth has in it too much of the philosophy of the end justifying the means; it would equally challenge the present law as to confessions and other out-of-court statements by an accused.

He goes on to point out that although the Canadian Bill of Rights,⁵⁰

. . . does not embody any sanctions for the enforcement of its terms, . . . it must be the function of the Courts to provide them in the light of the judicial view of the impact of that enactment. The *Drybones* case has established what the impact is, and I have no reason to depart from the position there taken. In the light of that position, it is to me entirely consistent, and appropriate, that the prosecution in the present case should not be permitted to invoke the special evidential provisions of s. 237 of the *Criminal Code* when they have been resorted to after denial of access to counsel in violation of s. 2(c)(ii) of the *Canadian Bill of Rights*. There being no doubt as to such a denial and violation, the courts must apply a sanction. We would not be justified in simply ignoring the breach of a declared fundamental right or in letting it go merely with words of reprobation. Moreover, so far as denial of access to counsel is concerned, I see no practical alternative to a rule of exclusion if any serious view at all is to be taken, as I think it should be, of this breach of the *Canadian Bill of Rights*.

The *Hogan* case brings us to the following anomalous result. If one follows the *Drybones* case, then an enactment in the *Criminal Code*, which would provide that a request to "retain and instruct counsel without delay" can be denied in compelling an accused to take a breathalyzer test, would be inoperative because it is inconsistent with the Canadian Bill of Rights, but when that transgression does not have legislative sanction, but merely takes place because of police initiative, then the Canadian Bill of Rights is to be ignored.

Finally, I must deal with the issue which has been before our Supreme Court most frequently in questions concerning the Bill of Rights, and that is the meaning to be given to the "equality before the law" clause in section 1(b). In a way it is unfortunate

⁵⁰ *Ibid.*, at pp. 443-444.

that in three of the five cases in which the Supreme Court dealt with this clause, the Indian Act was involved. Since the jurisdiction of Parliament under section 91(24) of the British North America Act is expressly with respect to "Indians and Lands reserved for Indians", it is quite clear that this jurisdiction is racially based. It could appear, therefore, that any difference between the treatment of Indians and the treatment accorded to all other Canadians, could be challenged under the "equality before the law" clause, particularly if it is interpreted in the light of the non-discrimination clause in the opening paragraph of section 1.

There are really two difficult questions that must be answered:

- (1) In assessing equality or inequality before the law in a federal system, who does one compare with whom?
- (2) Does the clause prohibit all cases of inequality, or must one sensibly recognize that in some instances what would appear to be unequal treatment is rationally justified and even, when applied to people who are not equal to all other Canadians, more equal than an equally-applied law?

The answer to the first question must surely be that the comparison cannot be between federal law and provincial law. Since provincial laws vary on many matters, Parliament would be facing an impossible dilemma in trying to enact laws which would provide equal treatment with that rendered under provincial laws. A federal law which would accord with the laws of one province would presumably cause an inequality in another province. In the alternative, if a federal law were made to vary from province to province in order to accord with provincial laws, then it might be possible to argue that a Canadian in province X is being treated differently under federal law than is another Canadian in province Y. Therefore, an assessment of equality before the law cannot be made by comparing a federal law to provincial laws. The inequality must be shown to arise out of the operation of provisions in federal law alone.

The second question must clearly be answered on the basis that laws which appear to apply unequally may be justified if there is a rational justification such as, for example, graduated income tax laws.

In the *Drybones* case, the Supreme Court had rejected an earlier interpretation of the British Columbia Court of Appeal,⁵¹

⁵¹ *Regina v. Gonzales* (1962), 32 D.L.R. (2d) 290.

that a law which applied equally to all persons of the same race or group did not contravene section 1(b) because, said the Supreme Court, this would justify "the most glaring discriminatory legislation against a racial group". The majority had no difficulty in deciding that:

Section 1(b) means at least that no individual or group of individuals is to be treated more harshly than another under that law.⁵²

One of the dissenting judges, Pigeon J., declined to join the majority largely because he was afraid that the majority decision could result in the whole of the Indian Act being held inoperative.⁵³ This apprehension, which I believe to be unjustified, he has reiterated time and again, and seems finally to have convinced the majority into retreating somewhat from the bold stand they took in *Drybones*.

Another major case to deal with the "equality before the law" clause, *A.-G. for Canada v. Lavell*,⁵⁴ dealt with a different provision of the Indian Act. Section 12(1)(b) provides that an Indian woman who marries a white man loses her membership in her Band, and her Indian status. There is no similar provision with respect to Indian men, in fact, a white woman who marries an Indian man joins his Band and becomes an Indian for the purposes of the Indian Act. Having become convinced by Pigeon J. that the whole of the Indian Act could be held invalid unless the "equality before the law" clause receives a more restricted meaning, Mr. Justice Ritchie, who gave the decision on behalf of four of the nine members of the court, retreated from his position in the *Drybones* case to his earlier interpretation in the *Robertson and Rosetanni* case to seek a meaning for the clause in the laws and concepts as understood at the time the Bill of Rights was enacted. This led him to adopt Dicey's definition, first rendered in the late nineteenth century, and to conclude that "equality before the law",

. . . as employed in s. 1(b) of the *Bill of Rights* is to be treated as meaning equality in the administration or application of the law by the law enforcement authorities and the ordinary courts of the land.⁵⁵

With respect, I would suggest, first, that this interpretation totally ignores the juxtaposition of the "equality before the law" clause with the non-discrimination clause in the opening paragraph of section 1. Second, it ignores the fact that by 1960

⁵² *Supra*, footnote 8, at p. 297.

⁵³ *Ibid.*, at pp. 303-304.

⁵⁴ (1973), 38 D.L.R. (3d) 481.

⁵⁵ *Ibid.*, at p. 495.

Canada had signed the Universal Declaration of Human Rights, that some of its leading jurists had participated in the work of the International Commission of Jurists in drafting a more modern mid-twentieth century definition of "rule of law" and "equality before the law," and that by 1960 most provinces in Canada had enacted anti-discrimination legislation. All of which indicates that even if one were to take Mr. Justice Ritchie's assertion that one looks to the clause as it was understood in Canada in 1960, its egalitarian aspect could not be ignored. Third, even Mr. Justice Ritchie himself in the *Drybones* case had applied an egalitarian concept and made no reference to Dicey's concept of equality before the law as part of his formulation of the "rule of law".

Moreover, even if one were to use the definition as proposed by Ritchie J., it is impossible to understand by what process of reasoning he reached the following conclusion:⁵⁶

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

Apart from the fact that the inequality in the *Lavell* case arose out of distinctions based upon sex, whereas in the *Drybones* case it was a racial distinction, I see no difference. How can it be denied that Indian women who marry non-Indians are not treated equally before the ordinary courts of the land, when in the administration and enforcement of the law the courts must deny them property rights, status, and access to their native territory, because of a provision which applies to them and not to Indian men? Surely this is greater inequality before the law, more fundamental and more drastic, than the relatively minor inequality dealt with in the *Drybones* case. One must conclude, therefore, that Laskin J. must be correct when he stated:⁵⁷

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

In a subsequent decision, *Regina v. Burnshine*,⁵⁸ the Supreme Court was concerned with a provision of the federal Prisons and

⁵⁶ *Ibid.*, at p. 499.

⁵⁷ *Ibid.*, at p. 508.

⁵⁸ [1974] 4 W.W.R. 49.

Reformatories Act⁵⁹ by which courts in Ontario and British Columbia may sentence anyone, who is apparently under the age of twenty-two, and who is convicted of an offence punishable by imprisonment for three months or more, to a fixed term of not less than three months, and an indeterminate period thereafter of not more than two years less one day to be served in a special correctional institution rather than a common gaol. Burnshine was sentenced to the maximum allowable, referred to above, even though the offence with which he had been charged had a maximum punishment of six months prescribed by the Criminal Code. By a decision of six to three the Supreme Court held that the provision in the Prisons and Reformatories Act did not contravene the "equality before the law" clause in section 1(b) of the Bill of Rights. Interestingly enough, Laskin J. who dissented (with Spence and Dickson JJ. concurring), would not have found the provision inoperative, rather he would have so "construed and applied" the provision that the maximum term of detention could not have exceeded that provided under the Criminal Code.⁶⁰

Mr. Justice Martland, who gave the majority opinion, paid lip service to the Ritchie formula for referring to 1960 and the law existing at the time to determine the meaning of the Bill of Rights. In fact, he went so far as to say that section 2 "did not create new rights. Its purpose was to prevent infringement of existing rights".⁶¹ If one were to take this *obiter* statement, without considering what he went on to state as the basis of his decision, it would appear to be futile to argue that any federal law enacted or in existence before 1960 can possibly contravene the Canadian Bill of Rights. And yet, this was done successfully in *Drybones*!

One suspects, therefore, that Martland J. would not want his judgment to be so circumscribed. After all, what he did go on to do was to examine the law. He was persuaded that its object was to reform young offenders, and since it was incarceration in an institution other than a goal, and since such facilities were available only in British Columbia and Ontario, he adopted an earlier statement by Laskin J., who had suggested,⁶²

... compelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly

⁵⁹ R.S.C., 1970, c. P-21.

⁶⁰ *Supra*, footnote 58, at p. 67.

⁶¹ *Ibid.*, at p. 58.

⁶² *Curr v. The Queen*, *supra*, footnote 36, at pp. 898-899.

enacted by Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government, which underlie the discharge of legislative authority under the *British North America Act*.

Martland J. went on to say:⁶³

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

What he did, in effect, was to apply the test of whether the impugned provision was "rationally related to a legitimate legislative purpose". And with that there can be no quarrel.

On January 28th last the Supreme Court rendered its most recent decision in which the main issue was the application of the Canadian Bill of Rights: *Attorney General of Canada et al. v. Canard et al.*⁶⁴ The main issue in the case concerned the validity of testamentary provisions in the Indian Act in the light of the "equality before the law" clause. Under the applicable provisions⁶⁵ all jurisdiction and authority in relation to descent of property of deceased Indians is vested exclusively in the Minister of Indian and Northern Affairs. The Minister may appoint executors and administrators, remove them and appoint others in their stead, and for this purpose give any order or direction that in his opinion is necessary or desirable to carry out his authority. The regulations pursuant to these provisions seem to contemplate that the usual procedure would be to appoint an officer of the Department as administrator. In fact, Mrs. Canard, the widow of the deceased, was not even informed that an administrator had been appointed, and she had made her own application.

No member of the Supreme Court was prepared to hold that the impugned sections of the Indian Act were inoperative. Of the seven members of the Supreme Court who heard the case, only three were prepared to conclude that the way the regulations were being applied would probably contravene section 1(b) of the Canadian Bill of Rights. However, one of these justices, Beetz J., declined to so hold on the ground that the wrong forum was chosen to initiate the action.⁶⁶ The other two, which included the Chief Justice, declared that the impugned sections were not inoperative, but must be applied consistently with the Bill of Rights,

⁶³ *Supra*, footnote 58, at p. 60.

⁶⁴ (1975), 52 D.L.R. (3d) 548.

⁶⁵ *Supra*, footnote 9, ss 42-44.

⁶⁶ *Supra*, footnote 64, at p. 583.

and that the particular provision in the regulations which most blatantly contravened "equality before the law", was inoperative.⁶⁷ The other four,⁶⁸ however, held that the Bill of Rights was not contravened. Although there was some hint in their judgments that, in accordance with the *Burnshine* decision, they thought that the legislation was enacted "pursuant to a valid federal objective",⁶⁹ the main reasons seem to be the continuing apprehension that to hold otherwise would render the whole Indian Act inoperative.⁷⁰

To the extent that I can understand the basis of the majority's judgments, one has to admit that the decision was not an easy one. Given that an assessment of inequality cannot arise out of a comparison between federal provisions and those of the provinces, dealing with descent of property, how could one conclude that provisions in the Indian Act infringed "equality before the law" when there was no other federal legislation dealing with the administration of the estates of anyone else? In the Manitoba Court of Appeal, Dixon J.A. (now a member of the Supreme Court of Canada), had held that in these provisions Parliament had placed a legal roadblock in the way of one particular racial group, placing that racial group in a position of inequality before the law, in that it has said in effect "because you are an Indian you should not administer the estate of your late husband".⁷¹ In the Supreme Court, Chief Justice Laskin agreed with Dixon J.A. that unjustified unequal treatment could arise out of a federal provision, even though there is no other federal provision on the same point with which it could be compared. He so concluded on the ground that in practice "it appears to be forbidden to Indians to become administrators of estates of Indian intestates, where no other class is singled out for disqualification".⁷² Although it is not explicit in either judgment, it would appear that both justices concluded that it was normal practice, and not just because of provincial laws, but in the western world generally, that the widowed spouse of a deceased is at least entitled to priority in consideration of who should be appointed as administrator. Regardless of the legal and historical basis for such appointments, it is only just and humane today to come to that conclusion.

⁶⁷ *Ibid.*, at pp. 556-558.

⁶⁸ Judson, Martland, Pigeon and Ritchie JJ.

⁶⁹ See, e.g., Martland J., at pp. 560-561, *ibid.*

⁷⁰ See particularly Pigeon J., at pp. 564-565, *ibid.*

⁷¹ (1972), 30 D.L.R. (3d) 9, at p. 23.

⁷² *Supra*, footnote 64, at p. 554.

To sum up my views on the interpretation of section 1(b) of the Bill of Rights, may I state that the majority views in the cases since the *Drybones* case, with their reference to 1960 definitions, merely camouflage the fact that the judges are giving their *own* interpretations of the words used, instead of following the rules of statutory interpretation to see *what Parliament intended*. If one follows the dictionary rule, one must include the non-discrimination clause in the opening paragraph of section 1 as being plainly a part of the definition. If one follows the "golden" rule, interpreting clauses not in isolation from each other but in the context of the whole, one must again take note of the very direct relationship between the opening paragraph and section 1(b). If one applies the "mischief" rule, then one cannot overlook the fact that the Parliament of Canada and the legislatures of Canada, during the decade of the 'fifties, were concerned with overcoming the inequality which arises from discrimination. Therefore, even applying 1960 concepts, one cannot exclude the modern twentieth-century notions of egalitarianism.

Nevertheless, there is a second step in the process, and that is assessing whether inequality in treatment constitutes inequality before the law. The purpose of Parliament in enacting the law providing for the distinction must be considered. The judges must, in case of any doubt, resolve the issue in favour of upholding the law. However, the Bill of Rights indicates that Parliament directed the courts to make the assessment. This assessment should be made on the basis of a standard like:

Is the distinction in the law or process justifiable in a liberal-democratic state which is committed to a policy of equality of opportunity, tempered with the aim of striving for equality in fact?

With that kind of a test no problem should arise with what are called "affirmative action programmes", or "benign discrimination", because these programmes are designed to help overcome inequality which already exists, and do not result in, to use the majority formula in *Drybones*, an individual or group of individuals being treated more harshly than another.

III. *Summary and Conclusion.*

My answer to the question I posed at the beginning: how civil libertarian was the Supreme Court in interpreting the Canadian Bill of Rights? must be: with few exceptions, hardly at all. Fortunately, however, the result is not yet irrevocable, and at least we have with us the important principle arising out of the *Drybones*

decision, that is, that laws which can only be "construed and applied" in contravention of rights or freedoms protected by the Bill of Rights, must be held inoperative to the extent of the inconsistency. Even though the Supreme Court has avoided saying so, and in fact has come very close to asserting the opposite, this decision has recognized that the Canadian Bill of Rights has a constitutional status.

It is difficult to see why the Supreme Court is so timid in recognizing that fact. An instrument does not have to be entrenched to be considered constitutional. Much of the British North America Act is in no way entrenched as against amendment by simple Act of the provincial legislatures or of Parliament. Thus, for example, section 63 of the British North America Act has in effect been rendered inoperative by "simple" statutes of the Legislature of Ontario, this is, the Executive Council Act,⁷³ and of Quebec, that is, the Executive Power Act.⁷⁴ Similarly, section 70 of the British North America Act has been rendered inoperative by a "simple statute" of the Legislature of Ontario, this is, the Representation Act,⁷⁵ and sections 72, 73, 77 and 80 by a "simple statute" of the Legislature of Quebec, that is, the Legislature Act.⁷⁶ Are any of these "simple statutes" of the Legislatures of Ontario or Quebec any the less constitutional than were the original provisions in the British North America Act, whose effect was changed? It appears mistaken to argue that inclusion in, or exclusion from, the British North America Act is a test of constitutionality. Any country which has a written Bill of Rights considers it to be a part of its constitution. In our case, for historical reasons, and at the time of its enactment, for political reasons, the Bill of Rights was not added to the British North America Act. However, during the constitutional debates of 1968-1971 the inclusion of a Bill of Rights in a new constitution was clearly accepted by all governments as a legitimate consideration.

Under section 91(1) of the British North America Act the legislative authority of the Parliament of Canada extends to "the amendment from time to time of the Constitution of Canada". Does the Bill of Rights have to include a textual statement that it is an expression of the power under section 91(1) to amount to such? Surely not. Surely it amounts to such an amendment and is constitutional.

⁷³ R.S.O., 1970, c. 153, as am.

⁷⁴ R.S.Q., 1964, c. 9.

⁷⁵ R.S.O., 1970, c. 413.

⁷⁶ R.S.Q., 1964, c. 6.

One further comment about the work of the Supreme Court with reference to the Canadian Bill of Rights must be added. One does not object so much to the actual decisions in the cases concerned, as to the process by which the conclusions are reached. Just two examples will suffice to illustrate the difficulties a law teacher has in explaining to his students what the judgments mean. The first is Mr. Justice Ritchie's conclusion in the *Lavell* case that:⁷⁷

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

How does he come to that conclusion? No clue is given.

The second example is Mr. Justice Pigeon's concurring judgment in *Regina v. Burnshine*:⁷⁸

I agree with Martland J. subject to the views I have expressed in *A.-G. of Canada v. Lavell* and *Isaac v. Bédard* (1974), 38 D.L.R. (3d) 481, so far as they happen to be different from those he has expressed.

What does that mean? Other examples could be provided, but perhaps it is wiser if they were not.

What I do want to emphasize in conclusion is that judgments of the Supreme Court justices are not solely a determination of the rights and obligations of the particular litigants. They should, at the same time, provide guidance for all citizens, and especially lawyers, judges and public officials. For the sake of citizens one would expect expositions of the issues at stake, and elaboration of the principles being applied. These should not only be readily understood, but also, if at all possible, be expressed in classic, enduring terms. For the sake of those involved in the administration of justice it should provide clear guidelines. Yet how is one to satisfy the need of the citizen or the need of public officials (including lawyers, civil servants, and judges) when in cases such as *Hogan* the majority judgment does not really come to grips with the issues raised in the minority judgment of the Chief Justice? What we need is the kind of dialogue which would provide guidance not only for law teachers and law students, but for lawyers, judges and public officials, and the rest of the country as well. What we need are the Olympian views and

⁷⁷ *Supra*, footnote 54, at pp. 499.

⁷⁸ *Supra*, footnote 58, at p. 61.

memorable phrases of a Holmes, a Sankey, or a Rand, especially with respect to civil liberties and the Canadian Bill of Rights. In *Drybones* the Supreme Court justices have shown that they could have been, like Martin Luther King, to the top of the mountain, but unlike him, they have not yet seen the promised land. Let us hope they do.
