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The Canadian Bill of Rights From Diefenbaker to Drybones

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Introduction

From its inception the Canadian *Bill of Rights* evoked widely divergent comments. Mr. Diefenbaker, whose project it was, described it in glowing terms.[1] His critics,[2] while not quite calling it a "mere scrap of paper", did denigrate it as "merely a statute". Perhaps the Bill's most inglorious moment came a few years after its enactment when copies were circulated as part of a toothpaste promotion campaign. (In the early 1960's we still believed that cleanliness was next to godliness!)

This survey of the judicial application of the Canadian *Bill of Rights* will attempt to assess these contradictory evaluations, not by a detailed case by case analysis, but by summarizing the overall

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[1] For some of these, see, Canada — *House of Common Debates (Hansard)* 1958, 4638-4649, and esp. 1960, 5643-50; *Proceedings of the Canadian Bar Association,* 1959, 94; and P. C. Newman, *Renegade in Power: The Diefenbaker Years,* (Toronto, 1963), c. 17, p. 230.

[2] See generally: Special Committee on Human Rights and Fundamental Freedoms, *Minutes of Proceeedings and Evidence,* 1960; Canada — *House of Commons Debates (Hansard),* 1960, 5650-5790 and 5884-5938; and the symposia in (1959) 37 *Canadian Bar Review*; (1961) *11 Themis*; and (1961) 8 *McGill L.J.*; Newman, *supra,* n. 1, pp. 226-30.

effect, and then section by section. The *Drybones* case,[3] however, will have to be considered in some considerable detail, because it is by far the most important decision on the Bill of Rights. But first, in order to evaluate the judicial application of the Canadian *Bill of Rights*, it is necessary to make a few observations about the decisions of our highest courts to protect civil liberties before they were ever concerned with a written Bill of Rights.

Thus, this paper will be divided into three parts — in the first part judicial protection of civil liberties before the enactment of the Canadian *Bill of Rights* will be considered, the second part will deal with the interpretation given to the Canadian *Bill of Rights* by the judiciary (which will include an evaluation of the *Drybones* case), and the third part will survey the decisions on the various detailed provisions contained mainly in sections 1 and 2 of the *Bill of Rights*.

Part I — Judicial Interpretation of Civil Liberties Issues Before the Canadian Bill of Rights

The Canadian Supreme Courts (the Judicial Committee of the Privy Council was in effect a Supreme Court for Canada), have in the past resorted mainly to two interpretive techniques which have protected civil liberties: the restrictive interpretation technique, and the power allocation technique.[4]

The restrictive interpretation technique arises out of the relationship between Parliament and the judiciary which we inherited from Great Britain whereby, because of the doctrine of Parliamentary supremacy, the courts do not have the right to invalidate an Act

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[3] *Regina* v. *Drybones* [1970] S.C.R. 282. For comments on the case see: F. M. Auburn, "Canadian Bill of Rights and Discriminatory Statutes", (1970) 86 *L.Q. Rev.* 306; W. F. Bowker, "Comment — *Regina* v. *Drybones*", (1970) 8 *Alta. L. Rev.* 409; L. H. Leigh, "The Indian Act, the Supremacy of Parliament and The Equal Protection of the Laws", (1970) 16 *McGill L.J.* 389; K. Lysyk, "Equality Before the Law", (1968) 46 *C.B.R.* 141; H. W. Silverman, "Dry Bones: Are They Alive?", (1970) 10 *C.R.* 356; J. C. Smith, "Regina v. Drybones and Equality Before the Law", (1971) 49 *Can. Bar Rev.* 163; E. E. Dais, "Judicial Supremacy in Canada in Comparative Perspecttive: A Critical Analysis of Drybones", paper presented at the Canadian Political Science Association Annual Meeting at Memorial University, Newfoundland, on 8 June, 1971; Paul Cavalluzzo, "Judicial Review and the Bill of Rights. Drybones and its Aftermath", unpublished LL.M. thesis for Harvard University, Spring, 1971.

[4] There are times when the sociological jargon introduced by the "Ivy League" law schools is useful. I acknowledge adoption of the terms from the excellent paper given by E. E. Dais, and the unpublished LL.M. thesis of P. Cavalluzzo,*supra*, n. 3.

of Parliament on the ground of its arbitrariness, or its alleged contravention of civil liberties. Nevertheless, the courts have used a principle of statutory interpretation whereby the common law rights of the subject cannot be restricted by ambiguous statutes. The presumption is against the imposition of taxation, or the imposition of penal sanctions, or the taking away of common law rights, unless the words of the statute are clear. Thus, if the courts have any choice in interpreting a statute which is not clearly and precisely drawn, the ordinary rules of statutory interpretation urge them to protect civil liberties.

This can be illustrated in Canada by two leading cases. The first of these is *Boucher* v. *The King*.[5] In this case the Supreme Court was concerned with a charge of seditious libel laid under section 133 (now section 60) of the Criminal Code against a Jehovah's Witness for distribution of pamphlets which made scurrilous and scathing attacks upon the Catholic church. Because of the vague definition of sedition in the *Criminal Code* the Supreme Court was able to interpret the offense narrowly as including actual incitement to violence, but excluding mere advocacy which might create ill-will between Her Majesty's subjects. The accused was, therefore, acquitted, and the result was that freedom of speech in Canada was significantly expanded.

Another more recent example of the restrictive interpretation technique is to be found in the case of *Brodie, Dansky and Rubin* v. *the Queen*.[6] In this case the Supreme Court, by a majority of five to four, held that the book *Lady Chatterly's Lover* was not obscene within the meaning of obscenity as provided for in section 150 of the *Criminal Code* of Canada.

The third case that can be used as an illustration of the expansion of a human right, even where the Supreme Court deliberately avoided an opportunity to discuss the issues from a human rights point of view, and instead confined the decision to a technical distinction, is the case of *Noble and Wolf* v. *Alley*.[7] Here the Supreme Court was concerned with a racially restrictive covenant, and was invited to declare the covenant invalid on the ground that it contravened the public policy of Ontario which favoured the promotion of human rights. This was the basis upon which Mr. Justice Keiller MacKay, in the case of *Re Drummond Wren*,[8]

[5] [1951] S.C.R. 265.
[6] [1962] S.C.R. 681.
[7] [1951] S.C.R. 64.
[8] [1945] O.R. 778.

had invalidated a racially restrictive covenant some years earlier. However, the Supreme Court declined to adopt this ground. Instead, the court held that a restrictive covenant was valid only if it related to user of the land, and the race of the prospective purchaser had nothing to do with user. Second, it held the covenant void for vagueness on the ground that proof of a person's membership in a racial group was too difficult. Thus, racially restrictitve covenants were declared invalid in Canada, although on a narrow interpretative ground which avoided discussion of human rights issues.

An interesting application of the restrictive interpretation technique resulted from the application of another fundamental doctrine of the British Constitution which is quite often overlooked when reference is made only to Parliamentary sovereignty, and that is, "the rule of law". In the case of *Roncarelli* v. *Duplessis* [9] the Supreme Court, inspired by an exhilarating view of the "rule of law", held that a government officer, even the Prime Minister of a province, could not use powers which he clearly has, for a purpose unrelated to the object of the statute which gives him those powers.

The power allocation technique has promoted civil liberties through the invalidation of legislation on the ground that, by the operation mainly of sections 91 and 92 of the *B.N.A. Act*, the statute in question was not within the jurisdiction of the legislature concerned because it was within the legislative competence of the other order of legislative body. Perhaps the most famous illustration of the application of this interpretation is the decision of the Supreme Court of Canada in *Switzman* v. *Elbling* (the *Padlock* case).[10] In this case the Quebec Padlock Act, which provided for the padlocking of any house found to have been used for the dissemination of "Communist" or "Bolshevik" literature, was invalidated on the ground that it was beyond the jurisdiction of the legislature of Quebec, because it was an exercise of the criminal law power which was within the jurisdiction of the Parliament of Canada. Thus, the fundamental freedoms of speech, and to some extent, of assembly, association, and of religion, were promoted through invalidation of provincial legislation by the power allocation technique.

A much earlier illustration of this technique, although the case was not dealt with by the Courts, nor referred to at the time, as dealing with human rights, was the case of *Union Colliery of*

[9] [1959] S.C.R. 121.

[10] [1957] S.C.R. 285.

British Columbia Ltd. v. *Bryden.*[11] In this case, British Columbia legislation restricting the rights of "Chinamen" to work in mines was invalidated on the ground that it was not legislation relating to "property and civil rights", but rather legislation in relation to "naturalization and aliens", a subject matter reserved exclusively for the Parliament of Canada. Thus, the human rights of Chinamen were protected by the Supreme Court through the use of the power allocation device, even though the decision was not rendered in recognition of the human rights issues involved.

A case which can be taken to illustrate the application of the "rule of law", as well as both of the interpretive techniques, is the *Alberta Press Bill* case.[12] By referring to the preamble to the *B.N.A. Act,* which provides that Canada is to have a constitution "similar in principle to that of the United Kingdom", three members of the Supreme Court of Canada were able to conclude that the core of our governmental system was Parliamentary democracy. They were further able to deduce that this presupposed a free flow and exchange of ideas across the Dominion which could not exist if restrictions were placed upon the freedom of the press by one of the provincial governments. Somewhat bound up with this interpretation, although forming a more important element in the decision of Mr. Justice Cannon, was the power allocation technique in that he decided that the restriction involved was an exercise of the criminal law power which was within the jurisdiction of the Parliament of the Dominion.

On the other hand, the resort to the restrictive interpretation and the power allocation techniques to protect civil liberties was subject to limitations. Thus, the orders-in-council passed pursuant to the War Measures Act, which provided for the deportation of Japanese-Canadians after the Second World War, were upheld because they were explicit as to their intention.[13] Where the statute, or the delegated legislation under it, is clear and unambiguous, the restrictive interpretation technique will not serve. So also, where the legislation in question was clearly within the jurisdiction of the legislature, as for example in *Cunningham* v. *Tomey Homma,*[14] which concerned the denial of the franchise in British Columbia to some races, the Judicial Committee had no option but to uphold

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[11] [1899] A.C. 580.

[12] *Re Alberta Statutes* [1938] S.C.R. 100.

[13] *Co-operative Committee on Japanese-Canadian* v. *Attorney-General for Canada* [1947] A.C. 87.

[14] [1903] A.C. 151.

the legislation concerned. Similarly, in the case of *Quong Wing* v. *The King*,[15] the Supreme Court upheld a Saskatchewan statute which forbade white girls to work for Chinese. Without a written *Bill of Rights* there are limits to the power of the judiciary to protect civil liberties.

Part II — Judicial Interpretation of the Canadian Bill of Rights

Pre-Drybones

In 1960, with the enactment of the Canadian *Bill of Rights*, the Canadian judiciary was given another instrument to use in the promotion of civil liberties, at least within the federal sphere. As indicated in Part I above, prior to 1960, where the courts decided that the subject matter of legislation was within federal jurisdiction and the language of the statute was unambiguous, the courts had no alternative but to apply the statute even if, in the opinion of members of the court, the statute contravened civil liberties. Now, for the first time, Parliament directed the courts to "construe and apply" federal laws so as not to "abrogate, abride, or infringe", certain human rights and fundamental freedoms set out in the Canadian *Bill of Rights*.

Within two or three years of the enactment of the Canadian *Bill of Rights*, however, the trend in the lower courts seemed to have been to ignore or explain away its existence. The Supreme Court of Canada, however, did not openly dismiss or reject the applicability of the Canadian *Bill of Rights* to federal laws. Rather the issue was avoided. Thus, in the *Rebrin* and the *Louie Yuet Sun* cases,[16] the Supreme Court declined to define "the due process of law" clause by stating that in their opinion the immigration officers concerned had acted "according to law". Similarly, in the case of *Regina* v. *O'Connor*,[17] the Supreme Court avoided having to decide the effect of refusal to permit access to counsel by finding that the breathalizer tests in question were taken before the accused requested permission to call his counsel. In the case of *Robertson and Rosetanni* v. *The Queen*,[18] again the majority in the Supreme Court avoided the necessity of deciding the effect of the *Bill of Rights* on an inconsistent statute, by giving an interpretation to

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[15] (1914), 49 S.C.R. 440.

[16] *Rebrin* v. *Minister of Citizenship and Immigration et al* [1961], S.C.R. 376; *Louis Yuet Sun* v. *The Queen* [1961] S.C.R. 70.

[17] [1966] S.C.R. 619.

[18] [1963] S.C.R. 651.

"freedom of religion" which was consistent with the existence of the *Lord's Day Act*.[19] Nevertheless, it must be emphasized that the Supreme Court was cautious enough, and perhaps perspicacious enough, not to throw any doubt upon, or raise any question about, the effectiveness of the *Bill of Rights*. In each of these cases, in the particular fact-circumstances, the Supreme Court was able to hold that application of the Canadian *Bill of Rights* was unnecessary for the determination of the issues. In fact in the *Robertson and Rosetanni* case, on behalf of the majority, Mr. Justice Ritchie repeated on several occasions expressions to the effect that "the Canadian *Bill of Rights guarantees*" freedom of religion. He merely went on to define freedom of religion as not including the right of a person to work on Sunday even though his Sabbath falls on a different day.

The first time that the Supreme Court of Canada faced up squarely to the issue of the effect of the Canadian *Bill of Rights* on a statute found to be inconsistent with its provisions was the *Drybones* case.[20]

The Drybones Case and the effect of the Bill of Rights

The facts in the *Drybones* case were very simple: On the 8th day of April, 1967, a Canadian Indian by the name of Joseph Drybones was found drunk in the Old Stope Hotel in Yellowknife, N.W.T., and was charged under section 94(b) of the *Indian Act*[21] on the grounds that "being an Indian, he was unlawfully intoxicated off a reserve, contrary to section 94(b) of the *Indian Act*". Drybones, who spoke no English, pleaded guilty, and the magistrate sentenced him the minimum fine of ten dollars plus costs, and in case of default to three days in jail. Subsequently, Mr. Justice Morrow, a judge of the North West Territorial Court, suggested that the conviction by the magistrate be appealed. After hearing the appeal by way of trial *de novo*, he acquitted the accused.

The Court of Appeal for the North West Territories dismissed an appeal by the Crown from the judgment of Mr. Justice Morrow.[22] The decision was in turn appealled to the Supreme Court of Canada.[23]

There was no question but that the accused was an Indian, that he was intoxicated on the evening of April 8th, 1967, on the premises

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[19] R.S.C. 1970, c. L-13.
[20] *Regina* v. *Drybones* [1970] S.C.R. 282.
[21] R.S.C. 1952, c. 149; Now R.S.C. 1970, c. I-6, s. 95.
[22] (1967), 64 D.L.R. (2nd) 260; 61 W.W.R. 370.
[23] [1970] S.C.R. 282, (1970), 9 D.L.R. (3rd) 473.

of the Old Stope Hotel in Yellowknife, and that there is no reserve within the meaning of the Indian Act in the North West Territories.

Section 94 of the *Indian Act* provides:

> 94. An Indian who
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> (a) has intoxicants in his possession,
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> (b) is intoxicated, or
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> (c) makes or manufactures intoxicants off a reserve, is guilty of an offence and is liable on summary conviction to a fine of not less than ten dollars and not more than fifty dollars or to imprisonment for term not exceeding three months or to both fine and imprisonment.

Section 19(1) of the *Liquor Ordinance* of the North West Territories [24] provides:

> No person shall be in an intoxicated condition in a public place....

There is, however, no provision for a minimum fine, and the maximum term of imprisonment is thirty days.

It was agreed both in the Court of Appeal and in the Supreme Court of Canada that although it was an essential element to any charge laid under section 94 to prove that the accused was "an Indian ... off a reserve", it was quite irrelevant that there were no reserves in the North West Territories. The important elements in the case concerned the disparity between the treatment of liquor offences by Indians under the *Indian Act*, and of others under the *Liquor Ordinance*. The *Indian Act* had a minimum fine, whereas the *Ordinance* did not; the maximum term of imprisonment under the *Indian Act* was three months, as against thirty days in the *Ordinance*; and yet most important of all, as a result of the *Indian Act*, and because there are no reserves in the North West Territories, an Indian could be convicted for being intoxicated anywhere in the North West Territories, whereas all others could be convicted under the *Liquor Ordinance* only for being intoxicated "in a public place".

The argument we are concerned with, then, was that a "law of Canada", within the definition of section 5 of the Canadian *Bill of Rights*, contravened the "equality before the law" clause in section 1(b) of the Canadian *Bill of Rights*, and was therefore invalid by section 2 of the Canadian *Bill of Rights*. The Court of Appeal of the North West Territories agreed with Mr. Justice Morrow that section 94 of the *Indian Act* was rendered inoperative because of the Canadian *Bill of Rights*.

There are really two main issues considered in this case, and they will be dealt with separately. One concerns the scope of the

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[24] R.O.N.W.T. 1957, C. 60.

"equality before the law" clause and this will be considered later. The other, which will be discussed first, is the effect of the Canadian *Bill of Rights* on laws which are determined to be contrary to it.

The most important portion of the Canadian *Bill of Rights* to consider for this purpose is the opening paragraph of section 2, and particularly the meaning of the words "construed and applied". What are courts and administrative officials to do in "construing and applying"? Is this merely an interpretation act?[25] Is this provision to be applied disjunctively? What if there is no way to construe a statute so as to conclude that it did not "abrogate, abridge, or infringe" any of the human rights and fundamental freedoms in the Canadian *Bill of Rights*? How does the court then apply the statute in question?[26] Is the phrase then merely a rule of construction which might be used to promote civil liberties when the statute can be construed in conformity with the Canadian *Bill of Rights*? What if a statute is unambiguous, and cannot be construed in conformity with the Canadian *Bill of Rights*, does the court then still have to "apply" the statute according to its plain terms, and ignore the Canadian *Bill of Rights*? Is the opening paragraph of section 2 a declaration by Parliament to the courts which must be followed in any case? If so, does this not amount to an abrogation of Parliamentary sovereignty and the establishment in Canada of judicial supremacy in the application of the Constitution?

In the initial years after the enactment of the Canadian *Bill of Rights* the Canadian courts were hesitant in their conclusion as to the meaning of section 2. The results were contradictory. There were some judges who did state that the *Bill of Rights* had to override legislation inconsistent with it.[27] Most of the judges, however, gave the Bill no effect. Where possible some courts circumvented the problem by stating that the *Bill of Rights* merely affirmed the traditional principles of the common law, or that it was a general enactment which could not have been intended to repeal specific enactments, or that Parliament could only have intended

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[25] See suggestions to this effect made before the Special Committee of the House of Commons on Human Rights and Fundamental Freedoms, *Minutes of Proceedings and Evidence*, 1960, pp. 37, 42, 53, 371, 484-5.

[26] See B. Laskin, "Canada's Bill of Rights: A Dilemma for the Courts", (1962) 11 *I.C.L.Q.* 519, 529.

[27] See the list of cases in W. S. Tarnopolsky, *The Canadian Bill of Rights*, (Toronto, 1966), 95-96.

the repeal of existing statutes if it had stated so specifically, and not ambiguously.[28]

Prior to the decision of the Supreme Court in *Regina* v. *Drybones*, there were only two important decisions discussing the effect of the Canadian *Bill of Rights* at any length. The first of these was the decision of the British Columbia Court of Appeal in *Regina* v. *Gonzales*,[29] which concerned the application of the liquor provisions of the *Indian Act*. The second case, which was a decision of the Supreme Court of Canada, is *Robertson and Rosetanni* v. *The Queen*, (the *Sunday Bowling Alley* case).[30] This case concerned the validity of Sunday observance legislation in the light of the Canadian *Bill of Rights*.[31]

In *Regina* v. *Gonzales* the British Columbia Court of Appeal was concerned with a conviction of the accused on the charge that he "being an Indian as defined by the *Indian Act* of Canada... was unlawfully in possession of an intoxicant off an Indian Reserve", contrary to section 94(a) of the *Indian Act*. The Court of Appeal unanimously dismissed the appeal from the conviction. In the course of his judgment, Mr. Justice Davey stated the problem that all courts face in considering the implications of the Canadian *Bill of Rights*: [32]

> The difficulty in interpreting and applying the very general language of the *Canadian Bill of Rights* has not been exaggerated. It is, in my opinion, impossible at this early date, to fully grasp all the implications of the Act, or to determine its application in circumstances that cannot be fully foreseen.

Both Mr. Justice Tysoe and Mr. Justice Davey, who gave separate judgments, held that section 2 of the Canadian *Bill of Rights* could not be more than a rule of construction which may require a

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[28] *Loc. cit.*

[29] (1962), 32 D.L.R. (2d) 290, (1962), 37 W.W.R. 257.

[30] [1963] S.C.R. 651.

[31] Alcohol and Sunday Observance have played a crucial role in the development of our constitution. From *Russell* v. *The Queen* in 188,1 through the *Local Prohibition* case of 1896, to the *Canada Temperance Act* case of 1946, the attempted regulation of liquor has provided some of our most famous constitutional decisions. Similarly, from the *Hamilton Street Railway* case in 1903, to the *Birks* v. *City of Montreal*, 1955, regulations of activities on Sundays or "holy" days has been the subject of our most important cases determining the extent of the criminal law power. Thus, perhaps, it is fitting that the two leading cases on the Canadian Bill of Rights, *i.e.*, *Robertson & Rosetanni* v. *The Queen*, and *Regina* v. *Drybones*, deal with Sunday Observance and Liquor respectively.

[32] *Supra*, n. 29, at p. 291.

change in the judicial interpretation of some statutes where the language permits, but which does not repeal any legislation which cannot be construed or applied so as to avoid conflict with section 1 of the Canadian *Bill of Rights*. Mr. Justice Davey concluded by saying that section 1 expressly recognizes the continued existence of legislation even though such legislation may contravene section 1. Mr. Justice Tysoe did not deal with that issue because he so construed the term "equality before the law" as to find that there was no conflict between section 94(a) of the *Indian Act* and the Canadian *Bill of Rights*.

In *Robertson and Rosetanni* v. *The Queen,* (the *Sunday Bowling Alley* case), the Supreme Court of Canada was invited to consider the effect of the Canadian *Bill of Rights* and more particularly, the effect of the opening paragraph of section 2 of the Canadian *Bill of Rights* because of an alleged conflict between the provisions of the *Lord's Day Act* and section 1(c) of the Canadian *Bill of Rights, i.e.,* "freedom of religion". Only Mr. Justice Cartwright (as he then was) specifically dealt with the effect of section 2, and he specifically declared his disagreement with Mr. Justice Davey in the *Gonzales* case as to the effect of the "construed and applied" clause:[33]

> With the greatest respect I find myself unable to agree with this view. The imperative words of s. 2 of the *Canadian Bill of Rights* quoted above, 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. As already pointed out s. 5(2) quoted above, makes it plain that the *Canadian Bill of Rights* is to apply to all laws of Canada already in existence at the time it came into force as well as to those thereafter enacted. In my opinion where there is irreconciable conflict between another Act of Parliament and the *Canadian Bill of Rights* the latter must prevail.

Mr. Justice Ritchie, who gave judgment on behalf of himself, Taschereau C.J.C., and Fauteux and Abbott JJ., did not deal with the issue directly because he did not find conflict between the *Lord's Day Act* and section 1(c) of the Canadian *Bill of Rights*. However, in the course of his judgment Mr. Justice Ritchie stated at least three times that the Canadian *Bill of Rights* "guaranteed" religious freedom, and on one occasion he referred to freedom of religion as being "safeguarded" by the *Bill of Rights*. In any case, by the time that the Supreme Court came to deal with the interpretation of section 2 of the Canadian *Bill of Rights* in the *Drybones*

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[33] *Supra,* n. 30, at p. 662.

case, no member of the court had previously precluded himself in any of his judgments from the finding in the *Drybones* case that legislation which is contrary to section 2 of the Canadian *Bill of Rights* is "inoperative".

The decision of the Supreme Court of Canada in the *Drybones* case witnessed one of the most amazing conversions ever proclaimed by a judge in a judicial decision. In his dissenting judgment in the *Robertson and Rosetanni* case, Mr. Justice Cartwright became the highest judge in the country to declare that the effect of the Canadian *Bill of Rights* was to declare inoperative any federal laws which were inconsistent with its provisions. In the *Drybones* case, he recanted completely and expunged his error by declaring that "after most anxious reconsideration of the whole question, in the light of the able arguments addressed to us by counsel, I have reached a conclusion that the view expressed by Davey, J.A., as he then was, in the words quoted above, is the better one."

Two factors would appear to have persuaded him: (1) He felt that the language used in section 2 was unclear, and that if Parliament had really intended the Canadian *Bill of Rights* to be overriding, it might have used some such terms as: "if any law of Canada cannot be so construed and applied, it shall be regarded as inoperative, or *pro tanto* repealed". (2) He seems to have been frightened by the prospect of the power and responsibility "imposed upon every justice of the peace, magistrate, and judge of any court in the country who is called upon to apply a statute of Canada or any order, rule, or regulation made thereunder", to declare any legislation contravening the *Bill of Rights* to be inoperative.

It is incumbent upon everyone to treat conversions with respect, but one cannot avoid noting that that duty and responsibility which Mr. Justice Cartwright feared might be too onerous for any justice of the peace, magistrate or judge, is one which has always existed in Canada. In the first place, prior to the *Statute of Westminster*, because of the *Colonial Laws Validity Act*, 1865, any Canadian statute, order, rule, or regulation, could be declared invalid if it were contrary to an Imperial statute extending to Canada. In the second place, since 1867, the additional task has been assumed by our courts of ruling *ultra vires* either statutes, or regulations made thereunder, which by the *British North America Act* were beyond the jurisdiction of the legislature concerned. The Canadian *Bill of Rights* may have broadened the scope of this responsibility, but the change is one of degree, not one of kind.

As far as his first point is concerned, one could easily agree that it might have been preferable for Parliament to have made section 2 of the Canadian *Bill of Rights* more explicit, but it did not, and speculating what might have been will not necessarily provide us with a valid interpretation of what has in fact been adopted.

Chief Justice Cartwright was joined in dissent by Mr. Justice Abbott, who had sat on the bench in the *Robertson and Rosetanni* case, and by Mr. Justice Pigeon, who had not. Mr. Justice Abbott's judgment was very brief — he merely agreed with the Chief Justice, with Pigeon, J., and with Davey J.A., in the *Gonzales* case, that section 2 merely provides a canon of interpretation. The view taken by the majority, he said: [34]

> necessarily implies a wide delegation of the legislative authority of Parliament to the courts. The power to make such a delegation cannot be questioned but, in my view, it would require the plainest words to impute to Parliament an intention to extend to the courts, such an invitation to engage in judicial legislation. I cannot find that intention expressed in s. 2 of the *Bill.*

Mr. Justice Pigeon gave the longest and most explicit dissenting judgment in the *Drybones* case.

With the greatest respect, one cannot help but conclude that Mr. Justice Pigeon's judgment was motivated by a desire to avoid the difficult role which the Supreme Court would probably assume with a finding that section 2 of the Canadian *Bill of Rights* renders "inoperative" any statute inconsistent with the terms of the Bill. Thus, he pointed out that "the rights and freedoms enumerated in s. 1 are not legal concepts of precise and invariable content." Further he went on to say that: [35]

> The meaning of such expressions as "due process of law", and "equality before the law", "freedom of religion", "freedom of speech", is in truth largely unlimited and undefined. According to individual views and the evolution of current ideas, the actual content of such legal concepts is apt to expand and to vary as is strikingly apparent in other conntries. In the traditional British system that is our own by virtue of the *B.N.A. Act,* the responsibility for up-dating the statutes in this changing world rests exclusively upon Parliament.

It should be noted that Mr. Justice Pigeon's judgment does not state that Parliament could not pass to the courts the power of declaring statutes inoperative on the ground of being contrary to the Canadian *Bill of Rights.* Rather, he emphasized that if Parlia-

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[34] *Supra,* n. 23, at p. 299.
[35] *Ibid.,* p. 306.

ment had so intended, it would have done so in plain terms. Since it did not explicitly grant this power to the courts, he reasoned that such wide-reaching power was not intended. He buttressed this conclusion with a number of arguments. Like Mr. Justice Davey in the *Gonzales* case, he referred to the opening paragraph of section 1, whereby the *Bill of Rights* declares that the human rights and freedoms "have existed and shall continue to exist...", and deduced therefrom that Parliament could not have intended the repeal or invalidation of legislation then existing. He said: [36]

> If in s. 1 the act means what it says and recognizes and declares *existing* rights and freedoms only, nothing more than proper construction of existing laws in accordance with the *Bill* is required to accomplish the intended result. There can never be any necessity for declaring any of them inoperative as coming in conflict with the rights and freedoms defined in the *Bill* seeing that these are declared as existing in them.

He suggested that it is necessary to choose between section 1 and section 2 and that he felt that paramount effect should be given to section 1, because, "it is the provision establishing the principle on which the whole act rests".

With respect, it has always been recognized that section 2 is the "operative" section, whereas section 1 is the "declaratory" section. This is obvious from the very fact that these are the words used in the two sections respectively. It may very well be, as the majority in the *Robertson and Rosetanni* case found, that the words used in the opening paragraph of section 1 will induce a court to define the rights and freedoms in section 1 in the light of the existing law. Thus, it would have been possible, applying reasoning similar to that in the *Gonzales* case, to conclude that the liquor provisions of the *Indian Act* did not create "inequality before the law", just as the Supreme Court in the *Sunday Bowling Alley* case had concluded that the *Lord's Day Act* did not infringe freedom of religion. One could disagree with this interpretation, but it is an interpretation which could logically follow from the analysis of Mr. Justice Pigeon. However, since an express provision overrides an ambiguous one, and Mr. Justice Pigeon does so argue, then surely the words in section 2 of the Canadian *Bill of Rights* are more explicit than those in section 1. Finally, section 1 does not purport to be a direction to the courts as to what to do in "construing and applying" the law of Canada. Section 2 does.

The other argument used by Mr. Justice Pigeon was that the approach of the majority "would be a radical departure" from the

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[36] *Ibid.*, p. 305.

basic British constitutional rule that the courts are not authorized to fail to give effect to clearly expressed words of Parliament. He felt that there was nothing in section 2 which clearly shows that Parliament intended such a drastic change. He did not think that the crucial words "construed and applied" indicate more than a rule of construction. He went on to say: [37]

> Certainly the word "construed" implied nothing else. Does the word "applied" express a different intention? I do not think so and, even if this may appear a trite saying, I must point out that what respondent asks the Court to do and what the Courts below have effectively done is not to apply the statute, the *Indian Act,* but to decline to apply it.

No one could take issue with those who contend, as Chief Justice Cartwright did, that the meaning of section 2 could have been made clearer if words had been added or used which made explicit the intention of Parliament that courts were to declare laws inconsistent with the Canadian *Bill of Rights* invalid or inoperative. However, although one may not like the choice of words, the intention of Parliament seems obvious that reference to every law of Canada, "unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the Canadian *Bill of Rights*", *shall* be *so* construed and applied as *not* to abrogate, abridge, or infringe the rights and freedoms which are enumerated in the Canadian *Bill of Rights.* Furthermore, the opening paragraph ends with the words: "no law of Canada shall be construed or applied so as to" contravene any civil liberties in the ways thereinafter enumerated. It is no more illogical to conclude, in the light of these words, that Parliament intended the courts *not* to apply a law which abrogates, abridges or infringes rights or freedoms set out in the Canadian *Bill of Rights,* than it is to conclude that the law *is* to be applied even though it *does* "abrogate, abridge, or infringe" these rights and freedoms. A direction to apply a law so as not to bring about a certain result must clearly be a direction not to apply that law. It would seem, then, that by the opening paragraph of section 2 Parliament intended what the majority of the Supreme Court said it intended, and that is that courts are to declare "inoperative" any laws which contravene the Canadian *Bill of Rights.*

The specific choice of the term "inoperative" as an alternative, to "void", or "invalid", must have been intended to restrict the effect of these decisions to the particular fact circumstances. Thus, section 94 of the *Indian Act* is not void, and in fact, as will be

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[37] *Ibid.*, p. 304.

argued later in this article, is operative in all parts of Canada unless another "law of Canada" provides for a lesser sanction for people other than people who are Indians within the terms of the *Indian Act*.[37a]

Mr. Justice Ritchie, on behalf of the majority, adopted the words of Mr. Justice Cartwright in the *Robertson and Rosetanni* case, and confirmed what has been stated just above. He laid considerable stress upon the *non-obstante* clause in section 2. Mr. Justice Pigeon made reference to the fact that when Parliament enacts legislation, it is presumed to be aware of the state of the law. Surely, one must at the same time conclude that Parliament would not, in the very same paragraph, add a completely superfluous clause, thus, as Mr. Justice Ritchie said, "a more realistic meaning" must be given to the opening paragraph of section 2. The *non-obstante* clause is a clear indication that Parliament intended that laws which do not contain the 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, then such law must be inoperative.

Manner and Form, Parliamentary Sovereignty

It should be pointed out that both the minority and majority judgments in the *Drybones* case made no explicit reference either to the question of entrenchment or to that of Parliamentary sovereignty.

Quite rightly, no reference was made to the fact that the Canadian *Bill of Rights* is not entrenched, and therefore of less effect. The matter of entrenchment has been confused as being necessarily bound up with the doctrine of Parliamentary sovereignty. It has to be emphasized that entrenchment is nothing more nor less than a matter of procedure. Of itself it does not place substantive limitations on the power of Parlament, but rather procedural limitations.

Although not so explicitly worded, the majority decision in the *Drybones* case must be taken as support for the proposition[38] that Parliament can impose a "manner and form" requirement for the enactment of certain types of legislation, and that such a requirement, until changed, is applicable whether one accepts the doctrine

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[37a] Therefore, *Regina* v. *Whiteman* (No. 2) (1970), 13 C.R.N.S. 356 was wrongly decided on this point. However, as the case is now being appealed, further comment can await further decision.

[38] Tarnopolsky, *supra*, n. 27, Chapter III, pp. 66-89.

of Parliamentary sovereignty or not. It has to be acknowledged that the facts of this particular case are particularly consistent with the doctrine of Parliamentary sovereignty in that the *Indian Act* is a prior statute of Parliament, while the Canadian *Bill of Rights* is a subsequent Act of Parliament. Therefore, applying the traditional Diceyan view [39] of Parliamentary sovereignty which states, *inter alia,* that a subsequent Act of Parliament overrides any prior Act of Praliament to the extent of any inconsistency, the decision in the *Drybones* case would seem to be a substantiation of this doctrine. In fact, the dissenting judgments in the *Drybones* case, and the decision of Mr. Justice Davey in the *Gonzales* case, although purporting to apply the law in accordance with the supremacy of Parliament, fly in the very face of the doctrine of Parliamentary sovereignty.

Nevertheless, Mr. Justice Ritchie made specific reference to section 5(2) of the Canadian *Bill of Rights,* which purports to apply the provisions of the *Bill of Rights* to laws of Canada enacted before or after the coming into force of the *Bill of Rights.* And he goes on to refer to the protection of "equality before the law" as if it were to apply equally to pre-existing, or to subsequent legislation. This could be a recognition, as some have stated,[40] of the fact that Parliamentary sovereignty has come to an end. On the other hand, inasmuch as a major reason given by Mr. Justice Ritchie for his conclusion that section 2 renders inconsistent legislation inoperative, is the specific inclusion of the *non-obstante* clause, one could deduce from this that the clause was intended to protect and maintain the doctrine of Parliamentary sovereignty, by acknowledging the need for imposing a "manner and form" requirement. Thus it could be argued that if Parliamentary sovereignty still exists today, Parliament can direct the courts to apply laws which do not contain the *non-obstante* clause, whether enacted before or after the Canadian *Bill of Rights, only* if they are *consistent* with the Canadian *Bill of Rights.*

It may very well be that Parliamentary sovereignty in a specific field, such as that of civil liberties, can only be restricted if the restrictions are to be found in the very statute which grants Parliament the authority to make laws. This would seem to be the purport of the decision of the Judicial Committee of the Privy

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[39] A. V. Dicey, *Introduction to the Study of the Law of the Constitution,* 10th ed. revd. by E. C. S. Wade, (London, 1961), pp. 39 ff.

[40] S. R. Peck, "The Supreme Court's New Supremacy", *Globe and Mail,* March 14, 1970, 7.

Council in *Bribery Commissioner* v. *Ranasinghe*.[41] If this were to be so, then the only way that Parliamentary sovereignty could be restricted so as not to permit deliberate Parliamentary infringements of civil liberties, would be if the Canadian *Bill of Rights* were included in the *British North America Act*. Nevertheless, this issue should not be confused with that of entrenchment, because the Canadian *Bill of Rights*, which could limit Parliament, (or the provincial legislatures or both if the *British North America Act* were appropriately amended), could yet be left unentrenched if the amending procedure for the *Bill of Rights* is the same as the procedure for enacting any other Act of Parliament. Or, in other words, a *Bill of Rights* does not have to be entrenched in order to override inconsistent legislation. Conversely, even if entrenched, a *Bill of Rights* does not necessarily override inconsistent legislation. The question is: *was it intended to do so?*

Thus, the mere fact that the Canadian *Bill of Rights* can be amended in the ordinary manner by the Canadian Parliament, in no way detracts from its overriding power while it is in existence. It is true that Parliament can repeal the Canadian *Bill of Rights* tomorrow by simple majority. However, until it does so, it has now provided a "manner and form" requirement under which no law of Canada can operate if it "abrogates, infringes or abridges" those civil liberties enumerated in the Canadian *Bill of Rights*, and does not have a required *non-obstante* clause outlined in the opening paragraph of section 2. Parliament seems to have recognized this fact when enacting the *Public Order (Temporary Measures) Act*, 1970, because s. 12 of this Act explicitly includes the *non-obstante* clause of s. 2. of the Canadian *Bill of Rights*.

Drybones and Equality Before the Law

The other main issue dealt with in the *Drybones* case, and in the *Gonzales* case, was the meaning of the clause "equality before the law". There is no doubt but that this phrase was taken from the Fourteenth Amendment of the United States Constitution. However, it should be noted that the wording is different. In the Fourteenth Amendment reference is made to "equal protection of the laws".

In the *Gonzales* case, Mr. Justice Tysoe referred to the opening paragraph of section 1 in which reference is made to the existence of the freedom "without discrimination by reason of race, national

[41] [1965] A.C. 172.

origin, colour, religion, or sex", and suggested that these were not qualifying words, but that this phrase was to be interpreted merely for the purpose of emphasizing "that the rights and freedoms exist for all persons no matter who they may be". He referred to the fact that in the United States laws dealing with Indians, which are similar to the Canadian laws, have been upheld by the courts. However, it should be pointed out that the "equal protection of the laws" clause in the Fourteenth Amendment to the American Constitution is a restriction only upon certain rights, and upon the states, not upon Congress. Since legislative jurisdiction with respect to Indians is federal, and since the "equal protection of the laws" clause does not restrict Congress, the situation is not analogous.

Mr. Justice Tysoe went on to point out that the same rights, privileges, duties and obligations cannot rest upon all members of society. He suggested that in a civilized society certain persons must be denied rights or privileges of some particular kinds, and that equality before the law is a practical impossibility. He made an analogy to himself as a judge being denied the right to the federal franchise. He suggested that the expression "equality before the law" means that the law shall be "applied equally and without fear or favour to all persons to whom the rights extend". He went on to give his own definition: [42]

> It is sufficient to say that in my opinion in its context s. 1(b) means in a general sense that there has existed and there shall continue to exist in Canada a right in every person *to whom a particular law relates or extends,* no matter what may be a person's race, national origin, colour, religion or sex, to stand on an equal footing with every other person to whom that particular law relates or extends, and the right to the protection of the law... So all persons to whom a particular law relates or extends shall be on the same level in such respects, and no one of such persons shall be in either a more or less advantageous position than any other of such persons, provided that the requirements of the particular law have been met.

In the *Drybones* case, Mr. Justice Ritchie correctly pointed out that pursuant to this interpretation "the most glaring discriminatory legislation against a racial group would have to be construed as recognizing the right of each of its individual members to 'equality before the law' ", so long as all the other members are being discriminated against in the same way. In his concurring judgment, Mr. Justice Hall more vividly illustrated the fallacy of the reasoning of Mr. Justice Tysoe by comparing its effects to the infamous

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[42] *Supra,* n. 29, 296.

"separate but equal" interpretation first put forth in the United States in the case of *Plessy* v. *Fergusson*,[43] and finally repudiated in 1954 in the case of *Brown* v. *Board of Education*.[44]

Mr. Justice Ritchie, while disclaiming that he was giving an exhaustive definition of the clause, suggested: [44a]

> ...that s. 1(b) means at least that no individual or group of individuals is to be treated more harshly than another under that law, and I am therefore of the opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty.

Further on in his judgment he emphasized that the judgment is to be limited: [44b]

> ...to a situation in which, under the laws of Canada, it is made an offence punishable at law on account of race, for a person to do something which all Canadians who are not members of that race may do with impunity; in my opinion the same considerations do not by any means apply to all the provisions of the *Indian Act*.

Although Mr. Justice Ritchie does not make this explicit, it would seem clear that the *Drybones* case would not be applicable to the operation of section 94 of the *Indian Act* in any of the provinces of Canada. The reference in the Canadian *Bill of Rights* is to "the law of Canada", which is defined as referring to that law which is within the legislative jurisdiction of Parliament. Therefore, an inequality which arises because of different provisions in a federal statute as contrasted with a provincial statute, would not be covered by the present "equality before the law" clause in the Canadian *Bill of Rights*. Thus, although the *Indian Act* limits the testamentary rights of Indians in a way that no provincial laws limit the testamentary rights of any other person, this provision in the *Indian Act* could not be declared inoperative merely on the strength of the *Drybones* decision. It cannot apply to an inequality which arises because of the operation of a federal law and a provincial law. For one thing, this answers Mr. Justice Pigeon's problem which he says arises out of the fact that Parliament is given specific legislative jurisdiction with respect to Indians and their lands. He was bothered by the fact that almost any legislation in the *Indian Act*, unless it treats Indians equally with everyone else,

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[43] 163 U.S. 537, (1896).

[44] 347 U.S. 483 (1954). To the same effect see Tarnopolsky, *supra*, n. 27, p. 217.

[44a] (1970) 9 D.L.R. (3d) 473, at p. 484.

[44b] *Ibid.*, at pp. 485-486.

even, or perhaps, if it treats Indians better than anyone else, would necessarily be declared invalid. Whether this should be so or not is not the issue for this article. The effect of the *Drybones* decision does *not* go that far. The decision is limited to an inequality which arises by operation of two or more provisions in federal statutes or regulations.

On the other hand, it would seem that that part of Mr. Justice Tysoe's judgment is correct which indicated that the "equality before the law" clause is not necessarily restricted only to inequality as between members of different races, religions, etc., since the non-discrimination clause in the opening paragraph of section 1 merely affirms that the rights and freedoms therein listed belong to everyone.

Similarly, one might question whether the courts should get involved at all in the issue that is so often raised with respect to the *Indian Act* at least, and that is whether the liquor provisions in the Act were intended as a protection for Indians, or as a disadvantage for them. Even though it is true that some of the original provisions were inserted at the request of Indian Chiefs who feared the effects of alcohol on their people, no evidence has ever been produced to show that there is a biological incapacity on the part of Indians when consuming alcohol. At most, there may be some sociological explanations, but since these are removable it does not seem a valid or predictable base for a court to judge whether the legislation is beneficial or not.

Rather, it would seem that the only rational interpretation to be given to the clause is that offered by the American courts, which is: "whether the challenged classification rests on grounds wholly irrelevant to the achievement of a valid state objective".[45] To restate in the light of the particular issue involved, I would suggest that the test might be "is the law reasonably justifiable in a liberal-democratic state which is committed to a policy of non-discrimination?"

Part III — Judicial Interpretation of the Canadian Bill of Rights — Specific Provisions

Section 1(a) — "Due process of law"

Although in the United States the "due process of law" clause has been the subject of more cases and articles than any other part

[45] *Turner* v. *Fouche*, 90 S. Ct. 532, 541 (1969).

of the American Constitution,[46] it has received almost no definition in Canada. In the first few years after the enactment of the Canadian *Bill of Rights*, the various courts did not go further then to equate the "due process of law" clause to "the law of the land as applied to all the rights and privileges of every person in Canada when suspected of or charged with a crime, and including a trial in which the fundamental principles of justice so deeply rooted in tradition apply".[47]

This early reluctance to define the due process clause has continued[48] even after the *Drybones* decision.[49] It would appear, therefore, that the following summation, made in 1966, would still apply today: [50]

> ...[T]he due process clause in the *Fourteenth Amendment* was given a broad definition because *vis-à-vis* the states there is not a long list of specific prohibitions as in the first eight amendments *vis-à-vis* the federal government. In the case of the *Canadian Bill of Rights*, on the other hand, the due process clause is listed as one of a number of specific rights and freedoms. Thus, for instance, there is no need to develop concepts of liberty of speech, press, religion, assembly and association out of the due process clause because these are explicitly set out. Then, too, s. 2 lists specifically many of the procedural safeguards which the American courts had to evolve out of the due process clause... It would appear that the due process clause would be relied on in those cases where there is a purported infringement of a purported right which is not listed in ss. 1 or 2. Thus, if an accused person claims that his property has been illegally searched or seized, he would probably rely on the due process clause.

Section 1(b) — "Equality before the law"

The most important case on this topic is the *Drybones* case. However, there are several other decisions, rendered after *Drybones*, that should be looked at briefly. One group of these cases concerns the vagrancy clause in the *Criminal Code*[50a] and prompts one to wonder how long the "Women's Liberation" movement will tolerate such special status for some women. Or, are some women more equal than others?

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[46] W. J. Brockelbank, *The Role of Due Process in American Constitutional Law*, (1953-54), 30 *Cornell L.Q.* 561, at p. 565.

[47] *Regina* v. *Martin* (1961), 35 C.R. 276, at p. 290.

[48] *Whitfield* v. *Canadian Marconi Company* (1968), 68 D.L.R. (2d) 251; affirmed by (1968), 68 D.L.R. (2d) 766 (S.C.C.).

[49] *Regina* v. *Provincial Court Judges; Ex Parte Nevin* (1971), 2 O.R. 25; *Regina* v. *Rival* [1971] 1 W.W.R. 223.

[50] Tarnopolsky, *supra*, n. 27, p. 154.

[50a] Crim. Code, s. 164(1).

In the first of these,[51] a judge of the provincial court referred to Mr. Justice Ritchie's judgment in the *Drybones* case, and decided that: [51a]

> [S]ection 164(1)(c) of the Criminal Code, being a statute of the Parliament of Canada, creates an offence whereby a female person having a specific status *which is not an offence punishable at law,* and I emphasize those words, is denied the right to do something her fellow Canadians are free to do without having committed any offence or having been made subject to any penalty, namely: "being found in a public place ...is required to give a good account of herself."

He therefore held that section 164(1)(c) of the *Criminal Code* is inoperative on the basis of the Drybones case. Subsequently, however, in two other cases the courts came to a different conclusion. In the case of *Regina* v. *Beaulne, Ex parte Latreille,*[52] Mr. Justice Houlden of the Ontario High Court held that section 164(1)(c) of the *Criminal Code* is not inoperative by virtue of the "equality before the law" clause in the Canadian *Bill of Rights,* because the *Criminal Code* section does not apply to all females, but merely to a particular group of females. Siinilarly, in the case of *Regina* v. *Lavoie,*[53] a judge of the county court in British Columbia came to the same conclusion.

There is no doubt but that section 164(1)(c), which provides that: "Every one commits vagrancy who being a common prostitute or a night walker is found in a public place and does not,, when required, give a good account of herself;" is a provision which applies only to females. It is a law of Canada which treats females on a different basis than males, without any reasonable justification. There is no reason to assume that a "common prostitute" or a "night walker" is more offensive or more or less able to fend for herself than is a "gigolo". Whether one agrees or not, this would seem to be a case of "inequality before the law" and therefore should result in the section being declared inoperative, until or unless the provision is amended to cover males as well.

In fact, one could question whether the whole vagrancy section is not discriminatory as between rich and poor. It is a provision which treats everyone equally only in the sense suggested by Anatole France of the law which equally forbids the rich and the poor to beg in the streets.

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[51] *Regina* v. *Viens* (1970), 10 C.R.N.S. 363.

[51a] *Ibid.,* at p. 372.

[52] [1971] 2 C.C.C. (2d) 196, 1 O.R. 630.

[53] [1971] 2 C.C.C. (2d) 185, [1971] 1 W.W.R. 690.

The other major area in which arguments have been raised on behalf of accused that they have not received "equality before the law", comes in that of discretionary alternate criminal procedures. Perhaps the best known of these cases is *Regina* v. *Smythe*.[54] This was a decision of the Supreme Court of Canada which held that a clause which confered a discretion on the Crown whether to proceed by way of summary conviction or by indictment does not contravene the "equality before the law" clause in the Canadian *Bill of Rights*. Similarly, in *Re McClary's Prohibition Application*,[55] the Alberta Supreme Court held that the right of the Attorney-General under the Federal *Food and Drug Act* to proceed by way of indictment or by summary proceeding was not contrary to the Canadian *Bill of Rights* because the Act applied equally to all Canadians. Both of these cases followed an earlier decision of the Quebec Court of Appeal [56] dealing with a similar discretion under the *Income Tax Act*.

Two additional cases should be referred to, if only because one misinterpreted the *Drybones* decision, and the other applied it. In *Re Shea*,[57] a decision of the Nova Scotia Supreme Court, it was stated: [57a]

> With respect, I cannot find that the Supreme Court of Canada has thereby [*Regina* v. *Drybones*] *laid* down any principle of general application that would state that where any statute of Canada is in conflict with the *Bill of Rights*, the *Bill* shall prevail. Even Ritchie, J., is careful to say "it is unnecessary to express any opinion respecting the operation of any other section of the *Indian Act*". The implication of those words must be that the decision is meant to extend no further than a single section of the *Indian Act*, R.S.C. 1952, c. 149, and I cannot see that it necessarily extends to all federal law.

With respect, although the learned Judge may be right that since the *Immigration Act* provides procedures that apply equally to all members of the class of immigrants concerned, and thereby does not violate the Canadian *Bill of Rights*, his statement about the effect of the *Drybones* case is mistaken.

In *Regina* v. *Chapman and Currie*,[58] Algoma District Court Judge Vannini held that section 6 of the *Habeas Corpus Act* could not be applied merely to those few who are committed for trial to Courts

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[54] [1971] 3 C.C.C. (2d) 366.

[55] [1971] 1 W.W.R. 741. See also *Regina* v. *Fauth* (1971), 13 C.R.N.S. 353.

[56] *Regina* v. *Court of Sessions of the Peace et al., Ex Parte Lafleur* [1967] 3 C.C.C. 244.

[57] [1970] 5 C.C.C. 107.

[57a] *Ibid.*, pp. 114-115.

[58] [1971] 1 O.R. 601.

of Assize, because such an interpretation would be a denial of the "equality before the law" clause and therefore, contrary to section 1(b) of the Canadian *Bill of Rights*. This judgment was affirmed by the High Court.[59]

Section 1(c) to (f) — "Freedoms of religion, speech, assembly and association, and of the press."

Although the Canadian *Bill of Rights* declares the fundamental freedoms of religion, speech, assembly, association, and press, without any qualifying or restrictive clauses, a very certain prediction is that these freedoms will never be interpreted in an absolute, unfettered manner. Even in the United States, where the First Amendment declares that, "Congress shall make *no* law . . . abridging the freedom of speech, or of the press", the United States Supreme Court has upheld sedition laws, libel and slander laws, obscenity laws, etc., as long as they have been, in the opinion of the judiciary, reasonable restrictions consistent with the needs of a liberal democratic state.

The most important case on freedom of religion since the Canadian *Bill of Rights* was enacted was the case of *Robertson and Rosetanni* v. *The Queen* (*Sunday Bowling Alley* case) which was discussed earlier.[60] Only one judge, Mr. Justice Cartwright, found that the *Lord's Day Act*, which prohibited pursuing one's ordinary calling on a Sunday, was invalid because of conflict with section 1(c) of the Canadian *Bill of Rights*. The majority held that the freedom of religion which was guaranteed by the Canadian *Bill of Rights* must have been intended to contemplate the continuing validity of the *Lord's Day Act*. The majority judgment specifically endorses the suggestion made above that these freedoms must be interpreted with some limitations: [61]

> It is to be remembered that the human rights and fundamental freedoms recognized by the courts of Canada before the enactment of the *Canadian Bill of Rights* and guaranteed by that statute for the rights and freedoms of men living together in an organized society subject to a rational, developed and civilized system of law which impose certain limitations on the absolute liberty of the individual.

In the case of *Regina* v. *MacLeod et al.*[62] the British Columbia Court of Appeal held that the freedom of the press under section 1(f) had to receive the same meaning as that given to the phrase

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[59] *Ibid.*, p. 617.
[60] *Supra*, n. 18.
[61] *Ibid.*, p. 655.
[62] (1970), 75 W.W.R. 161, [1971] 1 C.C.C. (2d) 5.

"freedom of speech" in section 1(d), and must mean that it is a freedom which is governed by law. Similarly, in the case of *Regina* v. *Prairie Schooner News Ltd. and Powers,*[63] the Manitoba Court of Appeal held that the freedom of the press protected by the Canadian *Bill of Rights* in section 1(f) did not result in making section 150 of the *Criminal Code,* which deals with obscenity, inoperative. The freedoms protected in the Canadian *Bill of Rights* were not without limit. The future controversies, then, will not be whether limits must be placed, but rather where and when to place them.

Because of the phraseology chosen by Mr. Justice Ritchie, who gave the judgment of the majority in the *Sunday Bowling Alley* case,[63a] there was some possibility that the effect of the decision would be to define the freedom of religion protected by the Canadian *Bill of Rights* in terms of the extent of the freedom on the day that the Canadian *Bill of Rights* was enacted, *i.e.,* August 10th, 1960. Thus he said: [64]

> It is to be noted at the outset that the *Canadian Bill of Rights* is not concerned with 'human rights and fundamental freedoms' in any abstract sense, but rather with such 'rights and freedoms' as they existed in Canada immediately before statute was enacted.

Fortunately, Mr. Justice Ritchie specifically rejected this interpretation in the *Drybones* case where he emphasized that the decision in the *Sunday Bowling Alley* case could not be considered "to be any authority for the suggestion that the *Bill of Rights* is to be treated as being subject to federal legislation existing at the time of its enactment..." [65]

Section 2(a) — "Arbitrary detention, imprisonment, or exile"

Only one case has dealt with this clause, and that is the Ontario Hight Court case of *Ex parte Beauchamp,*[66] in which the petitioner asked for a writ of *habeas corpus* to obtain his release from committal due to suspension of his parole. The applicant alleged that the parole board did not consider his story in coming to its decision, and that section 12 of the *Parole Act* violated section 2(a) and (c) of the Canadian *Bill of Rights.* The court rejected this contention, although it did go on to say that the parole board had a duty to act fairly, and if it did not do so,*mandamus* might lie.

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[63] [1971] 1 C.C.C. (2d) 251.
[63a] *Supra,* n. 18.
[64] *Ibid.,* p. 654.
[65] *Supra,* n. 20, pp. 295-6.
[66] [1970] 3 O.R. 607, [1971] 1 C.C.C. 101.

Section 2(b) — "Cruel and unusual treatment or punishment"

The Supreme Court of Canada came to deal with this clause as early as 1964, in the case of *Mugda* v. *The Queen.*[67] In this case the petitioner alleged that he was interned by Canadian authorities during World War II and subjected to "cruel and unusual treatment and punishment". However, the Supreme Court held that there was no liability in the Crown under Section 19(1)(c) of the *Exchequer Court Act,* and also rejected the petition as claimed on the grounds that the Canadian *Bill of Rights* was not in force during the period referred to, and, "... the pre-existing rights which it recognized do not include the right to bring an action in tort against the Crown except as specifically provided by statute".[67a]

Two cases arose in 1965. In *Ex Parte Kleinys,*[68] the British Columbia Supreme Court held that the detention of an accused subsequently found to be insane, pursuant to sections 523 and 526 of the *Criminal Code,* was not "cruel and unusual treatment or punishment", even though the detention was at the discretion of the Lieutenant Governor. The other case came before the Manitoba Court of Appeal as *Regina* v. *Dick, Penner and Finnegan.*[69] The majority held that a sentence of whipping for rape, rendered under s. 136 of the *Criminal Code,* was not contrary to s. 2(b) of the Canadian *Bill of Rights* (corporal punishment). The court held, it may be "cruel" to some people, but it is not an "unusual" punishment.

In the most recent decision [70] on this clause, an Ontario Provincial Court Judge held that section 660 of the *Criminal Code,* which provides for a sentence of indeterminate length for a habitual criminal, is not cruel and unusual punishment so as to violate section 2(b) of the Canadian *Bill of Rights.*

Section 2(c)(i) — "Prompt informing of reason for arrest or detention"

There has been almost no judicial interpretation of the right of "a person who has been arrested or detained ... to be informed promptly of the reason for his arrest or detention", except in the

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[67] [1964] S.C.R. 72.

[67a] *Ibid.,* p. 78.

[68] (1965), 49 D.L.R. (2d) 225.

[69] [1965] 1 C.C.C. 171.

[70] *Regina* v. *Buckler* [1970] 2 C.C. 4, [1970] 2 O.R. 614.

case of *Regina* v. *Viens,* mentioned earlier.[71] Provincial Judge Morrison dealt with the charge that the accused: [71a]

> "Being a common prostitute or a night walker was found in a public place and when required failed to give a good account of herself. Contrary to section 164(1)(c) of the Criminal Code of Canada."

The evidence was that the accused was stopped in a street by a detective who asked her to give an account of her earlier actions in a restaurant, and a hotel nearby. She replied that she would not give any account of herself until she had spoken to her lawyer. The court held that, by applying the Shorter Oxford English Dictionary definition of the word "to detain", *i.e.,* "to keep from proceeding; to keep waiting; to stop", the accused was "detained". Therefore, she had the right to invoke the protections of section 2(c) of the Canadian *Bill of Rights.* She had, therefore, properly invoked her legal right to refuse to give an account of herself until she had spoken to her lawyer. The court then went on to hold that such an invocation of her legal rights could not be used "as evidence that she failed to give a good account of herself, and in the circumstances of this case, I find that she did give a good account". The judge also found that the accused was not found in a public place, and that section 164(1)(c) of the Criminal Code was inoperative on the grounds that it contravened section 1(b) of the Canadian *Bill of Rights.*

Sections 2(c)(ii) and (d) — "Right to counsel"

At the outset a number of observations must be made about the right to counsel in the Canadian *Bill of Rights.* In the first place, the right to counsel outlined in section 2(c)(ii) applies to the period between arrest and trial while the right to counsel in section 2(d) arises only when "a court, a tribunal, a commission, board or other authority" compels "a person to give evidence". Secondly, it should be noted that both clauses are worded differently from the "right to counsel" clause in the Sixth Amendment of the American Constitution, which reads: "... [I]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." It is possible that some day Canadian courts will evolve, out of the right to counsel clauses in the Canadian *Bill of Rights,* the same obligation upon the state to provide legal counsel as has been held to apply in the United States. However, the wording *is* different. In section 2(c)(ii) it is "a right

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[71] *Supra,* n. 51.
[71a] *Ibid.,* p. 365.

to retain and instruct counsel without delay", and in section 2(d) it is the right not to be compelled "to give evidence" if a person is denied counsel. This is somewhat less positively stated than in the American clause which provides for the right "to have the assistance of counsel for his defense". On the other hand, the Sixth Amendment to the American Constitution refers to criminal prosecutions, whereas no such restriction applies, at least in paragraph (d) of section 2 of the Canadian *Bill of Rights*. The right to counsel in the United States has, of course, been developed to include non-criminal proceedings, but this has been a recent development expanding the right to counsel through a broad interpretation of the "due process of law" clause in the Fifth and Fourteenth Amendments to the United States Constitution.

From the beginning Canadian courts were not prepared to give great effect to the "right to counsel" clauses. Thus, in *Re Walsh and Jordan*[72] the Ontario High Court held that the word "counsel" did not necessarily have to be "legal" counsel, and so the provision under the *Royal Canadian Mounted Police Act* which prohibited legal counsel was held not to be in conflict with section 2(c)(ii) nor with s. 2(d), nor (e) — "the "fair hearing" clause".

There were some early decisions where reliance upon the right to counsel was successful. Thus, in *Regina* v. *Gray*,[73] a British Columbia provincial magistrate held that a denial of the right to counsel under section 2(c(ii) would result in a failure to accord the accused a "fair hearing", as provided for in section 2(e), and therefore the accused could not make a full answer and defense, and so should be acquitted. Similarly, in *Re Sommerville*,[74] Disbery J. of the Saskatchewan Court of Queen's Bench granted an order of prohibition against a provincial magistrate who denied counsel to a person who was being questioned pursuant to section 174 of the Canadian *Criminal Code* as being a "found-in". The learned judge found that the denial of counsel was contrary to section 2(d) as well as (e). Shortly thereafter, however, the Nova Scotia Supreme Court in the case of *Regina* v. *Steeves*,[75] held unanimously that although the accused was questioned following his arrest on a charge of failing to stop at the scene of an accident, contrary to section 221(2) of the Canadian *Criminal Code*, and was denied access to counsel, he could not be acquitted on the ground that

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[72] (1962), 31 D.L.R. (2d) 88.
[73] (1962), 123 C.C.C. 337.
[74] (1962), 133 C.C.C. 323.
[75] [1964] 1 C.C.C. 266.

this contravened either the right to counsel under section 2(c)(ii) or (d), or the right to a fair hearing under section 2(e) of the *Bill of Rights*. Similarly, the Manitoba Court of Appeal in the case of *Regina* v. *Piper*[76] held that although the accused did not have counsel at his trial (there was no evidence that he had requested counsel), neither section 2(d) nor (e) applied so as to invalidate the trial.

This decision was applied by the British Columbia Court of Appeal in the case of *Re Vinarao*.[77] The court quoted the headnote of the *Piper* case, which reads as follows: [77a]

> Section 2(c)(ii) of the *Canadian Bill of Rights*, 1960 (Can.) c. 44, provides only that an accused has the right to retain counsel, and that he might receive free legal aid, a failure so to advise the accused is not an infringement of the *Bill of Rights* since he was not deprived of the privilege to retain counsel.

Therefore, the court in the *Vinarao* case held, a failure by a Special Inquiry Officer under the *Immigration Act* to inform the applicant that she had a right to counsel did not contravene the Canadian *Bill of Rights*, because she was not "denied or deprived of the right of counsel".

A few years later, however, in *Regina* v. *Ballegeer*,[78] the Manitoba Court of Appeal unanimously allowed an appeal to quash a conviction and sentence on a plea of guilty, and directed a new trial, in a case where the accused showed that he had made and signed a statement when he had been "actively and deliberately" denied the right to obtain legal advice. On behalf of the court, Mr. Justice Freedman (as he then was), stated: [79]

> The facts surrounding this aspect of the case are disturbing to anyone who prizes the rights of individual liberty in a free society. Among these is assuredly the right, on being arrested or detained, to retain and instruct counsel without delay. This is a right enshrined in English common law, vindicated by many judicial decisions of high authority, and clearly and unmistakably affirmed in the *Canadian Bill of Rights*, 1960 (Can.), c. 44 s. 2(c)(ii).

Perhaps the most important case to deal with the right to counsel was the decision of the Supreme Court of Canada in *O'Connor* v. *The Queen*.[80] The accused was driving his car when he was stopped by a policeman at about 1:20 a.m. The constable

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[76] (1965), 51 D.L.R. (2d) 534.
[77] (1968), 66 D.L.R. (2d) 736.
[77a] *Ibid.*, pp. 739-40.
[78] (1969), 1 D.L.R. (3d) 74.
[79] *Ibid.*, 76.
[80] [1966] S.C.R. 619, 57 D.L.R. (2d) 123.

decided that the accused's driving was impaired and so he arrested him and took him to the police station, although the accused did not know he was under arrest and was not informed of this until after he had been given two breathalizer tests. He then requested permission to telephone his lawyer and was permitted one call. When he failed to contact his lawyer on the first try, he was denied permission to make a further call. Subsequently, he was convicted on a charge of impaired driving. Mr. Justice Haines of the Ontario High Court reversed the decision, and held that the case should be re-tried ignoring the evidence of the breathalizer.[81] This judgment was reversed by the Ontario Court of Appeal,[82] and the Supreme Court of Canada unanimously dismissed the appeal from the Ontario Court of Appeal.

On behalf of himself and three other members of the Supreme Court, Mr. Justice Ritchie dismissed the argument that the mere denial of the accused's "right to retain and instruct counsel without delay" automatically nullified the subsequent proceedings. He expressed his agreement with the decision of the Nova Scotia Court of Appeal in the *Steeves* case to the effect that there is no general rule that a person who has been denied the right to instruct counsel without delay must necessarily be acquitted. As far as the argument that the evidence of the breathalizer should be excluded is concerned, Mr. Justice Ritchie stated that there was no evidence of the accused being denied the right to obtain and instruct counsel prior to the taking of the breathalizer evidence. He therefore concluded in these terms: [83]

> The evidence in the present case does not, in my opinion, disclose that the circumstances under which the police refused "to allow the accused while under arrest to contact a lawyer" were such as to in any way deprive him "of the right to a fair hearing in accordance with the principles of fundamental justice" and I am accordingly of the opinion that no question arises as to the effect which the *Canadian Bill of Rights* might have upon such circumstances if they did exist.

The fifth member of the court, Mr. Justice Spence, agreed with the majority in the result, but specifically limited his concurrence to the particular circumstances of this appeal. He specifically went on to say: [84]

> There may well be cases where the same failure to warn the accused that he is under arrest and to state the charge against him results in the obtaining of evidence which it could not otherwise have been obtained.

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[81] (1965), 48 D.L.R. (2d) 110.
[82] (1965), 52 D.L.R. (2d) 106.
[83] *Supra,* n. 80, p. 628, 57 D.L.R. (2d) at 130.
[84] *Ibid.*, p. 629, 57 D.L.R. (2d) at 131.

The only way that these various decisions could be reconciled is by concluding that the Supreme Court of Canda did not have to face the full implications of the right to counsel in section 2(c)(ii) in the *O'Connor* case because the denial of access to counsel which occurred in that case, occurred after the taking of the evidence which was challenged before the Court. As far as the Manitoba Court of Appeal is concerned, the decision in the *Ballegeer* case, overrules the decision in the *Piper* case, at least to the extent that the court would probably quash a conviction where the denial of access to counsel is particularly repellant to the court. At the moment, one cannot yet envisage the Supreme Court of Canada being prepared to overrule the *Kuruma Rule*,[85] adopted by the Supreme Court of Canada in *Attorney General for Quebec* v. *Bégin*,[86] which holds that "the illegality affecting the method of obtaining the evidence does not affect, *per se*, the admissability of this evidence at the trial".

Section 2(c)(iii) — "Habeas corpus"

Although several of the cases which have considered the *Bill of Rights* involved application for *habeas corpus*, they were not dealt with under section 2(c)(iii), probably because this provision in the *Bill of Rights* goes no further than to assure a right to *habeas corpus*. *Habeas corpus* has been suspended only once in Canada since the enactment of the Canadian *Bill of Rights*, and this was on October 16th, 1970, with the invocation of the *War Measures Act*. Since section 6(5) of the *War Measures Act*, and section 6(5) of the Canadian *Bill of Rights*, specifically provide for the suspension of the *Bill of Rights* in the event of the invocation of the *War Measures Act*, questions concerning section 2(c)(iii) could not arise. Section 12 of the subsequent *Public Order (Temporary Measures) Act*, 1971, which replaced the invocation of the *War Measures Act* in December 1970, specifically invoked the *non-obstante* clause in the opening paragraph of section 2 of the Canadian *Bill of Rights*, and therefore questions concerning the applicability of section 2(c)(iii) could not arise while the Act was in force up to April 30th, 1971.

Section 2(d) — "Protection against self crimination"

Until recently, various courts have consistently declined to apply either paragraphs (d) or (e) of Section 2 of the *Bill of*

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[85] *Kuruma* v. *The Queen* [1955] A.C. 197 at p. 204.
[86] [1955] S.C.R. 593, 5 D.L.R. 394.

Rights so as to uphold any right against self-incrimination or a lack of a fair trial to exclude evidence obtained by a person being asked to perform certain physical tests,[87] or being required to take the breathalizer test.[88]

Similarly, in *Regina* v. *McKay*,[89] Mr. Justice Dohm of the British Columbia Supreme Court held that the compellability of an accused to take a breathalizer test did not amount to self-crimination and was therefore not contrary to section 2(d) of the Canadian *Bill of Rights*. It should be noted that in this case he applied the decision of Mr. Justice Laskin of the Supreme Court of Canada in *Reference concerning the Proclamation of Section 16 of the Criminal Law Amendment Act*[90] where Mr. Justice Laskin gave probably the best summation of the views of the Canadian Courts on this point: [91]

> There is no compellability of an accused to self-crimination by reason only of statutory prescriptions for presumptive proof of facts in issue.

In a similar vein, the Ontario Court of Appeal in the case of *Regina* v. *Steinberg*,[92] and the British Columbia Supreme Court in the case of *Regina* v. *Pearson et al*,[93] both in very brief references, held that a recording obtained from a wire-tap, or "bugging" device, did not contravene the right against self crimination in section 2(d) of the Canadian *Bill of Rights*.

In a case which only briefly dealt with the meaning of section 2(d) of the Canadian *Bill of Rights*, the Ontario Court of Appeal held[94] that it was not contrary to section 2(d) of the Canadian *Bill of Rights* for any employees of a company to be compelled to testify under the *Combines Investigation Act* because such testimony of the employees did not amount to self-crimination.

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[87] *Regina* v. *Martin* (1961), 35 C.R. 276.

[88] See *O'Connor* v. *The Queen*, *supra*, fn. 80.

[89] (1970), 12 C.R.N.S. 122.

[90] [1970] S.C.R. 777.

[91] *Ibid.*, p. 803. In the past few months these questions have been raised again in connection with breathalizer tests because accused persons are not being provided with capsules of their breath as was enacted in the new legislation but never proclaimed. It is beyond the scope of this article, however, to speculate on the possible results of these cases when they reach higher courts.

[92] [1967] 1 O.R. 733.

[93] (1969), 66 W.W.R. 380.

[94] *Regina* v. *Judge of the General Sessions of the Peace for the County of York, Ex parte Corning Glass Works of Canada Ltd.* [1971] 2 O.R. 3. Application for leave to appeal to the Supreme Court of Canada was refused.

Section 2(e) — "Right to a fair hearing"

Although this paragraph has the potential of developing into the Canadian equivalent of the American "due process of law" clause, thus far it has received very little interpretation in Canada. Usually, it has been invoked along with other provisions in the Canadian *Bill of Rights*, like paragraphs (c)(ii), (d), or (f).

It has been held that an appeal by way of trial *de novo*, by the Crown against an acquittal, pursuant to section 720 of the *Criminal Code*, does not amount to double jeopardy for an accused and therefore is not in conflict with section 2(e).[95] The Ontario Court of Appeal has held that section 467(c) of the *Criminal Code*, which gives a magistrate absolute jurisdiction to try a charge of obstructing a police officer in the performance of his duty, does not deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice.[96] In one case,[97] an accused moved for prohibition on the grounds that there was a real likelihood of his being denied a fair hearing in accordance with the principles of fundamental justice because the magistrate lacked a law degree and was ineligible for membership in the Law Society. The Alberta Supreme Court rejected the contention that this was a contravention of section 2(e) of the Canadian *Bill of Rights*. On the other hand, an accused was able to obtain an order prohibiting a named judge from proceeding with a charge on the basis that there were at least two informations and summonses dealing with the same offence, and that to allow the second summons would be a contravention of section 2(e) of the Canadian *Bill of Rights*.[98]

In another case [99] it was held that a delay in laying a charge might have prejudiced the accused's ability to make a full answer and defence to the charge and was therefore a deprivation of the accused's right to a fair hearing in accordance with fundamental justice.

The Supreme Court of Canada has had only one opportunity to define and apply section (e) of the Canadian *Bill of Rights*. This was the case of *Guay* v. *Lafleur*.[100] Guay was appointed as

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[95] *Regina* v. *Jordan* [1971] 1 C.C.C. 385.

[96] *Regina* v. *Judges of the Provincial Court (Criminal Division) of the County of York, Ex parte Nevin* [1971] 2 O.R. 25.

[97] *Piché* v. *The Queen* (1970), 12 C.R.N.S. 102.

[98] *Regina* v. *Bonnycastle, ex parte Welch* [1970] 4 C.C.C. 382.

[99] *Regina* v. *Dixon* [1965] 2 O.R. 540.

[100] [1965] S.C.R. 12.

a special inquiry officer by the Minister of National Revenue under the *Income Tax Act* to inquire into the affairs of Lafleur in connection with his liability for tax. Lafleur requested to be present at the investigation session, and to be represented there by counsel. This right was denied to him. The Supreme Court of Canada reversed decisions of the trial judge, and the Quebec Court of Appeal, and held that section 2(e) of the *Bill of Rights* was not applicable, "since no rights and obligations are determined by the person appointed to conduct the investigation."[101] The majority of the Supreme Court decided that the person holding the inquiry neither decides nor adjudicates upon anything, and so the *audi alteram partem* rule would not apply because this was not a judicial or quasi-judicial hearing. One person was charged with the responsibility of conducting an inquiry, and the decision-making was in the hands of another.

Since the powers of a Board of Inquiry under the *Ontario Human Rights Code* are similar to those of a special inquiry officer under the *Income Tax Act*, and since a Board of Inquiry merely recommends to another agency a course of action, and has no right of binding decision, it would seem that, following its own decision in *Guay* v. *Lafleur*, the Supreme Court should have held that a Board of Inquiry under the Human Rights Commission is not a judicial or quasi-judicial body. However, in *Bell* v. *Ontario Human Rights Commission*,[102] the Supreme Court held, without indicating how it distinguished the two cases, that the inquiry under the Ontario Human Rights Commission was unquestionably a judicial inquiry to which *certiorari* applies. If some future distinction is not drawn between the *Ontario Human Rights Commission* case and *all other* cases, then we might look forward to an occasion on which the Supreme Court will define the scope of section 2(e) with reference at least to administrative tribunals.

Section 2(f) — "Presumption of innocence"

Very soon after the enactment of the Canadian *Bill of Rights*, several courts considered clauses in the Criminal Code which provide for presumptions of fact or guilt after proof of certain facts, and in the absence of evidence to the contrary. In all cases it was held that these provisions do not infringe or abrogate the right of an accused to be presumed innocent until proved guilty

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[101] *Ibid.*, p. 16.

[102] (1971), 18 D.L.R. (3d) 1, overruling the Ontario Court of Appeal in *Regina* v. *Tarnopolsky ex parte Bell* (1920), 11 D.L.R. (3d) 658.

according to law pursuant to section 2(f) of the Canadian *Bill of Rights.*[103]

The most recent decision of the Supreme Court of Canada on this topic substantiates these early cases. In *Regina* v. *Appleby* [104] the Supreme Court considered section 224A(1)(a) of the *Criminal Code* which reads as follows:

> 224A(1) In any proceedings under section 222 or 224, (a) where it is proved that the accused occupied the seat ordinarily occupied by the driver of a motor vehicle, he shall be deemed to have had the care or control of the vehicle unless he establishes that he did not enter or mount the vehicle for the purpose of setting it in motion.

The Crown appealed from a finding of the Court of Appeal for British Columbia that the standard of proof required to rebut the statutory presumption was not proof by the balance of probabilities, but only proof raising a reasonable doubt. The decision of the Court of Appeal accorded with its own earlier decision in *Regina* v. *Silk.*[105] This case concerned a provision of the *Food and Drug Act,* which shifted the onus onto the accused to show that he was not trafficking, upon proof that he was in possession of a controlled drug. The Court of Appeal held that to have the accused do more than raise a reasonable doubt was too great an onus, and would be contrary to section 2(f) of the *Bill of Rights.* In the *Appleby* case the Supreme Court of Canada overruled the British Columbia Court of Appeal and held that the provision in question imposed a burden of proof on the accused "by a preponderance of evidence or by a balance of probabilities and... it is not enough for an accused merely to raise a reasonable doubt".

In the course of the argument it was contended that this construction of the section ran contrary to the provisions of section 2(f) of the Canadian *Bill of Rights.* Because it would "deprive a person charged with the criminal offence of the right to be presumed innocent until proved guilty according to law".

Mr. Justice Ritchie, who gave the majority judgment (Mr. Justice Laskin gave a separate concurring judgment with which Mr. Justice Hall concurred), rejected this argument by referring to the famous definition of Viscount Sankey, L.C., in *Woolmington* v. *Director of Public Prosecutions* [106] where he said: [106a]

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the

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[103] *Regina* v. *Goldstein* (1961), 34 C.R. 314; *Regina* v. *Guertin* (1961), 34 C.R. 345; *Regina* v. *Sharpe* (1961), 35 C.R. 375.

[104] [1971] 3 C.C.C. (2d) 354.

[105] [1970] 3 C.C.C. 1, 9 C.R.N.S. 277.

[106] [1935] A.C. 462.

[106a] *Ibid.,* p. 481.

> prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception.

Mr. Justice Ritchie declared that the clause "subject to any statutory exception" must be taken as referring to "those statutory exceptions which reverse the ordinary onus of proof with respect to facts forming one or more ingredients of a criminal offence." He therefore concluded: [107]

> It seems to me, therefore, that if the *Woolmington* case is to be accepted, the words "presumed innocent until proved guilty according to law" as they appear in s. 2(f) of the *Canadian Bill of Rights*, must be taken to envisage a law which recognizes the existence of statutory exceptions reversing the onus of proof with respect to one or more ingredients of an offence in cases where certain specific facts have been proved by the Crown in relation to such ingredients.

If the accused fails to rebut the assumption under section 224A(1)(a), Ritchie J. said, then he is guilty of an offence under section 222, but, he added: [108]

> There is in my view nothing in this procedure which deprives the accused of the right to be presumed innocent until proved guilty according to law within the meaning of *Woolmington* v. *Director of Public Prosecutions, supra,* and section 2(f) of the *Canadian Bill of Rights.*

In his concurring judgment, Mr. Justice Laskin defined the "right to be presumed innocent" in section 2(f) as being one which gives an accused "the initial benefit of a right of silence and the ultimate benefit (after the Crown's evidence is in and as well any evidence tendered on behalf of the accused) of any reasonable doubt." [109]

Whether one likes it or not, and at least for the moment, this decision puts to rest any argument that the reverse onus clauses are in conflict with the presumption of innocence clause in section 2(f) of the *Bill of Rights.*

Section 6(5) — "The Bill of Rights and emergencies"

Although there is no evidence one way or the other, it would probably be accurate to state that at the time of the enactment of the Canadian *Bill of Rights* the invocation of the *War Measures Act* during peace time was not in the minds of any of the legislators. When section 6 of the Canadian *Bill of Rights,* which is also section 6 of the *War Measures Act,* was discussed, it seemed clear that all members of Parliament contemplated a situation similar to the two World Wars. Nevertheless, the first time that the Canadian *Bill of Rights* was suspended pursuant to section 6(5) was on

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[107] *Supra,* n. 104, pp. 363-4.
[108] *Ibid.,* p. 364.
[109] *Ibid.,* p. 365.

October 16th, 1970, on the basis of a government declaration that there was an "apprehended insurrection".

It is beyond the scope of this article to discuss this event at any length. However, one should perhaps at least note that the first time the "non-obstante" clause in the opening paragraph of section 2 came to be applied was in Section 12 of the *Public Order (Temporary Measures) Act*, of December, 1970, which replaced the invocation of the *War Measures Act*. This became the first time that Parliament acknowledged the necessity for such a clause in order not to have legislation overridden by the Canadian *Bill of Rights*. It is somewhat ironic, therefore, that this important recognition of the overriding applicability of the Canadian *Bill of Rights* should occur as a result of the suspension of the operation of section 2 of the *Bill of Rights*.

Conclusion

It should be pointed out that limitations of time and space required this article to be confined to a survey of the effect given to the Canadian *Bill of Rights* in the Courts. However, it would be misleading to assess the *Bill of Rights* merely in the light of its application by the judiciary, without taking account of the very important influence it can have regardless of the actions of judges. This ignores the very important role of public opinion and of legislatures and governments with respect to effectuation of civil liberties. It ignores the fact that most citizens, including agents and officers of governments, tend to govern their activities in accordance with the law. Given a publicly declared sense of values, such as a declaration of human rights and fundamental freedoms, few individuals, much less civil servants subject to the censure of elected officials, who are themselves subject to the censure of the electorate, are prepared to ignore a condemnation of their conduct which is deemed contrary to an accepted set of principles such as a *Bill of Rights*.

In considering this survey of the judicial application of the *Bill of Rights* one should recall that most of the opposition to the adoption of the Canadian *Bill of Rights*, either as originally enacted while Mr. Diefenbaker was Prime Minister, or as currently proposed by Prime Minister Trudeau by way of a new Charter of Human Rights which would be entrenched in the written part of our Constitution to bind not only Parliament but the provincial legislatures as well, is based upon a distrust of the judiciary. The fear seems to be that a Supreme Court would become activist and conservative, like the United States Supreme Court from 1890 to 1937, introducing a wide substantive due process interpretation,

or activist and liberal, like the Warren court in the United States in the 1960's and give an extensive procedural due process interpretation. However, the above survey of the judicial interpretation and application of the *Bill of Rights* in the past eleven years must certainly quiet most of these fears. There is no evidence thus far that our provincial courts of appeal, or the Supreme Court of Canada, are rending legislation inoperative because of excessive zeal to protect our civil liberties against the legislators and administrators of Canada.

Despite the *Drybones* decision, one cannot yet predict the wide application of the *Bill of Rights*. For one thing, it must be remembered that unless and until the provinces agree to a new *Bill of Rights* which would apply to them as well, only Parliament and the federal government are presently restrained. For another thing, it will still be a question of the scope of the definition which the Supreme Court chooses to give to the civil liberties concerned. The extreme caution of the Supreme Court of Canada in avoiding an activist role is illustrated in the case of *Walter et al.* v. *Attorney-General of Alberta*.[110] In this case the Supreme Court was concerned with the Alberta *Communal Property Act* [111] which limited the territorial area of communal land currently held by existing "colonies", and controlled the acquisition of lands by new colonies. In defining a "colony" the Act covered religious and other groups, but it specifically provided that it "includes Hutterites or Hutterian Brethren and Doukhobors". It was admitted that the legislation was prompted by large-scale landholdings by Hutterite colonies, and that the purpose of the legislation was to control the expansion of Hutterite colonies in Alberta. Nevertheless, the Supreme Court applied both the restrictive interpretation and the power allocation techniques to uphold the provincial legislation, rather than to rule it invalid. The Supreme Court decided that the purpose was economic, relating to property and civil rights, and was not intended to interfere with freedom of religion. It was, therefore, *intra vires* the provincial legislature.

As long, then, as the Canadian *Bill of Rights* does not extend so as to apply to the provinces, and as long as the Supreme Court of Canada continues in its cautious tradition, the fear is not that the judiciary will supplant the legislators as policy-makers in the field of civil liberties but rather that they will abdicate that minimum responsibility for protecting civil liberties which the Supreme Court did adopt during the Rand period in the 1950's.

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[110] [1969] S.C.R. 383, (1969), 3 D.L.R. (3d) 1.
[111] R.S.A. 1955, c. 52.