Drybones and Stare Decisis

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In Regina v. Drybones [1] the Supreme Court of Canada has reversed its earlier decision in Robertson and Rosetanni v. The Queen,[2] and it would have been better for our human rights jurisprudence, indeed for Canadian public law generally, had the majority judges openly admitted that this was the case.

The 1966 practice statement of the English House of Lords [3] was really just the formal confirmation of a growing judicial awareness of the fact that the doctrine of precedent, when treated as a fundamental value in any legal order, is central to our system, but when deified into a dogmatic kind of absolute, tends over the long run to clog up the machinery of justice. The judgments in the classic decision in Ridge v. Baldwin,[4] especially that of Lord Reid, show clearly why the Lords decided to kick off the hobbles of *stare decisis*, and the dire predictions made by some that the legal order would begin to crumble have so far proved false. Their error, I suggest, lies in their conviction that English law owes its consistency to *stare decisis*. Such consistency as our law has derives not from doctrines or dogmas but rather from the common sense of justice shared by the judges, a sense that is, of course, disciplined by long training in the imperatives of positive law and an awareness of the parameters imposed on them by positive law.

In Drybones, Mr. Justice Ritchie, speaking for a majority of six, distinguished the Rosetanni case, in which he gave the judgment of four out of the five judges who sat. It is an interesting anomaly of our constitutional practice that in 1963 the question of what rôle the courts are to play in developing the human rights charter enacted by Parliament was worth only five judges, while in 1968 it drew a full court.

To support my thesis that Drybones reversed Rosetanni, I must establish what was authoritatively decided in each case and then demonstrate that the two decisions cannot stand together. That is what the balance of this note will seek to do.

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1 [1970] S.C.R. 282, hereafter called 'Drybones'.

2 [1963] S.C.R. 651, hereafter called 'Rosetanni'.

3 [1966] 1 W.L.R. 1234.

4 [1964] A.C. 40.

Ritchie, J. recognized that in Rosetanni there were two questions:

1. did section 4 of the Lord's Day Act,[5] as it was applied by the convicting magistrate, abrogate, abridge or infringe the freedom of religion of Robertson and Rosetanni?

2. if so, what is the effect of section 2 of the Canadian Bill of Rights [6] on the operation of section 4 in this case?

If the answer to the first question was "no", then question two need not be answered, and this was the way the case was disposed of in the Supreme Court of Canada. Thus, in Drybones Ritchie, J. was able to state that the Rosetanni case did not decide what would be the legal consequence if a provision of the Canadian Bill of Rights was found to be in conflict with another Act of Parliament, leaving the question an open one, to be decided at first instance in Drybones.

But is it that simple? Let us examine the reasoning of Ritchie, J. in Rosetanni in order to formulate the ratio decidendi of that case.

In order to answer question one, Ritchie, J. had first to decide what freedom of religion meant in law in 1963. This he did by going to section 1 of the Canadian Bill of Rights, where he zeroed in on the declaratory nature of that provision and observed that the Bill "is not concerned with 'human rights and fundamental freedom's in any abstract sense, but rather with such 'rights and freedoms' as they existed in Canada immediately before the statute was enacted." [7]

Thus, Ritchie, J. had first to decide that the Bill was only declaratory in effect, before he could arrive at the legal definition of freedom of religion that he applied to the facts of the case to arrive at his decision. That is why he asserted that it was "of first importance to understand the concept of religious freedom which was recognized in this country before the enactment of the Canadian Bill of Rights and after the enactment of the Lord's Day Act in its present form." [7a]

It was his determination that the Bill only declared and continued existing rights, did not create new rights, that conditioned the definition of religious freedom that he chose to apply in the case. Otherwise he would have had to base his definition of religious freedom on an interpretation of the substantive provisions of the Bill of Rights itself.

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[5] R.S.C. 1952 c. 171.
[6] Stats. Can. 1960 c. 44.
[7] *Supra* n. 2, p. 654.
[7a] *Ibid.*, at p. 655.

The manner in which Ritchie, J. applied his definition of religious freedom to the facts of Rosetanni is of no consequence here. His distinction between the effect of the Lord's Day Act and its purpose was used simply to help determine whether the operation of bowling alleys on Sunday came within that definition. That is, question one involved two distinct steps.

1. defining religious freedom in law
2. applying the definition to the facts of the case at bar.

The definition arrived at through step 1 is based upon the proposition that the declaratory nature of the Bill is its starting point, a proposition which thus becomes part of the ratio decidendi of the Rosetanni case.

Put another way, Ritchie, J. avoided question two only by deciding in the course of answering question one that the Bill is concerned only with rights and freedoms as they existed in Canada immediately before the statute was enacted, and section 4 of the Lord's Day Act as well as section 94 of the Indian Act, both being part of the law that defined those rights and freedoms, could not, *by definition,* abrogate, abridge or infringe those rights and freedoms.

How, then, could the Supreme Court in Drybones come to the opposite conclusion with respect to section 94 of the Indian Act? It did so in the usual manner demanded by *stare decisis:* by changing its mind, in the light of its fresh knowledge of the full implications of its earlier view, while denying that it had made a judicial determination of the issue in the previous decision.

It is interesting to note that the dissenting opinion of Pigeon, J. in Drybones is built on the same basic premise as is the judgment of Ritchie, J. in Rosetanni: that the declaratory nature of the Canadian Bill of Rights is its starting point. Not only does Pigeon, J. begin with this proposition,[8] but he falls back on it as authority for refusing to give any effect to the exception in section 2 of the Bill, which reads "unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights".

Just as surely as the dissent of Pigeon, J. in Drybones was legally "correct" if Rosetanni is a decision that is "binding" on the court, so the majority view in Drybones is constitutionally sound if one assumes as a value prior to legal correctness that Parliament does not expend large quantities of public time and

[8] Footnote 1 above, at p. 302.

money to produce fancy pieces of paper whose main function will be to serve as wallpaper in public schools and buildings.

The Drybones case had to originate with a judge like Mr. Justice Morrow, who as Territorial Judge is in daily contact with the consequences of the failure of Canadian law to respond to human values. If the Canadian Bill of Rights is not enough, what must Parliament do in order to move our judges and lawyers to accept a broad responsibility for the protection of fundamental human values and to find a way to weave this new responsibility into the disciplined fabric of the law so that they do not lose their judicial bearings? It is simply not good enough for judges to say that section 1 of the Canadian Bill of Rights is expressed in vague and general language, and they are accustomed to dealing with more specific formulations. The Canadian Bill of Rights was enacted by Parliament for an important purpose, and for lawyers and judges to decline to accept the responsibility because the Bill is not sufficiently technical to suit their taste is to thwart the will of Parliament. The irony is that many who take this view claim to be observing the doctrine of parliamentary supremacy.

I suggest that expressions like "judicial supremacy" and "judicial legislation" are simply empty slogans that serve to justify the lawyers' balking at difficult and challenging responsibilities conferred on them by Parliament.

Lord Reid answered this objection rather well in Ridge v. Badwin:

> "In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist."[9]

Analyses like the foregoing may seem to some nothing but gratuitous attacks on conscientious judges who cannot reply to such criticism. However, this view misses the point, which is that in a society whose institutions are already overloaded and under attack for failing to solve critical social problems it is unacceptable that highly trained judges should expend so much of their time performing tasks that assume a primacy of doctrine in the legal order.

I submit that if we are to achieve a civilised measure of justice under law for all citizens, judicial energies must be freed and directed to meet this challenge, putting into proper subordinate position the lawyers' fascination with technical gymnastics and obsession with the legal rights of established economic interests.

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[9] *Supra* n. 4, p. 64.