Indian Women's Rights

I. INTRODUCTION

A Bill of Rights that is not entrenched is unlikely to be of much consequence in the courts. Any jurisdiction enacting such a Bill will, at the time of the enactment, or shortly thereafter, either repeal any legislation which the government believes to be offending, or re-enact it with the provision that it overrides the Bill. When the Alberta legislature repealed the Human Rights Act[1], which had only an interpretative effect[2], and replaced it with the Individual's Rights Protection Act[3], which renders inoperative any statute authorizing what is prohibited by that Act[4], it, at the same time, repealed[5] the Communal Property Act[6]. The Communal Property Act was aimed at preventing the spread of Hutterite colonies in Alberta[7]. The federal Bill of Rights[8] requires the Minister of Justice to examine every Bill introduced in the House of Commons to determine whether the introduced Bill is inconsistent with the Bill of Rights[9].

The only statutory provisions that the Courts could find to be in conflict with the Bill of Rights would be those that the Crown lawyers believed not to be in conflict with the Bill, or those, which by inadvertence, the Crown had forgot to repeal or re-enact in conformity with the Bill. Such provisions must be few and far between. The federal Bill of Rights has now been in existence for six years, and the Supreme Court of Canada has found only one subsection of a federal statute[10] inconsistent with the Bill[11].

It is therefore, perhaps, not surprising that counsels' arguments have met with so little success in the courts. It is, perhaps, equally unsurprising that such arguments have so frequently been raised. The provisions of the Bill are a faint hope for any counsel in a case where a federal statute is relevant to the rights of the parties. The Bill's platitudes are a convenient soap-box on which any advocate may stand.

An argument on the Bill of Rights may now deserve the description applied to estoppel, that it is the last resort of desperate counsel.

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1. (1970) R.S.A. c. 178.
2. s.2
3. (1972) S.A. c.2
4. s.1(1)
5. (1972) S.A. c.103
6. (1970) R.S.A. c.59
7. **Walter v. A.G. Alta** (1969) SCR 383 at 390, 392
8. (1970) R.S.C. App. III
9. s.3
10. s.95(b), Indian Act (1970) R.S.C. Chap. I-6
11. **R. v. Drybones** 1970 S.C.R. 282

II. SUMMARY

As inauspicious as most arguments based on the Bill of Rights must be, the one raised in the *Lavell* case seemed to have more promise than most. In *AG of Canada v. Lavell, Isaacs v. Bedard*[12], Mrs. Lavell's name was deleted from the membership list of her Indian band because she had married a non-Indian. In the case of Mrs. Bedard, who was separated from her non-Indian husband and living on a reserve, her band council passed a resolution requesting that a notice to quit the reserve be served upon her. The Indian Act provides that a woman who marries a non-Indian is not entitled to be registered as an Indian[13]. There is no comparable provision for men marrying non-Indian women. Both women brought an action asking the courts to declare that the Indian Act provision removing their entitlement to registration be declared inoperative on the ground that it was in conflict with the Bill of Rights[14]. At the Supreme Court of Canada the two actions were heard and decided together.

The Bill of Rights provides that every federal law shall be applied so as not to abrogate the right, without discrimination by reason of sex, to equality before the law. The Supreme Court held that the contested Indian Act provision was not rendered inoperative by the Bill of Rights. Mr. Justice Ritchie held, with Fauteux CJC, Martland and Judson J.J. concurring, that though there may have been discrimination by reason of sex, sexual discrimination by itself was not enough to invalidate a statute, and there was no inequality before the law. Secondly, the Bill of Rights could not be interpreted to remove from Parliament the power granted to it by the B.N.A. Act to legislate concerning Indians[15]. If Parliament were not allowed to say who was and was not an Indian, the Bill of Rights would have effectively revoked the grant of this power.

Mr. Justice Pigeon maintained the point of view he held in the *Drybones* case[16], that because all federal Indian legislation is inevitably discriminatory, Parliament must have intended none of it to fall within the provision of the Bill of Rights. Mr. Justice Laskin, in dissent, with Hall and Spence J.J. concurring, held that the contested provision of the Indian Act manifested sexual discrimination, and sexual discrimination by itself was sufficient to render inoperative a federal statutory provision. In a separation dissenting judgment, Mr. Justice Abbott agreed with Mr. Justice Laskin.

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12. (1973) 23 CRNS 197
13. s.12(1)(b)
14. **Lavell** 1972 10R390 (Co.Ct.), 1972 10R396 (C.A.); **Bedard** 1972 2 OR391 (H. Ct.)
15. s.91(24) (1970) R.S.C. App. II, No. 5
16. (1970) SCR 282 at 303

III. RATIO DECIDENDI[17]

There is no one judgment with which a majority of the judges of the court are in agreement. The principle for which the case stands has to be extracted from the two judgments, that of Ritchie and Pigeon JJ., forming the majority. The second reason for judgment of Mr. Ritchie must be considered the principle of the case. Mr. Justice Pigeon held that all Indian legislation is not subject to the Bill of Rights, and Mr. Justice Ritchie held that some Indian legislation is not subject to the Bill of Rights, that legislation necessary to the effective exercise of the power granted by the B.N.A. Act. Since Mr. Justice Pigeon's broad proposition necessarily involves agreement with Mr. Justice Ritchie's narrower opinion, that narrower opinion has a majority of judges in its favour.

Ritchie J.'s other reason for judgment, that the contested provision does not create inequality before the law, does not have a majority of judges in its favour. The case cannot be considered a precedent for his discussion of the meaning of equality before the law.

IV. INDIANS AND LANDS RESERVED FOR INDIANS

In light of some of the remarks that Mr. Justice Ritchie made in coming to the conclusion that Indian legislation necessary to the exercise of the Indian power is immune from the Bill of Rights, it is perhaps not superfluous to point out that s.91(24) of the B.N.A. Act gives Parliament exclusive jurisdiction over two matters, one being "Indians", and the other being "lands reserved for Indians"[18].

Two conclusions follow from this observation. Firstly, the federal jurisdiction over Indians is not restricted to Indians on reserves. The federal government jurisdiction over Indians extends to Indians that are not on reserves. Secondly, the federal jurisdiction over lands reserved for Indians is not restricted to legislation dealing with Indians on reserves. It extends to legislation applying to non-Indians on reserves[19].

Because Mr. Justice Ritchie takes the position that the Bill of Rights must not be interpreted so as to frustrate a constitutional grant of legislative power, it becomes important to state exactly what the power granted is. The power to say who is and who is not an Indian may be necessary to the exercise of a power over Indians. The power to say how lands are to be used, by Indians and non-Indians alike, may be necessary

17. Ed Ratushny, **Defence Counsel and the Canadian Bill of Rights** (1973) 23 CRNS 265

18. See **Cardinal v. A.G. Alta** S.C.C. (1974) 13 C.C.C. (2d) 1 per Mr. Justice Martland, at p.7, per Mr. Justice Laskin, p.15.

19. K. Lysyk, The Unique Constitutional Position of the Canadian Indian (1967) CBR 514.

to the exercise of a power over lands[20]. Because the lands are lands reserved for Indians, there must exist an unfettered power in Parliament to limit the right of Indians to alienate the lands of the reservations or any estate or interest they have in the lands. However, the power to say how reserve lands are to be used by Indians, the power to say what Indians, as opposed to non-Indians, may or may not do on a reserve, while it may be necessary for the exercise of a (non-existent) power over Indians on land reserved for Indians, is not necessary to the exercise of a power over Indians or of a power over lands reserved for Indians.

Mr. Justice Ritchie distinguishes the *Drybones* case on the ground that the law there in question concerned the conduct of Indians off a reserve[21]. He says "there is a wide difference" between the "regulation of internal domestic life of Indians on reserves" and "legislation exclusively concerned with behaviour of Indians off a reserve"[22]. However, since the relevant distinction is between persons on a reserve and persons off a reserve, or between Indians and non-Indians, but not between Indians on a reserve and Indians off a reserve, these statements of Mr. Justice Ritchie could cause problems for the court.

The Indian Act presently provides that the Minister of Indian Affairs may appoint administrators of estates of deceased Indians ordinarily resident on reserves[23]. It, in effect, removes the right, for an Indian on a reserve, that he would otherwise have to act as administrator of his deceased spouse's estate. In *Conrad v. A.G. Can.*[24], the Manitoba Court of Appeal held the provision rendered inoperative by the Bill of Rights. Mr. Justice Dickson, giving judgment for the Court, recognized that some laws essential to the integrity of reserves would remain operative despite the Bill of Rights[25]. However, the power to pass the provision in question was not a necessary incident to Parliament's control of reserve land.

The case has been appealed to the Supreme Court of Canada. Leave to appeal was granted on October 16, 1972[27]. Argument was heard on March 7th and 8th, 1974. The Court has reserved judgment. Since the law under dispute deals with Indians on reserves, but is not a necessary exercise of the power over Indians or lands reserved for Indians. Mr. Justice Ritchie's judgment in *Lavell* provides no clear guidance to the Court for the disposition of the case[28].

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20. cf. **R. v. Whiteman** (No. 1) (1971) 2 WWR 316 (Sask Ct.)
21. p.316
22. p.214
23. s.43(a), s.4(3).
24. (1972 5) WWR 678 (Man. C.A.)
25. at p. 690
26. Les Katz, *The Indian Act and Equality before the law* 6 Ott. Law Rev 277 at 284 fn. 21.
27. cp. D.E. Sanders, Status of Indian Women (1973-4) Sask. L.R. 243 at p. 249

V. EQUALITY BEFORE THE LAW

Counsel for Mrs. Lavell and Mrs. Bedard argued that the contested provision of the Indian Act was rendered inoperative by the Bill of Rights because the provision denied these women equality before the law. Mr. Justice Ritchie held that the equality before the law provision in the Bill of Rights was not violated. In so holding, he presented a definition of equality before the law that had not previously appeared in the case law.

Some of the other explanations of the phrase "equality before the law" appearing in the cases are:

1. A law that is discriminatory by reference to a prejudice such as race, sex or other prejudices listed or not listed is in violation of the requirement of equality before the law. If there is an obvious acceptable legislative reason for a law, and the reason is not the unacceptable one of prejudice, the law does not violate the equality provisions[29].

2. If a class is entitled to insist that the determination of its substantive rights and privileges be made according to the rules of natural justice, then a sub-class of that class cannot be denied the benefit of those rules without the equality provision being violated[30]. In *Re Prata*[31], aliens in Canada against whom a deportation order had been made, were entitled to appeal the order to the Immigration Appeal Board[32]. At the time of the appeal, by the rules of natural justice, they were entitled to be heard. However, aliens concerning whom a certificate had been filed by the Minister of Manpower and Immigration and the Solicitor General stating that it would be contrary to the national interest that they remain in Canada had no right to appeal[33]. Mr. Justice Thurlow, in dissent, held[34] that those aliens concerning whom a certificate had been filed were denied the benefit of equality before the law.

3. Equality means equality of rights, but not equality of privileges[35]. If a law grants privileges to a class, but denies those privileges to a subclass within that class, the quality provision is not violated[36].

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29. Jackett C.J.C. in **Re Prata and Minister of Manpower and Immigration** (1973) 31 D.L.R. (3d) 465 at 473 followed by MacLean J.A. dissenting, in **R. v. Burnshine** 22 C.R.N.S. 271 (B.C.C.A.).
30. Per Thurlow J. in **Re Prata** at p.477.
31. See footnote 1
32. s.15 Immigration Appeal Board Act (1970) R.S.C., CI 3
33. s.21 Immigration Appeal Board Act
34. at p.477
35. See W.N. Hohfeld, Fundamental Legal Conceptions (1919), for the distinction between a right and a privilege
36. per Sweet D.J. in **Re Prata** at p.478

4. If a class of people is treated more harshly than the general population, there is inequality. If the general population is treated more harshly than a class of people, there is not inequality[37]. Branca J.A.[38] held that federal law treating B.C. males between 18 and 22 more harshly than adults [39] was in violation of the requirement of equality before the law but indicated that federal law treating juveniles less harshly than adults[40] was not, even though the age for juveniles varies from province to province[41].

5. If a class of people is, in general, treated more favourably than the general population, then the fact that it is treated more harshly in some minor particular does not result in inequality. In *Regina v. O.*[42] a juvenile's time for leave to appeal had lapsed, and the court had no power to extend the time. Even though, if the defendant were an adult, the court would have been able to entertain an appeal, the inability to grant leave was not rendered inoperative by the Bill of Rights, because, in general, the law in relation to juveniles was to give special protection to juveniles, and was for their benefit. The attitude of Mr. Justice Dickson in *Canard v.A.G.Can*[43] is in direct conflict to this position. There he says that it is not reasonable that a law forfeits basic rights which otherwise are assured for the reason that the class has certain perquisites not shared by other men. The freedoms expressed in the Bill of Rights cannot be bartered away.

6. Equality before the law means equality of remedies before different courts[44]. In *R. v. Chapman & Currie,* the accused committed for trial to a County Court applied for a writ of habeas corpus. The Habeas Corpus Act [45] applies to Assize Courts, but not to County Courts. Mr. Justice Vannini held, and Mr. Justice Stewart of the High Court agreed, that because of the equality provision in the Bill of Rights, habeas corpus is available to those who are entitled for trial to the County Court as well as to those who are committed for trial to the Courts of Assize.

The explanation of Mr. Justice Ritchie of the phrase "equality before the law" is somewhat similar to that of Mr. Justice Vannini in *R. v. Chapman & Currie*. For Mr. Justice Ritchie, equality befor the law

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37. (1973) 22 CRNS 271 reversed by S.C.C., Globe & Mail, April 3, 1974 p.9
38. 22 CRNS at p.296
39. s.150 Prisons and Reformatories Act (1970) RSC c P-21 as interpreted by **Turcotte v. R.** (1970) SCR 843
40. Juvenile Delinquent Act (1970) R.S.C., c J-3
41. B.C., under 17, S.O.R./70-442, Manitoba and Quebec, under 18, Alberta, under 18 for girls, all other provinces, under 16, R.G. Fox and Maureen Spencer, The Young Offenders Bill (1971-2) 14 Crim. L.Q. 173 at 188.
42. (1972) 6 C.C.C. (2d) 385 (B.S.S.C.)
43. (1972) 5 WWR 678 at 689
44. (1971) 1 OR 601 (Ont. A. Ct.) Ont H. Ct. p. 617n
45. (1679) 31 CAR. II c.2

means equality before the courts and law enforcement authorities, not just of remedies, but of rights as well. The unequal treatment of women that the Indian Act imposes is not an inequality before the law because inequality is not at least in the first instance, before the courts or before the law enforcement authorities. If the list of Indians had to be kept, instead of by administrative officials, by a court prothonotary, there would have been an infringement of the Bill of Rights. However, because the inequality is before the administrative authorities under the Indian Act, before the Indian Registrar, the officer of the Department of Indian Affairs in charge of the Indian Register, or before District Supervisors, the law creating the inequality is not rendered inoperative by the Bill of Rights.

VI. DICEY'S RULE OF LAW

Mr. Justice Ritchie derives his definition of "equality before the law" from A.V. Dicey's doctrine of the rule of law. Dicey says that two features have at all times characterized the political institutions of England. One is supremacy of Parliament, the other is the rule or supremacy of law[46]. The rule of law has three meanings. One is the predominance of regular law as opposed to the influence of abritrary power. The second is equality before the law. The third is that the law of the constitution is the result of the ordinary law of the land[47].

Equality before the law itself means the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts. Government officials are not exempt from the duties of obedience to the law which govern other citizens. There are no separate administrative tribunals for disputes in which the government is concerned.

It is questionable whether equality before the law, as Dicey described it, existed at the time he wrote his treatise[48], and even more questionable whether it exists now. Government officials have had and do have special rights, duties and immunities particularly related to their responsibilities. If there were the equality before the law that Dicey had in mind, there would be no doctrine of Crown privilege in the law of evidence; the need to enact Crown liability acts would never have arisen; the perogative rights could be used against the Crown. One of the cases before the Court, the *Bedard* case, gave an example disproving the claim that Dicey's equality before the law characterized Canadian

46. A.V. Dicey, The Law of the Constitution, 9th Ed. p. 183 (1948)
47. p.202
48. 1st. ed., 1885

institutions. Mrs. Bedard had originally moved for an injunction restraining the District Supervisor of the Department of Indian Affairs from expelling her and her children from her reserve.[49] The application for an injunction was withdrawn and only a declaration sought on the ground that it would be improper to enjoin the Crown or its agent, the District Supervisor[50].

The other facet of Dicey's notion of equality before the law, that there is no system of administrative courts dealing with administrative law, is of equally uncertain existence. Judicial bodies such as the Tax Appeal Board, the Immigration Appeal Board, the Federal Court and the Federal Court of Appeal, from which the *Lavell* case itself came to the Supreme Court of Canada, appear to belie the notion that such separate courts do not exist. In any case, even if this part of Dicey's concept of equality before the law can be considered accurate, its significance is nothing more than procedural. Dicey was contrasting the English system with the French system, where there is a separate set of administrative courts to handle administrative law cases. However, the French conseil d'etat was not established to provide a privilege for government officials, but to provide specialized protection for the citizen. In Canada, even though there may be no administrative courts as such, there nonetheless exists a body of administrative law[51].

The use of Dicey's notion of equality before the law as an explanation of the phrase in the Bill of Rights creates difficulties. If Dicey's sort of equality does not exist, then the Bill's equality has no clear meaning. Even if Dicey's equality can be given a precise content, the courts may be vexed with the question of what is an ordinary court.

The doctrine as enunciated provides an easy way for Parliament to circumvent the Bill. It can legislate inequality, and provided that inequality is enforced, in the first instance, by administrative officials, and not the courts or law enforcement authorities, the inequality is not inoperative. The courts, if they accept this doctrine, will be hiding their heads in the sand. Inequality in the law will be tolerated as long as they do not see it, as long as it does not come before them.

VII. CONTEMPORANEA EXPOSITIO

In arguing for the use of Dicey's definition of equality before the law, Mr. Justice Ritchie relies on the doctrine of statutory interpretation, that the meaning to be given to the language employed in a Canadian

49. **Bedard v. Isaac** 1972 2 OR 391

50. at p. 394, cp. SCC at p.220

51. Jennings, The Law and the Constitution, 5th ed. (1959) at p.312.

statute is the meaning which it bore in Canada at the time the statute was enacted[52]. Contemporanea expositio est optima et fortissima in lege[53].

The standard rule of statutory interpretation is that words must be interpreted as taking their ordinary and natural sense. The rule of applying the meaning at the time the statute was passed, the rule of contemporanea expositio, is the exception to this standard or primary rule. In the case of ancient statutes words might have meanings at the time they were passed different from that which they have when their interpretation becomes a matter of dispute before the courts. The doctrine of contemporanea expositio says that the ancient meaning is to be preferred.

The doctrine is to be applied only to ambiguous language used in very old statutes where the language itself may have had a rather different meaning in those days, *Campbell College v. N.I. Valuation Comm.*[54]. In the *Campbell College* case, decided in 1964, Lord Upjohn refused to apply the doctrine to a statute passed in 1854[55], over a hundred years earlier. In *Trustees of Clyde Navigation v. Laird*[56], Lord Watson, in 1883 refused to apply the doctrine to a statute passed twenty-five years earlier in 1858[57]. In *Assheton Smith v. Owen*[58], Cozens-Hardy L.J. refused, in 1905, to apply the doctrine to statutes of 1793[59], and 1800[60], statutes he called comparatively modern. The Supreme Court of Canada applied the doctrine in 1921, in *Upper Canada College v. Smith*[61], but the application was to the Statute of Frauds passed in 1677[62]. The contemporaneous exposition that the Court applied was that found in cases decided in 1678[63].

Mr. Justice Ritchie's reference to this doctrine weakens his argument rather than strengthens it. Since the doctrine is used to justify a deviation from what is the plain and ordinary meaning of the words at the time of litigation, the use of the doctrine suggests that the plain and ordinary meaning of the words "equality before the law" in 1973 was not what Dicey thought it to be. Since the doctrine of contemporanea expositio was not applicable, and the plain and ordinary meaning of the words "equality before the law" was presumably the

52. at p.210
53. 2 Co. Inst. 11
54. 1964 1 WLR 912 (H.L.N.I.) at 941 per Lord Upjohn
55. Valuation (Ireland) Amendment Act 17 & 18 Vict. c.8
56. (1883) 8 App. Cas. (H.L. Sc.) 658 at 673, per Lord Watson
57. Clyde Navigation Consolidation Act 21 & 22 Vict. C. 149
58. (1906) 1 Ch. 178 (C.A.) Per Cozens-Hardy L.J. at 213
59. 33 Geo. 3 c. 123
60. 49 Geo. 3 c. 24
61. (1920) 61 SCR 413 per Mr. Justice Anglin at p.440, per Mr. Justice Duff at p.429
62. 29 Car. 2
63. **Helmore v. Shuter**, 2 Shower 17; **Ash v. Abdy** 3 Swanston 669; **Gillmore v. Shooter** 2 Mod. 310

same in 1960 as it was in 1973, the conclusion follows, from the reference to the doctrine and its inapplicability, that whatever "equality before the law" in the Bill of Rights does mean, it does not mean what Dicey said it meant.

The principle of contemporaneous exposition that Mr. Justice Ritchie stated in relation to the Bill of Rights in the *Lavell* case was earlier used by him in the case of *Curr v. The Queen*[64]. In that case, where what was at issue was the meaning of the Bill of Rights phrase "due process of law", Mr. Justice Laskin, in his judgment in that case, used, as an aid in interpreting the meaning of that phrase, cases decided in another country decided subsequently to the enactment of the Bill of Rights. He referred to a 1964 American case [65] and two 1966 American cases [66] that interpreted the phrase "due process of law" in the American Bill of Rights.

Mr. Justice Ritchie, in an exercise of Canadian jurisprudential nationalism, rejected this attempt to Americanize Canadian law. He said that the meaning to be given to the language employed in the Bill of Rights was the meaning which it had in Canada[67]. He adjoins to the doctrine of exposition at a particular time, the doctrine of exposition at a particular place.

A spatial parallel to the contemporanea expositio doctrine would be, perhaps, that where words are adopted for a Canadian statute from the statute of a jurisdiction that is geographically very distant from Canada, that jurisdiction's interpretation of those words should be used as an aid in interpretation. Where, however, Canadian statutory wording is adapted from a jurisdiction in physical proximity of Canada, it is not that jurisdiction's interpretation that is to be looked to when deciding on the meaning of the statute, but the ordinary and everyday meaning of the words in Canada. If there is such a rule of statutory interpretation, then, although Mr. Justice Ritchie's rejection of 1964 and 1966 cases as aids in interpreting the 1960 Bill of Rights can be questioned, his rejection of American cases cannot.

VIII. STARE DECISIS

The concurring majority judgment of Mr. Justice Pigeon[68] is short, and in it he takes a position he says "cannot be improper". It, nonetheless, presents an exception to the doctrine of stare decisis, and there may be some who would take exception to it.

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64. (1972) SCR 889 at 916
65. **Malloy v. Hogan** (1964) 378 US 1
66. **Miranda v. Arizona** (1966) 384 US 436; **Schnerber v. California** (1966) 384 US 757
67. cp. fn. 1
68. at p.217

The court has not been an unequivocal supporter of the doctrine of stare decisis. In constitutional law cases, in view of the difficulties of change, and the relative infrequency with which it occurs, the Court has been prepared to be flexible[69]. Even in a non-constitutional case, the Court will not insist on following its past decisions. However, in such a case, where Parliament or a provincial legislature is free to alter the law, and the Court in the previous case has not made a decision per incuriam, the Court will require compelling reasons to reverse itself[70].

The doctrine of stare decisis is, of course, something that applies to judgments of the Court, and not to judgments of individual judges. If an appeal judge dissents in one case, and, in a subsequent case the same issue arises and the judge maintains his dissent, he is not following the doctrine of stare decisis; he is violating it. Thus in *Mann v. R.*[71], Mr. Justice Cartwright based his decision on the argument that the point at issue had been decided in the previous case of *O'Grady v. Sparling*[72]; and that the Court in *Mann* was bound by the *O'Grady* decision. He held this position even though he had dissented in the *O'Grady* case. In *Peda v. Q.*[73], he even went so far as to dissent on the ground that the majority's position in that case might make possible the re-opening of the decision in the *O'Grady* case[74].

In *Lavell*, Mr. Justice Pigeon maintains his loyalty to not what he thought the Supreme Court had decided in the earlier case of *R. v. Drybones*[75], but to his dissent in that case. He justifies his stand by equating the position of Mr. Justice Ritchie in *Lavell* with his own position in *Drybones*. It is doubtful that these two positions are identical[76], but even if they were, it may well have been improper for Mr. Justice Pigeon to prefer his own past opinion to the Court's past opinion. By so doing, he is presenting another exception to the doctrine of stare decisis.

IX. DISCRIMINATION BY REASON OF SEX

Mr. Justice Laskin, in a dissent that may have been, in part, responsible for his leapfrogging to the head of the Supreme Court[77], does not disagree squarely with either of the positions of Mr. Justice Ritchie in his majority judgment. The dissenting judge says that discriminatory

69. See Rand J. in **Reference re Farm Products Marketing Act** (1957) SCR 198 at 212
70. See Cartwright J. in **Binus v. Q.** (1967) SCR 594 at p.601
71. (1966) SCR 238
72. (1960) SCR 804
73. (1969) SCR 905
74. at p.911
75. (1970) SCR 282
76. cp. Sections II and III of this note
77. See the Glove & Mail of Dec. 29, 1973, p.6

treatment does not inhere in the grant of legislative power over Indians[78]. The case of *Isaac v. Davey*[79], where Mr. Justice Osler declared the whole Indian Act inoperative on the basis of the decision in *R. v. Drybones* [80], *Canard v. A.G. Canada* [81], and *Bedard v. Isaac* at the High Court level[82], casts doubt on that assertion. He also says that the fact that the exercise of a legislative power may be attended by a breach of the Bill of Rights is no justification for the breach. That is a proposition that, presumably, no one would take exception to.

However, the position of Mr. Justice Ritchie was neither that discrimination that is inherent in the grant of a power nor that discrimination that might attend the exercise of a power is exempt from the Bill, but that discrimination in those exercises of a power that are necessary for the implementation of the authority vested in Parliament by the B.N.A. Act are exempt from the Bill.

The response of Laskin J. to Ritchie J.'s position, that the *Drybones* case could be distinguished because, in that case, there was inequality before the courts and law enforcement authorities, is that *Drybones* case did not turn on the fact that the contested statutory provision created an offence visited by punishment[83]. Again, Mr. Justice Ritchie did not hold that the only statutory provisions that must meet the test of equality before the law are those statutory provisions that create offences. Any statutory provision, civil or criminal, that must be administered or enforced by the ordinary courts or law enforcement authorities must not require inequality.

The dissent of Mr. Justice Laskin, rather than being based on a disagreement with Mr. Justice Ritchie, is based on a judicial redrafting of the Bill of Rights. Section 1 of the Bill says that there shall exist without discrimination by reason of sex, the following rights and freedoms: "(a) the right of the individual to life... (f) freedom of the press." Mr. Justice Laskin applies the Bill as if it read, there shall exist the following rights and freedoms "(a) freedom from discrimination by reason of sex... (g) freedom of the press". He holds that discrimination by reason of sex is enough by itself to render inoperative federal statutory law, and that the provision at issue manifests such discrimination[84].

The dissenting justice supports this statutory twist by reference to *Curr v. The Queen*[85]. In that case, where the main question was whether

78. at p.228
79. (1973) 3 O.R. 677
80. (1970) SCR 282
81. (1972) 5 WWR 678
82. (1972) 2 O.R. 391, per Osler J., the same judge as in **Isaac v. Davey**
83. **at p. 224**
84. **at p.226**
85. **(1972) SCR 889**

the due process requirement of the Bill[86] was violated, a preliminary question was whether the existence of one of the listed forms of discrimination was necessary before the Bill could be applied. Even if there was no due process of law, was the Bill violated where there was no discrimination by reason of race or national origin or colour or religion or sex. The court held that the existence of one of the listed forms of discrimination was not necessary to the application of the Bill.

From this judgment, Mr. Justice Laskin extracts the conclusion that the existence of one of the listed forms of discrimination is sufficient for the application of the Bill. He says that the *Curr* case, in which he gave the majority judgment, made that point clear. He does refer, in the *Curr*-case, to the listed forms of discrimination as "prohibited kinds of discrimination"[87]. However, he also refers to these as "forms of prohibited discrimination". Perhaps he would also say that the *Curr* case makes clear that any form of discrimination, whether listed or not is sufficient to bring the Bill of Rights into play, even though none of the guaranteed rights and freedoms are violated.

X. CONFLICTING LAWS

A question not settled in *Drybones*[88], because it did not arise, was whether or not the application of the Bill of Rights was limited to cases where two federal statutes confliced. In *Drybones*, there were two conflicting federal provisions, one that applied to Indians[89], and another of general application[90]. The general provision, a North West Territories Ordinance, was a federal law by virtue of Parliament's power over territories not for the time being included in any Province[91]. In that case the equality before the law requirement rendered the provision imposing harsher treatment on a class inoperative.

However, in *Lavell*, there was no conflict between two federal provisions, one provision applying to all Indians, and another harsher provision applying only to Indian women. The form that the inequality took was that Indian women were treated one way[92] and Indian menanother[93]. The Court heard the argument that the Bill of Rights had no scope for application, because there was no conflict within federal law. Mr. Justice laskin rejected this argument[94].

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86. s.1(a)
87. at p.896
88. (1970) SCR 282
89. s. 94(b) Indian Act R.S.C. 1952, c.149
90. Liquor Ordinance, R.O.N.W.T. 1957, c.60, s.19(1)
91. B.N.A. Act (1871) 34-35 Vict., c.28, s.4
92. s.12(1) (b), Indian Act, R.S.C. 1970, Chap. I-6
93. s.11(1) (c), Indian Act
94. 23 CRNS at p.228

In so doing, he did not say, as might have been expected, that, even if there is no conflict between two federal statutory provisions, when two federal statutory provisions are put side by side, a violation of the principals of the Bill appears, then the Bill applies. Instead he said that a statute may, in itself, be offensive to the Bill. He, however, did probably not want to suggest that the Bill would have rendered inoperative the provision removing the right to registration of inter-married Indian women, even if there existed a provision removing the right to registration of inter-married men.

A question still left open, after *Lavell*, is whether the Bill of Rights applies when the treatment imposed on a class of federal law is harsher by comparison with a provincial law of general application or a provincial law applying to another class.

XI. PARLIAMENTARY REPERCUSSIONS

The *Lavell* case has been one of political significance, with repercussions in Parliament. Mr. Brewin (Greenwood) suggested that the Bill of Rights be amended to read the way Mr. Justice Laskin had read it, with freedom from discrimination as an independent listed freedom[95]. The government indicated it would not stay proceedings for eviction from reservations consequent upon the *Lavell* decision [96]. It did not intend to repeal the provision contested in the *Lavell* case until such time as there was "a great deal of consultation" with the native people.

Mr. Diefenbaker objected to the government having appealed the *Lavell* case when the lower courts had applied the Bill of Rights to render the discriminatory provision of the Indian Act inoperative[97]. He accused the government of opposing the Bill of Rights to the limit. Mr. MacGuigan, in reply, suggested that the fault lay with the wording of the Bill, which the Diefenbaker government had originally introduced[98]. Mr. MacGuigan suggested, as did Mr. Brewin, at a later date, that the entrenching of the Bill in the Constitution would have made it more effective in the *Lavell* case. However, since the statute in dispute in the *Lavell* case was federal, an entrenched Bill with the same wording as the present Bill would have resulted in the same decision.

A lesson Mr. Brewin[99] and Mr. Monroe (Hamilton East)[100] drew from the *Lavell* case was that it pointed out the limitations of the Bill of

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95. (1973) Vol 117 H. of C. Debs. p. 6066
96. p.6469
97. p.8090
98. p.8102
99. p.8548
100. March 5, 1974, H. of C. Debs. p.187

Rights in protecting women against discrimination. The limitations to the Bill in the *Lavell* case, however, were not just limitations to the protection of women against discrimination, but limitations to the protection against discrimination by reason of race, national origin and colour, as well.

Mrs. Morin introduced a private member's Bill[101], that would give divorced or judicially separated Indian women a right to register. Mrs. Bedard, the other Indian woman besides Mrs. Lavell involved in the *Lavell* case at the Supreme Court of Canada level, was separated from her husband at the time she began her action[102]. Flora MacDonald, Conservative Indian Affairs critic, opposed Mrs. Morin's Bill on the ground that it was piece-meal and dictating change to the Indians[103].

XII. CONCLUSION

It is ironic that the Bill of Rights, intended as a shield to protect minority groups such as Indians, was almost used as a club to victimize them. The *Lavell* case, if it had gone the other way, could have destroyed treaties and reserves[104]. Though non-Indians in theory are not entitled to live on reserves, if inter-married Indian women are entitled to be on reserves, their non-Indian husbands would , in all likelihood, have been allowed to stay there as well. There would have been the danger of a large and dominating male non-Indian population living on reserves. The support Indians show for the contested statutory provision is not an exercise in sexual prejudice by Indians, but an attempt to protect themselves against the patterns of male dominance amongst non-Indians.

On another level, the *Lavell* case, rather than pointing to the need of entrenchment of a Bill of Rights, presents a convincing argument against such entrenchment. None of the interpretations of the Bill of Rights set out in the *Lavell* case is so convincing that Parliament would want to see it impossible, or even difficult, to change. Parliament may wish to list freedom from discrimination as a guaranteed freedom. It may wish to change "equality before the law" to "equality in the law". Making these changes difficult or impossible, as entrenchment would, would not encourage the development of human rights in Canada. It would frustrate such development.

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101. Bill C-229

102. 23 C.R.N.S. at p.202

103. Globe & Mail, November 11, 1973 p.17

104. D.J. Sanders, The Bill of Rights and Indian Status (1972) 7 U.B.C. L.R. 81 at p.99

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