THE SUPREME COURT AND CIVIL LIBERTIES

W. S. TARNOPOLSKY*

To what extent has the Supreme Court of Canada tended to promote human rights and protect fundamental freedoms? This question is examined by looking at the bases on which the Supreme Court can protect civil liberties. In decisions prior to 1950 the author finds that the Supreme Court was not protective of "egalitarian" civil liberties. With respect to "political" civil liberties, the author finds the majority judgments of the Supreme Court of Canada of the 1950's inspiring. The enactment of the Canadian Bill of Rights in 1960 provided an important direction to the Court to protect civil liberties. The author feels that the Supreme Court has not yet satisfactorily responded to this direction. However, the Drybones *decision recognized the constitutional status of the Bill of Rights and the author supports the argument that it is a constitutional instrument.*

I. INTRODUCTION

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

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

You will note that I am confining myself to the political, legal, and egalitarian civil liberties, and will not be discussing the economic civil liberties. I exclude the latter from my consideration for two reasons. First, the economic civil liberties are, in my opinion, still in a rapid state of transition, so that there is not yet universal agreement as to what they are. And second, to the extent that there is agreement on such economic civil liberties as a right to protection for the economically weak against the economically powerful, from destitution due to a mishap, and the protection of a minimum standard of life, the active intervention of the State is required for their realization. For this purpose positive action by the legislative branch of government is required, and not the restraint which is the main weapon of the judicial branch. Moreover, the extent of protection that should be provided is a policy matter, which is eminently more appropriate for legislative determination than for judicial determination.

* Professor of Law, Osgoode Hall Law School of York University, Toronto.

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

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

Therefore, to sum up, I believe that the political civil liberties and the legal civil liberties and that part of the egalitarian civil liberties which is directed against official or state discrimination are eminently suitable for inclusion in a Bill of Rights. At the same time, I believe that the economic civil liberties are not, and I believe that the protection of the egalitarian civil liberties from private discrimination is better handled through an administrative agency. Also, largely because the legislature will ultimately have its way over the courts, and because civil liberties are best protected if the issues are clarified in a kind of public dialogue between the legislative and judicial branches of government, I believe a notwithstanding clause like the one in the present Bill of Rights may be the only restraint we need place on the legislature. I am not much concerned with the question of entrenchment against future deletion or amendment, because I

do not believe that any future Parliament would be moved to amend the Bill of Rights except to strengthen it, and if times are so changed that I am proved wrong, even the Supreme Court and a written Bill of Rights would not stop such a Parliament. The electorate will. If it does not, then we will be in such a changed situation that Bills of Rights and Supreme Courts will be irrelevant. I do believe that it is possible once again to have a Parliament (and public opinion supporting it) such as during World War II, which acted to deport the Japanese-Canadians from the west coast. However, even in the United States, the Bill of Rights and the Supreme Court did not stop such action. One must be realistic and understand that the most one can expect from a written Bill of Rights and judicial review is control of administrative and police action and the occasional invalidation of legislative action, subject to being overriden in the latter instance by a Parliament determined to have its way even in the face of a determination that its legislative acts are in contravention of civil liberties.

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

I will deal with the topic of "The Supreme Court and Civil Liberties" in two parts: In Part II I will consider how the Supreme Court dealt with egalitarian and political civil liberties before the enactment of the Canadian Bill of Rights. In Part III I will discuss the Supreme Court's interpretation of the Canadian Bill of Rights, particularly with respect to legal and egalitarian civil liberties.

II. JUDICIAL INTERPRETATION PROTECTIVE OF CIVIL LIBERTIES IN THE ABSENCE OF A WRITTEN BILL OF RIGHTS

In the absence of a written Bill of Rights, and in the face of the doctrine of Parliamentary Supremacy, the Supreme Court has available to it two interpretive techniques for the protection of civil liberties: The restrictive interpretation technique, and the power allocation technique.[1]

The restrictive interpretation technique arises out of the relationship between Parliament and the judiciary which we inherited from the United Kingdom whereby, because of the doctrine of Parliamentary Supremacy, the courts do not have the right to invalidate an Act of Parliament on the ground of its arbitrariness, or its alleged contravention of civil liberties. Nevertheless, the courts have used a principle of statutory construction 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 a 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 inter-

---

[1] Although these terms are now widely known and used, and their meaning is textually obvious, I have to acknowledge two excellent papers which first suggested them to me: Cavalluzzo, P., "Judicial Review and the Bill of Rights: Drybones and its Aftermath", (1971) *O.H.L.J.* 511; E. E. Dais, "Judicial Supremacy in Canada in Comparative Perspective: A Critical Analysis of Drybones", a paper presented at the Canadian Political Science Association Annual Meeting at Memorial University, Newfoundland, on June 8, 1971.

pretation urge them to protect civil liberties. I will show later that one of the best examples of this technique in expanding the scope of the fundamental freedom of speech was the case of *Boucher* v. *The King*.[2]

The power allocation technique is one we did not inherit from the United Kingdom, because it is applicable only in a federal system. Through this interpretive technique civil liberties can be promoted through the invalidation of legislation, or administrative action pursuant to it, on the ground that, because of the operation mainly of ss. 91 and 92 of the B.N.A. Act, the statute in question was not within the jurisdiction of the legislature concerned. The best-known illustration of this, which I will discuss subsequently, is the Supreme Court decision in *Switzman* v. *Elbling* (the *Padlock* case).[3] This interpretive technique has been used to invalidate provincial restrictions of civil liberties but, as is obvious, the result is that it expands the sphere of federal legislative jurisdiction, and provides no protection against infringement of civil liberties by Parliament. Nevertheless, until the provinces agree to the adoption of a written Bill of Rights binding not only Parliament but the provincial legislatures as well, occasions could well arise in the future where a Supreme Court would be moved to restrain provincial action and, where the restrictive interpretation cannot be used, will be induced to resort to the power allocation interpretation. Presumably, since there is a written Bill of Rights applying to Parliament, a "civil libertarian" court may well have further reason to restrain the provinces through the power allocation interpretation, at least until they adopt their own Bills of Rights.

1. Egalitarian Civil Liberties

Before the enactment of the Canadian Bill of Rights in 1960, the Supreme Court was faced with egalitarian issues in four main cases: *Quong-Wing* v. *The King*,[4] *Reference re Meaning of Word 'Persons' in Section 24 of the B.N.A. Act*,[5] *Christie* v. *The York Corporation*,[6] and *Noble and Wolfe* v. *Alley*.[7]

The first time the Supreme Court of Canada was faced with legislation having a racial focus was *Quong-Wing* v. *The King*. Quong-Wing was convicted for employing white, female servants contrary to the provisions of s. 1 of the Saskatchewan "Act Respecting the Employment of Female Labour in Certain Capacities",[8] which provided:[9]

> No person shall employ in any capacity a white woman or girl or permit any white woman or girl to reside or lodge in or to work in or, save as a bona fide customer in a public apartment thereof only, to frequent any restaurant, laundry or other place of business or amusement owned, kept or managed by any Chinaman.

---

[2] [1961] S.C.R. 265.

[3] [1957] S.C.R. 285.

[4] [1914] 49 S.C.R. 440.

[5] [1928] S.C.R. 276.

[6] [1940] S.C.R. 139.

[7] [1951] S.C.R. 64.

[8] S.S. 1912, c. 17.

[9] The Act originally referred to "Japanese or other oriental person" as well, but this was deleted the following year (S.S. 1912-13, c. 18) following representations by the Japanese Government. There is an exchange of correspondence after the amendment between the Japanese Consul-General in Vancouver and the office of Premier Walter Scott which indicates this: *Scott Papers*, Provincial Archives, Saskatoon, 45 991 and 45 992.

The Supreme Court of Saskatchewan upheld the conviction, and Quong-Wing appealed to the Supreme Court on the basis that the Act in question was *ultra vires* the provincial legislature. The Supreme Court, with only Idington J. dissenting, dismissed his appeal.

In order to understand the options open to the Supreme Court it is necessary to refer to two earlier decisions of the Judicial Committee of the Privy Council, which were not actually acknowledged by the Judicial Committee to involve civil liberties, but which in retrospect, and in the light of present values, clearly do.

The first of these is *Union Colliery Co. of British Columbia* v. *Bryden*.[10] At issue was the constitutional validity of an 1890 amendment to the British Columbia Coal Mines Regulation Act, which amendment added the italicized words "and no Chinaman" to s. 4 thereof:

> No boy under the age of 12 years, and no woman or girl of any age, *and no Chinaman*, shall be employed in or allowed to be, for the purpose of employment in any mine to which the Act applies, below ground.

As on other occasions, the Judicial Committee made it clear that it was not concerned whether the exercise of legislative power was "discreet", and reaffirmed that "courts of law have no right whatever to inquire whether [the] jurisdiction has been exercised wisely or not".[11] Their Lordships indicated that the legislation might have been valid as coming within provincial undertakings in s. 92(10) of the B.N.A. Act or "Property and Civil Rights in the Province" in s. 92(13), if it were not for the fact that the subject-matter of the legislation was found to come within "naturalization and aliens" in s. 91(25) and thus, by the concluding paragraph of s. 91, within the exclusive jurisdiction of Parliament.

The Judicial Committee had no difficulty in finding that "the leading feature of the enactments" was that they had:[12]

> no application except to Chinamen or aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens as naturalized subjects shall not work, or be allowed to work, in underground coal mines within the province of British Columbia.

In their Lordships' opinion, "the whole pith and substance" of the provision in question "consists of establishing a statutory prohibition which affects aliens or naturalized subjects". Since they could "see no reason to doubt that", by s. 91(25), Parliament "is vested with exclusive authority in all matters which directly concern the rights, privileges and disabilities of the class of Chinamen who are resident in the provinces of Canada", they found these enactments to "trench upon the exclusive authority of the Parliament of Canada", and therefore the provisions in question were "insofar as they relate to Chinamen, *ultra vires* of the provincial legislature, and therefore illegal".[13]

In the course of their judgment their Lordships did not feel it necessary to consider the precise meaning of the term "naturalization", and therefore their statement on the matter is clearly *obiter*. Nevertheless, it is interesting to note that they suggested that s. 91(25) "might possibly be construed" as conferring on the Parliament of Canada ['the exclusive right to legislate for'] naturalized aliens after naturalization. They state:[14]

---

[10] [1899] A.C. 580.

[11] *Id.* at 585.

[12] *Id.* at 587.

[13] *Id.* at 587-8.

[14] *Id.* at 586.

> The subject of 'naturalization' seems *prima facie* to include the power of enacting what shall be the consequences of naturalization, or, in other words, what shall be the rights and privileges pertaining to residents in Canada after they have been naturalized.

Although the above statement, as mentioned earlier, is clearly *obiter*, their Lordships went on in reference to the specific matter before them to state that:[15]

> Their Lordships see no reason to doubt that, by virtue of s. 91, sub-s. 25, the legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges, and disabilities of the class of Chinamen who are resident in the provinces of Canada.

The mere fact that the federal Naturalization Act of 1886 exercised only partial control over the rights of aliens did not mean that the provincial legislature could:[16]

> legislate for the exclusion of aliens being Chinamen from underground coal mines. The abstinence of the Dominion Parliament from legislating to the full limit of its powers, could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91 of the Act of 1867.

Therefore, their Lordships advised, the provisions of s. 4 of the British Columbia Coal Mines Regulation Act, 1890, "were, insofar as they relate to Chinamen, *ultra vires* of the provincial legislature, and therefore illegal".

This last-quoted statement was the subject of re-examination in the case of *Cunningham and A.-G. for British Columbia* v. *Tomey Homma and A.-G. for Canada*.[17] Section 8 of the Elections Act of British Columbia[18] provided that:

> No Chinaman, Japanese or Indian shall have his name placed on the register of voters for the electoral district, or be entitled to vote at any election . . . .

Section 3 defined the expression "Japanese" as meaning "any native of the Japanese Empire or its dependencies not born of British parents, and shall include any person of the Japanese race naturalized or not". Tomey Homma, who was a native of the Japanese Empire, and not born of British parents, but was a naturalized British subject, applied to have his name placed on the register, and was refused. When the case reached the Judicial Committee its composition had changed totally except for Lord Macnaghten.

Once again, as in *Bryden's* case, the Judicial Committee declared that "the policy or impolicy of such an enactment as that which excludes a particular race from the franchise is not a topic which their Lordships are entitled to consider."[19] After reviewing the fact that "the extent to which naturalization will confer privileges has varied both in this country and elsewhere", and the fact that "from the time of William III down to Queen Victoria no naturalization was permitted which did not exclude the alien naturalized from sitting in Parliament or in the Privy Council",[20] their Lordships concluded that the term "political rights" used in the Canadian Naturalization Act[21]

> cannot be held to give necessarily a right to the suffrage in all or any of the provinces. In the history of this country the right to the franchise has been granted and withheld on a great number of grounds, conspicuously grounds of religious faith, yet no one has ever suggested that a person excluded from the franchise was not under allegiance to the Sovereign.

---

[15] *Id.* at 587.

[16] *Id.* at 587-8.

[17] [1903] A.C. 151.

[18] R.S.B.C. 1897, c. 67.

[19] *Supra*, n. 17 at 155.

[20] *Id.* at 156.

[21] *Id.*

Lord Halsbury, who delivered the judgment, then asked the rhetorical question: "Could it be suggested that the Province of British Columbia could not exclude an alien from the franchise in that province?" From this he went on to assert: "Yet, if the mere mention of alienage in the enactment could make the law *ultra vires*, such a construction of s. 91, sub.-s. 25, could involve that absurdity."[22] Therefore, he concluded that:[23]

> The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion — that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as to which consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality.

Having come to the conclusion that the Board in the case of *Bryden* was wrong on the issue of legislative jurisdiction with respect to *consequences* of alienage or naturalization, but without being able to say so, Lord Halsbury had to distinguish the earlier decision. He did so upon the ground that the *Bryden* case "depended upon totally different grounds".[24] In his opinion the regulations in the earlier case

> were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province. It is obvious that such a decision can have no relation to the question whether any naturalized person has an inherent right to the suffrage within the province in which he resides.[25]

With this background, then, we can return to the analysis of the Supreme Court decision in *Quong-Wing* v. *The King*.[25a]

The Chief Justice, Sir Charles Fitzpatrick, unlike all the other judges, apparently did not feel it necessary to refer either to the *Bryden* case or the *Tomey Homma* case. He stated that the Saskatchewan provision purported to regulate the places of business owned by Chinese "independent of nationality in the interest of the morals of women and girls in Saskatchewan".[26] He compared this legislation to factory Acts which require proper accommodation for workmen, and which tended to safeguard "the bodily health" and the "morals" of Canadian workers.[27] And he failed "to understand the difference in principle between that legislation and this". He likened the provision as well to legislation permitting municipalities to make regulations to prevent disorders on Sundays, and to close drinking places at certain hours. The difference between the Act in question, and such legislation, he stated: "was one of degree, not of kind".[28] Although he acknowledged that the classes from which a Chinaman could select his employees were limited, "the Chinaman is not deprived of the right to employ others". He concluded, therefore, that the legislation "may affect the civil rights of Chinamen, but it is primarily directed to the protection of children and girls".[29]

---

[22] *Id.*

[23] *Id.* at 156-7.

[24] *Id.* at 157.

[25] *Id.*

[25a] *Supra*, n. 4.

[26] *Id.* at 444.

[27] *Id.*

[28] *Id.* at 445.

[29] *Id.* at 444.

Mr. Justice Davies (with whom Anglin J. concurred) had no doubt that the legislation "seriously affects the civil rights of the Chinamen in Saskatchewan, whether they are aliens or naturalized British subjects".[30] However, like the Judicial Committee in the earlier cases, he felt that the question "is not one as to the policy or justice of the Act in question".[31] Although he thought that the *Bryden* case might have led him to conclude that the legislation at bar was *ultra vires*, he felt that the *Tomey Homma* case had "modified" the *Bryden* decision. He referred to the passage in Lord Halsbury's judgment that the power under s. 91(25) did not include the power to deal "with the consequences of either alienage or naturalization",[32] and with that view he felt that he was "relieved from the difficulty I would otherwise feel."[33] Emphasizing again that regardless of how "harshly [the legislation] might bear upon Chinamen, *naturalized or not*", he felt there was nothing in the B.N.A. Act "which says that such legislation may not be class legislation."[34] He went on to distinguish the pith and substance of the legislation before him from that of the *Bryden* case by stating that: "Its object and purpose is the protection of white women and girls"[35] and did not "come within the class of legislation or regulation which the Judicial Committee held *ultra vires* of the provincial legislatures in the case of *The Union Collieries* v. *Bryden*."[36] There was no doubt in his mind that "the prohibition is a racial one" and that it "does not cease to operate because a Chinaman becomes naturalized."[37] He concluded in the following terms:[38]

> In other words, it was not aimed at any class of Chinamen, or at the political status of Chinamen, but at Chinamen as men of a particular race or blood, and whether aliens or naturalized.

The judgment of Duff J. is particularly interesting not only because he was the only member of the court in the *Quong-Wing* case who also sat in the *Edwards*[38a] case and *Christie* v. *The York Corporation*,[38b] but also because he is probably considered to be the most influential member in the history of the Supreme Court of Canada.[39]

He reasoned, in a manner similar to that adopted in the later case of *Bédard* v. *Dawson*,[40] that legislation dealing with employment in a particular occupation on grounds affecting the public health, public morality, or public order from the "local and provincial point of view" could fall within s. 92(16), and that it was not criminal law legislation merely because it consisted "of a prohibition and of clauses for prescribing penalties for the non-observance of

---

[30] *Id.* at 445.

[31] *Id.*

[32] *Supra*, n. 23.

[33] *Supra*, n. 4, at 447.

[34] *Id.* at 448.

[35] *Id.*

[36] *Id.* at 449.

[37] *Id.* at 450.

[38] *Id.*

[38a] *Supra*, n. 5.

[38b] *Supra*, n. 6.

[39] For a recent assessment of Sir Lyman Duff, which is both excellent and sympathetic to him, see Gerald Le Dain, "Sir Lyman Duff and the Constitution", (1974) 12 *O.H.L.J.* 261, and references therein to other articles about Sir Lyman.

[40] [1923] S.C.R. 681.

the substantive provisions."[41] The real question, he felt, was whether the Act could be *ultra vires* because it was in relation to a matter within s. 91(25).

Like Davies J., he felt that the legislation applied equally to all Chinese whether aliens, naturalized or natural-born. The Legislature, he said, was dealing with classes of persons not according to nationality, "but as persons of a certain origin, or persons having certain common characteristics and habits sufficiently indicated by the language used."[42] He distinguished the *Bryden* case by saying that is was "impossible to affirm that [the legislation in question] establishes a new rule or regulation at all comparable to the regulations of the character [in the *Bryden* case]".[43] He felt that it would "be going quite beyond what is warranted by anything like a fair reading of the statute before us to say that" as Lord Watson had in the *Bryden* case, "it establishes no rule or regulation except a rule or regulation laying the prohibition upon aliens who are naturalized subjects."[44] He does not indicate how he found the two statutes different, unless his justification was, as he went on to say, that the legislation before him did not prohibit Chinese from carrying on any of the establishments mentioned in the statute:[45]

> It would require some evidence of it to convince me that the right and opportunity to employ white women is, in a business sense, a necessary condition for the effective carrying on by Orientals of restaurants, laundries and like establishments in the western provinces of Canada. Neither is it any ground for supposing that this legislation is designed to deprive Orientals of the opportunity of gaining a livelihood.

Since he came from British Columbia, and must have been aware of the attitudes of British Columbians towards Orientals, and the extent to which the provincial and municipal governments were prepared to try to drive them out of the province, it comes as no surprise that in his opinion the Legislature was dealing 'with a strictly local situation":[46]

> In the sparsely inhabited Western provinces of this country the presence of Orientals in comparatively considerable numbers not infrequently raises questions for public discussion and treatment, and, sometimes in an acute degree, which in more thickly populated countries would excite little or no general interest. One can without difficulty figure to one's self the considerations which may have influenced the Saskatchewan Legislature in dealing with the practice of white girls taking employment in such circumstances as are within the contemplation of this Act; considerations, for example, touching the interests of immigrant European women, and considerations touching the effect of such a practice upon the local relations between Europeans and Orientals; to say nothing of considerations affecting the administration of the law. And, in view of all this, I think, with great respect, it is quite impossible to apply with justice to this enactment the observation of Lord Watson in the *Bryden* case that "the whole pith and substance of it is that it establishes a prohibition affecting" Orientals. For these reasons, I think, altogether apart from the decision in *Cunningham* v. *Tomey Homma*, to which I am about to refer, that the question of the legality of this statute is not ruled by the decision in *Bryden's* case.

Not content with distinguishing the case before him from *Bryden's* case, Duff J. felt he was supported in his conclusion by the *Tomey Homma* decision. Although he did admit that "the legislation their Lordships had to examine in the last-mentioned case, it is true, related to a different subject-matter", nevertheless he felt moved to affirm the restriction upon *Bryden's* case on the point that s. 91(25) did not deal with "the consequences of that alienage or naturaliza-

---

[41] *Supra*, n. 4 at 462.

[42] *Id.* at 463.

[43] *Id.* at 465.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 465-6.

tion".[47] Any contention that this particular passage in the *Tomey Homma* case was obiter, and inconsistent with certain passages in *Bryden's* case, was, in his opinion, completely answered by that part of Lord Halsbury's judgment which distinguished *Bryden* on the ground that the legislation in that case was "in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province". That was the interpretation of *Bryden's* case which Mr. Justice Duff claimed appeared to him "to be our duty to accept".[48]

He finished his judgment with a further rationalization which does not seem to have been raised in the two earlier cases. This was that regardless of what "rights, powers and privileges" the Canadian Naturalization Act conferred on naturalized citizens, it could not confer "a status in which they are exempt from the operation of laws passed by provincial legislatures",[49] and which applied to native-born subjects in the same manner as to naturalized subjects and aliens. If the legislation had been confined to Orientals who were native-born British subjects, he felt it would be impossible to argue that there was any invasion under s. 91(25). It seemed to him impossible to assert "that this legislation deprives any Oriental, who is a naturalized subject, of any of the 'rights, powers and privileges' in which an Oriental, who is a native-born British subject, is allowed to exercise or retain."[50]

In his dissenting judgment, Idington J. was the only one who recognized that although the Act, by its title, referred to female labour and dealt only with the case of white women, "in truth its evident purpose is to curtail or restrict the rights of Chinamen". Unlike the others, he distinguished between "political rights" and other rights. "Political rights", he acknowledged, could be limited and varied by the Legislature of the province, even if it amounted to discrimination in favour of one section or class as against the other.[51] However, he asserted that:[52]

> the 'other rights, powers and privileges' (if meaning anything) of natural-born British subjects to be shared by naturalized British subjects, do not so clearly fall within the powers of the Legislature to discriminate with regard to as between classes or sections of the community.

He went on to make a declaration which the Supreme Court was not able to bring itself to, even on the eve of World War II:[53]

> It may well be argued that the highly-praised gifts of equal freedom and equal opportunity before the law, are so characteristic of the tendency of our British modes of thinking and acting in relation thereto, that they are not to be impaired by the whims of any Legislature; and that equality taken away unless and until forfeited for causes which civilized men recognize as valid.

He felt that the federal power over naturalization of aliens "implied the power to guarantee to all naturalized subjects that equality of freedom of opportunity to which I have adverted."[54] [It was not until Mr. Justice Rand

---

[47] *Id.* at 466.

[48] *Id.* at 468.

[49] *Id.* at 469.

[50] *Id.*

[51] *Id.* at 451.

[52] *Id.* at 452.

[53] *Id.*

[54] *Id.*

did so in 1951 in the *Winner*[54a] case, that a like egalitarian declaration was made in the Supreme Court of Canada.]

Referring to the *Bryden* and *Tomey Homma* cases, Idington J. observed that the former touched more directly the point involved in the case before him:[55]

> What was clearly decided in the first case was that such comprehensive language as used in the regulation in question and, I rather think, aimed chiefly at alien Chinamen, was *ultra vires,* and, in the other, that the political right to vote was something within the express power of the Legislature to give or withhold or restrict as it should see fit. This latter point in no way touches what is raised herein.
> . . . I submit that the *obiter dictum* [regarding the restriction of the federal power over naturalization and aliens] although it was intended to be treated or taken in the sense now sought to be attributed to it, and, in bearing such implication, that it is not maintainable.

In a rather interesting fashion, he concluded his judment by reasoning that the Legislature could not possibly have intended to refer to naturalized Chinamen. After all, he argued, before a person becomes naturalized "he has presumably been certified to as a man of good character" and therefore enjoyed equal treatment with other subjects. In the light of this, he said that he would not "willingly impute an intention to the Legislature to violate that assurance".[56] He declared:[57]

> Indeed, in a piece of legislation alleged to have been promoted in the interests of morality, it would seem a strange thing to found it upon a breach of good faith which lies at the root of nearly all morality worth bothering one's head about.

Therefore, he felt that the Act should be construed as being applicable only to those Chinamen who had not become naturalized British subjects, and therefore was not applicable to the appellant who had become a British subject. Nevertheless, he felt that the jurisdiction of Parliament under s. 91(25) was paramount over any possible provincial jurisdiction in this area, and concluded by saying that he felt bound by the *Bryden* decision as the like term "Chinamen" was used in the case before him and in that case.

I believe that the Supreme Court in the *Quong-Wing* case could have come down on the side of egalitarianism. It could easily and rationally have distinguished the Saskatchewan Act from the British Columbia Act in the *Tomey Homma* case, and likened it to the British Columbia legislation in the *Bryden* case, even within the terms of the *Tomey Homma* reinterpretation of the *Bryden* case.

Let us turn first to the "pith and substance" of the legislation as found by the majority. Both the Chief Justice and Davies J. found that although the legislation affected the civil rights of Chinamen, it was primarily directed to the protection of white women and girls. Although Duff J. did not expressly make the same statement, his long description of the "strictly local situation" which in his opinion the Saskatchewan Legislature faced, meant that he considered the object of protection at least as some rationalization for the legislation. However, if one looks at the arguments in the *Bryden* case in support of the British Columbia legislation, one can see that one of the strongest was that the legislation was designed for the protection of other (obviously white) workers in the mines. Considering that work in mines was in confined quarters, where difficulty of communication with Chinese who probably did not have the opportunity to learn the English language, contained greater potential of danger

---

[54a] [1951] S.C.R. 887.

[55] *Supra,* n. 4 at 454.

[56] *Id.* at 455.

[57] *Id.* at 456.

than whatever the legislators contemplated the Chinese might do in a restaurant or a laundry, then surely protection of others could have been more rationally upheld in *Bryden* than in *Quong-Wing*. And yet, the Judicial Committee in the *Bryden* case had no difficulty in finding that "the leading feature of the enactment" was that it had "no application except to Chinamen who are aliens or naturalized subjects".[58]

That this, and not protection of white women and girls, was the chief object in *Quong-Wing* was readily recognized by Idington J., and even by Davies J., who was obviously "relieved from the difficulty I would otherwise feel"[59] because he did not have to deal with the "policy or justice" involved. And yet, both the Chief Justice and Duff J. could conclude, to use Mr. Justice Duff's words, that there was *no* "ground for supposing that this legislation is designed to deprive Orientals of the opportunity of gaining a livelihood".[60] The Chief Justice felt that the Chinese were not deprived of the right to employ others, and Mr. Justice Duff said he needed evidence to convince him that "the right and opportunity to employ white women is, in a business sense, a necessary condition for the effective carrying on by Orientals of restaurants, laundries and like establishments in the western provinces of Canada."[61]

Perhaps the Chief Justice, unlike Duff J., did not come from a part of Canada where Orientals constituted a significant portion of the population, or he might have known, as no doubt Duff J. did, that if a Chinese restaurant owner could not employ white females, there were no Chinese females for him to employ, because they were not permitted to immigrate to Canada. In view of the kind of mentality which led to the enactment of this kind of legislation, could one seriously expect that the Chinese could employ white men? One presumes that the legislative and judicial establishment reasoned that, since employment opportunities of Chinese were being restricted anyway, the Chinese restaurant or laundry owner could easily have found a surplus of Chinese male labourers, and obviously did not need to hire white females! If he did hire them, he must have other purposes in mind!

Nevertheless, even if one could not expect the majority to take the same egalitarian view of the case that Idington J. did, there is still the question whether the Saskatchewan case was more analagous to *Bryden* or to *Tomey Homma*. Both Davies J. and Duff J., who referred to these decisions, felt bound by the later case on the ground that the federal power under s. 91(25) did not include the power to deal "with the consequences of either alienage or naturalization". But, strictly speaking, that particular comment on the scope of s. 91(25) was *obiter in* both earlier decisions. *The Tomey Homma* case did not deal with all consequences of naturalization, except the privilege of the franchise, any more than the *Bryden* case dealt with all consequences of alienage or naturalization, other than employment. In fact, in *Tomey Homma* the Board acknowledged that "the right of protection" was necessarily involved in the nationality conferred by naturalization, but found that "the privileges attached to it" *i.e.*, the franchise, are "quite independent of nationality".[62] In any case, in *Tomey Homma* their Lordships, in distinguishing the case before them from the *Bryden* case, stated that the latter had held provincial legislation to

---

[58] *Supra*, n. 12.

[59] *Supra*, n. 4 at 447.

[60] *Id.* at 465.

[61] *Id.*

[62] *Supra*, n. 17 at 157.

be invalid because it was devised "to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province".[63] Surely, the British Columbia legislation, in barring Chinese from working in underground mines, was no more and no less effective in prohibiting the continued residence of Chinese in that province or in earning their living there, than the Saskatchewan legislation was in doing the same. In the *Quong-Wing* case the Supreme Court of Canada could easily have distinguished the *Tomey Homma* case on the ground that it dealt with the provincial franchise, a matter not essential to the earning of one's livelihood, a matter which we today consider a right, but which has for centuries been considered a privilege and withheld not only from naturalized citizens, but even from women until after World War I. It was a matter clearly within s. 92(1) of the B.N.A. Act, whereas the matter of employment is regulated either by the provinces or the federal government, depending partly upon the enterprise involved, and in some cases, as with "Indians" and with "aliens" it could be subject to the jurisdiction of Parliament.

One suspects that what the majority in the Supreme Court could not rationalize was what both Davies J. and Duff J. recognized, *i.e.*, that the legislation was intended to apply to all Chinese whether aliens, naturalized, or natural-born. If they had held that the Saskatchewan Legislature could not restrict aliens or naturalized subjects, because of s. 91(25), whereas no such restriction stood in their way to affect the rights of Canadian-born Chinese, one could have had the anomaly of protection for the former, and not for the latter. Perhaps, if the majority had been concerned with "equal opportunity before the law" as was Idington J., the anomaly created by such a decision might have been better in any case in speeding up change. On the other hand, the Supreme Court could have applied the *Bryden* case, in the light of the interpretation given to it in the *Tomey Homma* case, to conclude that anyone within the country, whether born here, or whether permitted to come here as an alien, or whether staying here as a naturalized Canadian, could not be prohibited from residing in any province he or she chose, or from earning a fair living in any province. That interpretation was possible even in the light of the *Tomey Homma* case.

One does not know what the Judicial Committee might have said if *Quong-Wing* had been decided otherwise in the Supreme Court and appealed. However, since even before the *Quong-Wing* case the legislation had been amended to delete the original reference to Japanese, and since representation by the Chinese government during World War I led to changes in the Act by 1919,[64] perhaps the Saskatchewan government would have accepted a Supreme Court decision holding the legislation *ultra vires*, and a very different attitude might have been fostered.

The next time that the Supreme Court of Canada was faced with an issue involving egalitarian civil liberties, but this time from the point of view of equality of sex, rather than of race, was in *Re Meaning of Word 'Persons' in Section 24 of the B.N.A. Act* (the *Edwards* case).[65] Pursuant to a petition by

---

[63] *Id.*

[64] S.S. 1918-19, c. 85, s. 3, replaced by an Act in which reference to Chinese was deleted: S.S. 1918-19, c. 85.

[65] *Supra*, n. 5.

five leading suffragettes, submitted on October 18, 1927, the government referred the following question to the Supreme Court:

> Does the word 'Persons' in s. 24 of the British North America Act, 1867, include female persons?

The Supreme Court (Anglin C.J.C. and Duff, Mignault, Lamont and Smith JJ.) unanimously rendered a negative answer.
Section 24 of the B.N.A. Act provided:

> The Governor-General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate . . . .

All of the judges, except Duff J., devoted themselves to deducing whether the term "qualified Persons" in s. 24 included women in 1867. In a foretaste of the approach used by a later Supreme Court in attempting to define the terms used in the *Canadian Bill of Rights*, the Justices felt that the term had to bear the same construction in 1928 that the Courts would have given to the term if they had been required to pass upon it when first enacted. I will not attempt to summarize the long judgment of Anglin C.J.C. in which he showed that women were not intended to be included in the term "qualified Persons" in 1867. I will not refer, either, to a long judgment of Mr. Justice Duff who in effect came to the same conclusion, although he did not feel it necessary to decide whether women were included or excluded from the term "qualified Persons"; rather he based his judgment upon the inference in the B.N.A. Act that the Senate had to be the same in principle as the Legislative Councils established under the Constitutional Act of 1791 and the Act of Union of 1840. Under those statutes, it was clear that women were not eligible for appointment.

On the other hand, when the case came before the Judicial Committee of the Privy Council, as *Edwards* v. *Attorney-General for Canada*,[66] the Lord Chancellor, Lord Sankey, after summarizing the views of the Justices of the Supreme Court, flatly replied:[67]

> Their Lordships are of the opinion that the word 'Persons' in s. 24 does include women, and that women are eligible to be summoned to and become members of the Senate in Canada.

In terms which might have suggested themselves to the judges of the Supreme Court, but did not, Lord Sankey asserted:[68]

> The exclusion of women from all public offices is a relic of days more barbarous than ours, but it must be remembered that the necessity of the times often forced on men customs which in later years were not necessary.

He went on to review the cases referred to by the Supreme Court of Canada, as well as to the legislative history of the governments of the colonies which eventually federated into Canada, but since he felt that the word was ambiguous, and "in its original meaning would undoubtedly embrace members of either sex",[69] he felt that an appeal to history was not conclusive, and went on:[70]

> Over and above that, their Lordships do not think it right to apply rigidly to Canada of today the decisions and the reasons therefor which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries, to countries in different stages of development.

---

[66] [1930] A.C. 124.

[67] *Id.* at 127.

[68] *Id.* at 128.

[69] *Id.* at 134.

[70] *Id.* at 134-5.

Lord Sankey continued with advice that could be heeded even today:[71]

> Referring therefore to the judgment of the Chief Justice and those who agreed with him, their Lordships think that the appeal to Roman law and to early English decisions is not of itself a secure foundation on which to build the interpretation of the British North America Act of 1867.

He continued in terms that are often forgotten both by his successors and the members of subsequent Supreme Courts of Canada:[72]

> The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits . . . .
> Their Lordships do not conceive it to be the duty of this Board — it is certainly not their desire — to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the provinces to a great extent, but within certain fixed limits, are mistresses in theirs.

He went on to quote from a leading Canadian constitutionalist, Clement, that the B.N.A. Act "should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the subject with which it purports to deal in very few words".[73]

The word "person", Lord Sankey said, may include members of both sexes, and to those who would ask why the word should include females "the obvious answer is, why should it not?"[74] In these circumstances, he said, "the burden is upon those who deny that the word includes women to make out their case".[75] After looking at the sections which dealt with the Senate as a whole, (ss. 21 - 36), his Lordship was unable to say "that there is anything in those sections themselves upon which the Court would come to a definite conclusion that women are to be excluded from the Senate."[76] He went on to show that there were sections in the B.N.A. Act, such as 41 and 84, dealing with the franchise in the House of Commons, and in the Quebec Legislature respectively, which make reference to male subjects in contradistinction to the term "person". The Judicial Committee concluded that for all the textual reasons summarized, as well as "to the object of the Act — namely, to provide a Constitution for Canada, a responsible and developing State",[77] the word "persons" in s. 24 includes members both of the male and female sex.

There is no need to add any comment to those of the Judicial Committee of the Privy Council to indicate how unimaginative the Supreme Court was in its textual rigidity. The decision of Lord Sankey in itself indicates the heights to which the Supreme Court might have reached, but didn't.

Just before World War II, in May, 1939, the Supreme Court of Canada was again faced with an issue involving egalitarian civil liberties in the case of *Christie* v. *York Corporation*.[78] Christie was a black man (described by counsel for the respondent as "not extraordinarily black"), who was a season-subscriber to the Montreal Forum, in which building the respondent operated a beer tavern. The appellant had often, while attending the hockey matches,

---

[71] *Id.* at 135.

[72] *Id.* at 136.

[73] *Id.* at 137.

[74] *Id.* at 138.

[75] *Id.*

[76] *Id.* at 141.

[77] *Id.* at 143.

[78] [1940] S.C.R. 139.

bought beer in the respondent's tavern. On the particular evening in question, the appellant entered the tavern with two friends, one white and the other "coloured", placed his money on the table, and asked for three steins of beer. The waiter declined to serve him, and stated that he was instructed "not to serve coloured people".[79] The appellant and his friends then spoke to the manager who affirmed the reason for refusal. The appellant then telephoned the police, and the manager repeated to the police the refusal that he had previously made. Thereupon the appellant and his friends left the premises of their own accord. In delivering the judgment on behalf of himself and of Duff C.J., and Crocket and Kerwin JJ., Mr. Justice Rinfret emphasized that the refusal was made "quietly, politely and without causing any scene or commotion whatever". He stated that "if any notice was attracted to the appellant on the occasion in question, it arose out of the fact that the appellant persisted in demanding beer after he had been so refused and went to the length of calling the police, *which was entirely unwarranted by the circumstances*".[80] [emphasis my own]

Prior to this decision there had been a number of decisions of lower courts in Ontario and Quebec regarding the matter of refusal of services to blacks. The earliest of these, *Johnson* v. *Sparrow et al*,[81] was concerned with an action for damages, including compensation for injury to feelings, for refusal to permit the plaintiff and a lady friend to occupy seats in the orchestra section in the theatre known as the Academy of Music in Montreal. Mr. Justice Archibald referred to earlier English cases which had held that a hotel-keeper is bound to receive every traveller, until his hotel is full, unless he can show good cause for refusal. He felt that the only possible difference, namely the urgent need of travellers for accommodation, was not a difference of kind, but of degree. Since both theatres and hotels receive a license from the municipal authority to do business, he felt this constituted a privilege which the public granted to the licensees, and therefore the public ought to receive a corresponding benefit. In his words:[82]

> . . . [A] theatre is licensed by public authority for the use of the public, and is not so far a strictly private enterprise as to justify the owner to admit one and exclude another member of the public at his will . . . .

He granted judgment to the plaintiff of $50 and costs.

Considering the date of the decision, coming some fifteen years before *Quong-Wing* v. *The King*, it is interesting to note the response of Archibald J. to a contention that the regulation was reasonable:[83]

> . . . [T]he regulation in question is undoubtedly a survival of prejudices created by the system of negro slavery . . . . Our Constitution is and always has been essentially democratic, and does not admit of distinctions of races or classes. All men are equal before the law and each has equal rights as a member of the community . . . I should certainly hold any regulation which deprived negroes as a class, of privileges which all other members of the community had a right to demand, was not only unreasonable but entirely incompatible with our free democratic institutions.

On appeal the Court of Appeal affirmed[84] the lower court decision but on a different ground, *i.e.*, that there was an unconditional contract by which the two seats in the orchestra section had been leased to the respondent.

---

[79] *Id.* at 141.
[80] *Id.*
[81] [1899] Q.R.C.S. 104.
[82] *Id.* at 112.
[83] *Id.* at 107.
[84] (1899) Q.R. 8 B.R. 379.

Some twenty years later, in the case of *Loew's Theatres* v. *Reynolds*,[85] the Quebec Court of Appeal faced almost exactly the same set of facts as in *Johnson* v. *Sparrow*. The majority of the Quebec Court of Appeal held that although a ticket to a specific seat could not be revoked, in the case of a general ticket for admission the management of a theatre could impose restrictions and make rules which would deny to persons, because of their colour, admission to any particular part of the theatre. In the course of his decision Chief Justice Lamothe said:[86]

> Alors, chaque propriétaire est maître chez lui; il peut, à son gré, établir toutes règles non contraires aux bonnes moeurs et à l'ordre public. Ainsi, un gérant de théâtre pourrait ne recevoir que les personnes revêtues d'un habit de soirée. La règle pourrait paraître arbitraire, mais elle ne serait ni illégale ni prohibée.

An Ontario case, which had considered discrimination in the provision of services in a restaurant, was *Franklin* v. *Evans*.[87] The plaintiff in this case had asked to be served lunch in the defendant's restaurant, and was refused by the girl serving the table on the grounds that "they did not serve coloured people". The defendant confirmed the previous refusal before a police officer. In the words of Mr. Justice Lennox, "he certainly was not as humane or considerate as he might well have been".[88] In fact, he was probably "unpardonably offensive".[89] Although Mr. Justice Lennox claimed that he "could not but be touched by the pathetic eloquence of [the plaintiff's] appeal for recognition as a human being, of common origin with ourselves", yet nevertheless he denied the claim. He compared a restaurant keeper to a proprietor of a department store, being different from hotel-keepers, "who, in consideration of the grant of a monopoly or quasi-monopoly, take upon themselves definite obligations, such as supplying accommodation of a certain character, within certain limits, and subject to recognized qualifications, to all who apply".[90] The most that Lennox J. felt moved to do was to dismiss the action without costs because of the "unnecessarily harsh, humiliating and offensive attitude of the defendant and his wife toward the plaintiff".[91]

In *Christie* v. *The York Corporation* the Supreme Court considered only the last two cases, and no reference was made to *Johnson* v. *Sparrow*, probably because it was assumed that that decision was overruled by *Loew's* case. On behalf of the majority Rinfret J. rejected Christie's claim on two grounds. The first was that "the general principle of the law of Quebec was that of complete freedom of commerce".[92] Thus, he said:[93]

> Any merchant is free to deal as he may choose with any individual member of the public. It is not a question of motives or reasons for deciding to deal or not to deal; he is free to do either. The only restriction to this general principle would be the existence of a specific law, or, in the carrying out of the principle, the adoption of a rule contrary to good morals or public order.

---

[85] (1921) Q.R. 30 B.R. 459.

[86] *Id.* at 460.

[87] (1924) 55 O.L.R. 349.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 350.

[91] *Id.* at 352.

[92] *Supra*, n. 78, at 142.

[93] *Id.*

Like Chief Justice Lamothe in *Loew's* case some twenty years earlier, Rinfret J. felt that it could not "be argued that the rule adopted by the respondent in the conduct of its establishment was contrary to good morals or public order".[94]

On the second ground ,namely that the sale of beer in Quebec was either a monopoly or a privileged enterprise which should offer services equally to everybody, he also rejected the contention of the appellant. Although s. 33 of the Quebec Licence Act provided that "No licensee for a restaurant may refuse, without reasonable cause, to give food to travellers", Rinfret J. felt it did not apply in this case because a "tavern" is not a "restaurant", because "beer" is not "food", and the appellant was not a "traveller".[95] Therefore, he asserted, there was no specific law to restrict or conradict the general principle of the freedom of commerce.

In his dissenting judgment Mr. Justice Davis argued that since under the law of Quebec the province had taken complete control of the sale of liquor, and since a glass of beer could only be bought from a person who had received a permit from the government to sell beer to the public, the sole question was "whether the respondent, having been given under the statute the special privilege of selling beer in the glass to the public, had the right to pick and choose those of the public to whom he would sell. In this case the refusal was on the ground of the colour of the person."[96] Since, according to Davis J., s. 43 of the Quebec Alcoholic Liquor Act had specifically named classes of persons to whom sale of alcoholic liquor was forbidden, and since this did not include the class of people distinguished by their colour, the question, he felt, was: "Has the licensee the right to set up his own particular code, or is he bound, as the custodian of a government permit to sell to the public, to sell to anyone who is ready to pay the regular price?"[97] After considering *Loew's* case and *Franklin* v. *Evans*,[98] as well as the English case of *Sealey* v. *Tandy*,[99] where it was held that the licensee of licensed premises had a right to request any person to leave whom he did not wish to remain upon his premises, he referred to two earlier cases cited in Volume 18 of Halsbury, where, after reference to *Sealey* v. *Tandy* these cases were cited to show that a "victualer" was in the same position as an innkeeper. By a dictionary definition he referred to a "victualer" as being one who sells food or drink to be consumed on the premises, *i.e.*, a publican.[100] Although he recognized that the authorities were divergent, he made his decision on the ground that the special legislation establishing complete government control of the sale of beer in the province, and the statutory prohibition against buying beer in the glass from anyone but a person having the special government privilege to sell, meant that the holder of such a government permit did not have the right of an ordinary trader to pick and choose those to whom he would sell. He went on:[101]

> In the changed and changing social and economic conditions, different principles must necessarily be applied to the new conditions. It is not a question of creating a new principle but of applying a different but existing principle of law. The doctrine that any

---

[94] *Id.* at 144.

[95] *Id.* at 144-5.

[96] *Id.* at 150.

[97] *Id.*

[98] *Supra*, n. 87.

[99] [1902] 1 K.B. 296.

[100] *Supra*, n. 78, at 152.

[101] *Id.* at 152-3.

> merchant is free to deal with the public as he chooses held a very definite place in the older economy and still applies to the case of an ordinary merchant. But when the State enters the field and takes exclusive control of the sale to the public of such a commodity as liquor, and the old doctrine of freedom of the merchant to do as he likes has in my view no application to a person to whom the State has given a special privilege to sell to the public.
>
> If there is to be exclusion on the ground of colour or of race or religious faith or on any ground not already specifically provided for by the statute, it is for the legislature itself, in my view, to impose such prohibitions under the exclusive system of governmental control of the sale of liquor to the public which it has seen fit to enact.

What can one add to the dissenting judgment of Davis J. except to say that, although it was in the spirit of Lord Sankey's statements in the *Edward's* case, it did not commend itself to the majority. It is no wonder, then, that the legislatures, with no aid from the judiciary, had to move into the field and start to enact anti-discrimination legislation, the administration and application of which has been largely taken out of the courts.

Prior to the enactment of the Canadian Bill of Rights the Supreme Court had one further occasion to consider discrimination, this time with respect to racially restrictive covenants, in *Noble and Wolfe* v. *Alley.*[102]

In an earlier case dealing with restrictive covenants, *Re Drummond Wren,*[103] Mr. Justice Mackay, of the Ontario High Court, declared that a covenant not to resell land to "Jews, or to persons of objectionable nationality", was invalid on the grounds that it was contrary to public policy, void for uncertainty, and for being a restraint upon alienation. In his judgment Mackay J. reviewed a number of international instruments such as the Atlantic Charter and the United Nations Charter, and several Ontario Acts indicating a policy of non-discrimination, in coming to his conclusion that such a covenant was contrary to public policy. The *Noble and Wolf* case was also concerned with a restrictive covenant which had prohibited the sale of land to any person of the "Jewish, Hebrew, Semetic, Negro or coloured race or blood". Since the covenantee wanted to sell to a Jew, and did not know if she could pass good title to him, she referred the question to court. Both the lower court and the Ontario Court of Appeal upheld the covenant as valid, and would not agree with the decision in *Re Drummond Wren* that there was a ground of public policy which would render such covenants void.

Before the case reached the Supreme Court the Legislatures of both Ontario and Manitoba passed amendments to their property legislation.[104] Therefore, the Supreme Court had further evidence of the view of the Legislature as to what was public policy with respect to discrimination. However, none of the justices chose to use this as a basis of the decision. Instead, five[105] of the seven held that a covenant of this type did not relate to user of the land and so was not a covenant which could run with the land, and four[106] also held the covenant void for uncertainty.

It is possible to argue that the Supreme Court decision achieved the same result as did Mackay J. However, one certainly could not look to the decision for any inspiration in attempting to achieve an egalitarian society.

---

[102] [1951] S.C.R. 64.

[103] [1945] O.R. 778.

[104] Ontario Conveyancing and Law of Property Act, amended S.O. 1950, c. 11, now R.S.O. 1970, c. 85, s. 22; Manitoba Law of Property Act, amended by S.M. 1950, (1st Sess.) c. 33, now R.S.M. 1970, c. L-90, s. 7.

[105] Kerwin C.J.C. and Taschereau, Rand, Kellock and Fauteux JJ.

[106] Rand, Kellock, Estey and Fauteux JJ.

Pronouncements of the Supreme Court could and should be looked to for guidance by the public, and should also provide guidance for the representatives of the public in enacting legislation. Although *Noble and Wolf* v. *Alley* was not as unfortunate a decision as either *Quong-Wing* or *Christie*, it certainly will not go down in the annals of judicial history as one of the more inspiring judgments of our Supreme Court.

2. Political Civil Liberties

The Supreme Court of Canada has had its finest hours as a "civil libertarian" court when dealing with political civil liberties. Even Mr. Justice Duff, who, from my point of view at least, was so disappointingly timid and unimaginative when considering the egalitarian civil liberties, gave us one of the most inspiring views of what the Supreme Court could do, even in the absence of a written Bill of Rights, in the famous *Alberta Press Bill* case.[107]

In 1937 the Alberta Social Credit Government passed a number of Bills to implement the radical programme which it had promised the electorate. One of these was "An Act to Ensure the Publication of Accurate News and Information". By it, newspapers could be compelled to disclose the source of their news information, and could be compelled to print government statements to correct previous articles. Contravention of the Act was punishable by prohibition from further publication. This Bill, along with two other Social Credit Bills, was referred to the Supreme Court. They were all held *ultra vires* as interfering with federal powers. However, of the six justices who heard the case, three gave additional reasons for holding the Press Bill *ultra vires.*

Mr. Justice Cannon used the power allocation technique to hold that the Bill dealt with the regulation of the press of Alberta not from the point of view of private wrongs or civil injuries, but from the viewpoint of public wrongs or crimes. The power to curtail freedom of the press, if deemed expedient in the public interest, he said, were matters of criminal law within the jurisdiction of Parliament.

Chief Justice Duff (with whom Davis J. concurred) also held the subject-matter of the proposed legislation to be beyond the jurisdiction of the province, but he did not do so on the basis that it was criminal law legislation. Rather, he started from the preamble to the B.N.A. Act which, he said, contemplated "a Parliament working under the influence of public opinion and public discussion". This right of free public discussion of public affairs, which he called "the breath of life of Parliamentary institutions", was subject to legal restrictions, such as those based upon decency, public order, protection of such private and public interests as found in the laws of defamation and sedition, but only the Parliament of Canada possessed the authority to legislate for the protection of this right. He rested that authority upon the Peace, Order and Good Government clause in s. 91 of the B.N.A. Act both as a matter of overriding national interest, and as a residual matter in the sense "that the subject-matter of such legislation could not be described as a provincial matter purely".[108] Thus, in a way, his judgment could be taken simply as a decision based upon the distribution of legislative jurisdiction. However, his judgment could have a wider implication. Since he based his decision upon the preamble to the B.N.A. Act, and the necessity thereby to permit the maximum of free discussion of public affairs, it is possible to imply a limitation even in Parliament. It is true that he claimed that only the Parliament of Canada possessed authority to legislate for the

---

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

[108] *Id.* at 133.

protection of this right, but one could imply therefrom that even the Parliament of Canada could not restrict this right except "upon considerations of decency and public order, and others conceived for the protection of various private and public interests".[109] However, maybe this is reading too much into his judgment, and in any case, only Mr. Justice Abbott in the *Padlock* case[110] was able to extend the principle so far.

The decision in the *Alberta Press Bill* case is generally considered a landmark in the Supreme Court development of our civil liberties, not so much because of what was held, as because of what was said. After all, only three of the six judges held that the proposed legislation was *ultra vires* of the province, and when the reference reached the Judicial Committee of the Privy Council, the Alberta Press Bill was not even discussed. Rather, the enduring importance of the case lies in the statements of Duff C.J.C. and Cannon J. regarding liberty of the press and the right of public discussion. This is what endures from the *Alberta Press Bill* case. To this day discussion of the fundamental freedoms by lawyers and laymen are affected by such statements as that of Duff C.J.C. when he described the central importance in a constitution "similar in principle to that of the United Kingdom" of "a Parliament working under the influence of public opinion and public discussion." He explained.[111]

> There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. . .
> . . . [I]t is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischeif, is the breath of life for parliamentary institutions.

Similarly, perhaps even more impressively, Cannon J. stated.[112]

> Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State within the limits set by the Criminal Code and the common law. Every inhabitant in Alberta is also a citizen of the Dominion. The province may deal with his property and civil rights of a local and private nature within the province; but the province cannot interfere with his status as a Canadian citizen and his fundamental right to express freely his untrammelled opinion about government policies and discuss matters of public concern.

During the 1950's the Supreme Court came to deal with several cases involving the political civil liberties, all arising from the Province of Quebec.

In one of these, *Saumur* v. *City of Quebec*,[113] the *ratio decidendi* is so obscure[114] that it is difficult to decide that the case stands for more that that a distributor of religious pamphlets would not have to get prior police approval for the distribution of his pamphlets in the street, at least in the province of Quebec. Of the majority, four[115] would have declared the by-law *ultra vires* as being beyond what the provincial legislature could authorize, while the fifth (Kerwin C.J.C.) felt that the by-law was within provincial power, but that the Quebec Freedom of Worship Act protected the appellant from its effects.

---

[109] *Id.*

[110] [1957] S.C.R. 285, at 320.

[111] *Supra*, n. 107, at 133.

[112] *Id.* at 146.

[113] [1953] 2 S.C.R. 299.

[114] See the comment by Professor Laskin (as he then was) in "An Inquiry into the Diefenbaker Bill of Rights", (1959) 37 Can. Bar Rev. 77, at 116-17.

[115] Rand, Kellock, Estey and Locke JJ.

Again, the case is more important because of some of the statements about freedom of religion, which have subsequently affected our thinking of that fundamental freedom, than it is for what was held. Nevertheless, because four of the majority judges felt that freedom of religion was within federal jurisdiction, this, combined with the *Birks* case,[116] which held that legislation with respect to "holy" days was "in pith and substance" religious and Sunday Observance legislation, and thus was part of the federal criminal law power, resulted in three of Canada's leading constitutional experts (two of whom have now made it to the Supreme Court of Canada), arguing that freedom of religion is probably within federal competence.[117]

What was actually held in these two cases results in a protection of religious freedom only if one accepts the argument that since the provinces themselves are more homogeneous that the country as a whole, and since they have in the past been less tolerant of minorities than has the country as a whole, freedom of religion is better protected if it is found to be within federal jurisdiction. However, as I remarked earlier with reference to the *Press Bill* case, these cases are important because of what was said with respect to the fundamental freedoms by some of the judges, especially Rand J. Only two of his declarations in the *Saumur* case will suffice:[118]

> . . . [F]reedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order.
>
> Under [the B.N.A. Act] Government is by parliamentary institutions, including popular assemblies elected by the people at large in both Provinces and Dominion; Government resting ultimately on public opinion reached by discussion and the interplay of ideas. If that discussion is placed under licence, its basic condition is destroyed: the Government, as licensor, becomes disjoined from the citizenry. The only security is steadily advancing enlightenment, for which the widest range of controversy is the *sine qua non*.[119]

If anyone wonders why more law students today can remember the name of Rand J. than of any of the chief justices during his time, they need only read his judgments in cases dealing with civil liberties.

Perhaps the two most important decisions of the 1950's court which determined the fundamental freedom of expression were *Boucher* v. *The King*[120] decided just after the beginning of the decade, and *Switzman* v. *Elbling* (the *Padlock* case),[121] decided some six years later. The first was an application of the restrictive interpretation technique for expanding the bounds of political civil liberties, while the second involved a determination of legislative jurisdiction which resulted in a restriction on provincial competence to interfere with these liberties.

The *Boucher* case set clear limits to excessive prosecutions for the offence of seditious libel. By a majority of five to four the Supreme Court held that strong words are not enough, and not even an intention to promote ill-will and hostility between subjects, as included in Stephen's definition of sedition, is enough: there must be an intention to incite the people to violence and to create public disorder or disturbance, or unlawful conduct against Her Majesty

---

[116] *Birks & Sons (Montreal) Ltd.* v. *City of Montreal* [1955] S.C.R. 799.

[117] For these views see the Symposium in (1959) 37 Can. Bar Rev. — Laskin at 121-2, Pigeon at 76, and Scott at 141.

[118] *Supra*, n. 113, at 329.

[119] *Id.* at 330.

[120] [1951] S.C.R. 265.

[121] [1957] S.C.R. 285.

or an institution of the state. In another of his classic judments Rand J. described that freedom of discussion which is short of sedition:[122]

> Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality . . . Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in mortals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability.

He referred to the *Criminal Code* section on seditious intention as a provision which "with its background of free criticism as a constituent of modern democratic government, protects the widest range of public discussion and controversy, so long as it is done in good faith and for the purposes mentioned."[123]

The case of *Switzman* v. *Elbling*, which has become known as the *Padlock* case, dealt with legislation which tried to regulate the dissemination of certain ideas. The 1937 Quebec Act Respecting Communistic Propaganda declared it illegal to use a house for the propagation of Communism or Bolshevism, or to use it to print, publish or distribute a document for the same purpose, and it provided for the placing of a padlock on such a house under the authority of the Attorney General. The Supreme Court declared (with only Taschereau J. dissenting) that this was legislation with respect to criminal law, and so under federal jurisdiction by s. 91(27), and not under provincial jurisdiction either under s. 92(8) "Municipal Institutions", s. 92(13) "Property and Civil Rights", or s. 92(16) "Matters of a merely local or private Nature" in the province.

In rendering this decision the Supreme Court had to distinguish an earlier case, *Bédard* v. *Dawson*,[124] which seemed to be nearly identical, and which had upheld similar provincial legislation. In the *Bédard* case the Court was faced with a Quebec statute which provided for the closing of premises known as "disorderly houses" upon conviction of the owner or occupier under the *Criminal Code* for running a "disorderly house". This legislation was upheld under s. 92(13) of the B.N.A. Act as dealing with "Property and Civil Rights", and being concerned with the suppression of conditions favouring crime, rather than being criminal legislation *per se*.

In the *Padlock* case, the dissenting judge felt bound by *Bédard* v. *Dawson*, but the remainder had no difficulty in distinguishing it. As Fauteux J. pointed out, the earlier case dealt with an Act designed to regulate the control and enjoyment of property, and the suppression of certain social conditions, whereas the Act being considered in the *Padlock* case was intended to make the propagation of Communism a crime and to prohibit it with penal sanctions. He stated that such an Act cannot come under s. 92(16) as a local matter because the propagation of an idea can hardly be considered a local matter. He said:[125]

> Seul le Parlement, légiférant en matière criminelle, a competence pour decréter, définir, défendre et punir ces matières d'un écrit ou d'un discours qui, en raison de leur nature, lèsent l'ordre social ou la sécurité de l'Etat.

Two other judgments are of interest. Abbott J. went further than any other Supreme Court justice and declared that not even Parliament, much less a provincial legislature, could abrogate the right of free public debate. Rand J.,

---

[122] *Supra*, n. 120, at 288.

[123] *Id.* at 290.

[124] [1923] S.C.R. 681.

[125] *Supra*, n. 121, at 320.

with whom Kellock J. concurred in a short judgment, gave another of his classic judgments in the civil liberties field. As he and Kellock J. had done four years earlier in the *Saumur* case, he once again proceeded to show that "civil liberties" could never have been intended to be included as such in "Property and Civil Rights" or "Matters of a merely local or private Nature" in the province. The rights of free opinion, public debate, and discussion, he stated, are clearly necessary to Parliamentary government. He went on:[126]

> This means ultimately government by the free public opinion of an open society, the effectiveness of which, as events have not infrequently demonstrated, is undoubted.
>
> But public opinion, in order to meet such a responsibility, demands the condition of a virtually unobstructed access to and diffusion of ideas. Parliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves; and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles. Under that government, the freedom of discussion in Canada, as a subject matter of legislation, has a unity of interest and significance extending equally to every part of the Dominion. With such dimensions it is *ipso facto* excluded from head 16 as a local matter.

The *Boucher* and the *Padlock* cases, together with the decision in *Roncarelli* v. *Duplessis*,[127] which constituted an exemplary definition and application of the "rule of law" doctrine, are a clear illustration of why the Supreme Court majority of the 1950's was a civil libertarian majority unequalled before or since.

III. THE SUPREME COURT AND THE CANADIAN BILL OF RIGHTS

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

Let me state at the outset that I am not yet totally pessimistic because, as I hope to show, none of the decisions were such as to irrevocably relegate the Bill of Rights to an ineffectual instrument. Moreover, some of the reasons given by recent majorities for coming to their conclusions are either sufficiently ambiguous, or obscure, or even non-existent, that a future majority, cognizant of the expectations of the public, and prepared boldly to face up to its task as one of the major opinion-moulders of the country, will be able, with little difficulty, to overcome these decisions. We should not forget that the Bill of Rights is not yet fifteen years old. After all, in the United States it was not until some ten years after the passing of the Amendments which created the United States Bill of Rights that judicial review was asserted by Chief Justice Marshall in the case of *Marbury* v. *Madison*,[128] and it was probably not until some one hundred years later, and some would say almost a century and a half later, that the American Supreme Court started to apply the Bill of Rights in accordance with what would appear to be the intentions of the framers.

Moreover, our Bill of Rights does not explicitly provide, as it could have, that "laws of Canada" which are found to be inconsistent with the Canadian Bill of Rights are to be declared invalid or inoperative. Rather, it provided in

---

[126] *Id.* at 306.

[127] [1959] S.C.R. 121.

[128] (1803) 1 Cranch. 137.

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

For the first decade the Supreme Court was extremely cautious in its interpretation of the Bill of Rights. Thus, within a year of the enactment of the Canadian Bill of Rights the Supreme Court had two occasions to define the "due process" clause, but declined to do so. The occasions were the cases of *Louie Yuet Sun* v. *The Queen*[129] and *Rebrin* v. *Minister of Citizenship and Immigration et al*,[130] both of which involved deportation orders made under the Immigration Act against illegal entry into Canada. In both cases applications to quash the orders alleged that such action was contrary to "due process of law". In each case the judgment of the Supreme Court was delivered by Kerwin C.J.C. with only brief reference to the clause. In the *Louie Yuet Sun* case he stated that the applicant "has not been deprived of his liberty except by due process of law,"[131] and in the *Rebrin* case he declared: "There was no infringement as the appellant has not been deprived of her liberty except by due process of law."[132] No attempt was made to discuss the possible meaning of "due process". Though the clause was obviously borrowed by the legislative draftsmen from the Fifth and Fourteenth Amendments to the United States Constitution, there was neither an attempt to deduce a possible meaning in the light of that experience, nor even to recognize it for the purposes of deciding that it was not applicable. In fact, although minimal knowledge of the history and origins of the clause make it obvious that the Supreme Court was giving it an interpretation synonymous with the phrase "according to the law of the land", this was not explained: it was merely applied.

Since that time the Supreme Court has dealt with about a dozen cases in which the Bill of Rights has played an important role. The most important of these, not because of its facts as much as because of what was said with respect to the Canadian Bill of Rights, was that of *Regina* v. *Drybones*.[133] The issue was s. 94 of our Indian Act, which provided that an Indian who "is intoxicated . . . off a reserve" is guilty of an offence punishable by a minimum fine of $10 (with a maximum of $50) or by imprisonment for a term not exceeding three months, or by both fine and imprisonment. The allegation on behalf of Drybones was that this provision contravened s. 1(b) of the Canadian Bill of Rights which guarantees "equality before the law and the protection of the law", because everyone else in the Northwest Territories, where the offence took place, was subject to a penalty only if he was "in an intoxicated condition in a public place", and in that case there was no minimum fine, and the maximum term of imprisonment was thirty days. The Supreme Court divided six to three in favour

---

[129] [1961] S.C.R. 70.

[130] [1961] S.C.R. 376.

[131] *Supra*, n. 129, at 72.

[132] *Supra*, n. 130, at 381.

[133] [1970] S.C.R. 282.

of holding that the particular provision in the Indian Act was rendered inoperative by s. 2 of the Canadian Bill of Rights, because it was contrary to s. 1(b) of the Bill of Rights.

The three dissenting judges could not join the majority because they seemed to be frightened by the implications of the decision. One of them (Cartwright C.J.C.) recanted[134] from his views in an earlier case[135] in which he was the only member of the Supreme Court to come to the conclusion that the Canadian Bill of Rights would render inconsistent legislation inoperative, because he feared that this would place too onerous a task on every judge in Canada. He seems to have overlooked the fact that this has been their responsibility under the Colonial Laws Validity Act, and continues to this day because of the distribution of legislative power under the B.N.A. Act. Another of the judges (Abbott J.) felt that the delegation of authority to the courts implied in the majority decision could only be affirmed with the plainest words.[136] He did not find those words in s. 2. The third judge (Pigeon J.) also expressed his fear over the responsibility placed on the courts if the majority view applied.[137] He appears to have been concerned with the fact that Parliament had not provided detailed definitions of the various rights and freedoms listed. But surely the judiciary is capable of providing more adequate and detailed definitions on a case-by-case basis, than is a legislative draftsman in what must be a relatively terse instrument! Moreover, he felt[138] that the words in s. 1 which refer to the rights and freedoms as having existed and continuing to exist were more important than the possible effect of s. 2, and indicated that no change in the application of laws was intended. Finally, he was apprehensive[139] that the whole of the Indian Act might be declared inoperative as being contrary to the "equality before the law" clause in the Canadian Bill of Rights. Although the whole of the Indian Act was not before him, but merely one section of it, it would appear that what he had in mind was the fact that any distinction between Indians and others might be deemed to be contrary to "equality before the law". The more limited definition of the clause by the majority to the particular facts before them appear to me to provide an adequate answer to Mr. Justice Pigeon, but I will deal with that issue subsequently in a fuller discussion of the "equality before the law" clause.

The majority, however, felt that the reading of s. 2, in conjunction with s. 5, was imperative enough to require the courts to refuse to apply any law of Canada whether enacted before or after 1960, which infringed the Canadian Bill of Rights, unless Parliament expressly declared that the law which does so infringe shall operate "notwithstanding the Canadian Bill of Rights". Mr. Justice Ritchie, who gave the majority judgment, laid considerable stress[140] on the *non obstante* clause in s. 2. He indicated that Parliament would not add a completely superfluous clause such as this, and asserted that a "realistic meaning" must be given to the opening paragraph of s. 2. The *non obstante* clause, he stated, was a clear indication that Parliament intended that laws which do

---

[134] *Id.* at 287.

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

[136] *Supra*, n. 133, at 299.

[137] *Id.* at 305.

[138] *Id.* at 302.

[139] *Id.* at 303-4.

[140] *Id.* at 294.

not contain that clause, and which cannot sensibly be construed and applied so as not to abrogate, abridge or infringe the rights and freedoms enumerated in the Bill, would be inoperative.

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

On the other hand, it should not be presumed that our Supreme Court seems at all ready to find legislative or administrative acts to be inconsistent with the Canadian Bill of Rights. In fact, in only two other decisions has the Bill been so applied as to protect the civil liberties of an accused. And in both of these, the Supreme Court was not compelled to hold that a law of Canada was inoperative, but rather was able to "construe and apply" the law in conformity with the Bill of Rights. Thus, in *Lowry and Lepper* v. *The Queen*[141] the Supreme Court held unanimously that when a Court of Appeal allows a Crown appeal from an acquital of an accused, it must afford the accused an opportunity to be heard before passing sentence. The decision of the Court, delivered by Martland J., held that this right was affirmed by the Canadian Bill of Rights, especially the 'fair hearing" clause in s. 2(e).[142]

In *Brownridge* v. *The Queen*[143] the Supreme Court was concerned with compulsory breathalyzer tests in the Criminal Code. The accused was arrested for impaired driving and, when a demand was made of him for a breath sample, asked for an opportunity to call his lawyer for information as to whether he should comply. He told the police he would not take the test unless his lawyer so advised. The opportunity was denied him and he refused to provide a breath sample. Two hours later, after having spoken with his lawyer, he requested an opportunity to give a sample of his breath but the offer was refused. He was then charged under s. 223(2) [now s. 235(2)] for failing or refusing, without reasonable excuse, to comply with the police officer's request for a breath sample.

The Supreme Court, by a majority of six to three, held that the conviction should be quashed. Once again, as in the *Drybones* case, Pigeon and Abbott JJ. dissented, and this time Judson J. concurred in Mr. Justice Pigeon's dissenting judgment. Unless I misunderstand his reasons, it would appear that Pigeon J. could not see why a motorist suspected of impaired driving should have the right to retain and instruct counsel upon arrest, if there were no such right when a person is not under arrest.[144] It would appear to me that the answer is that s. 2(c)(ii) of the *Bill of Rights* does not speak of a right to counsel when a person is not under arrest, but does where he is "arrested or detained", and there was no question but that the appellant was under arrest when the request for the breath sample was made.

Mr. Justice Ritchie gave judgment on behalf of four of the justices, and concluded that:[145]

---

[141] (1972) 26 D.L.R. (3d) 224.

[142] *Id.* at 228-31.

[143] [1972] S.C.R. 926.

[144] *Id.* at 943-4.

[145] *Id.* at 937.

> . . . [I]t would run contrary to the provisions of [the Bill of Rights] to hold that denial to a man under arrest of 'the right to retain and instruct counsel without delay' was *incapable* of constituting a reasonable excuse for failing to comply with the demand under s. 223 of the *Criminal Code*.

Mr. Justice Laskin (as he then was) in a judgment concurred in by Hall J., agreed that the accused should be acquitted, but he felt that the case raised a larger issue, and asserted that s. 2(c)(ii) of the Canadian Bill of Rights sets up a bar which is independent of the words "reasonable excuse" in the penal provision in the Criminal Code.[146] Rather, he held that the accused should be acquitted because in this particular case, on these particular facts, this was the way to enforce the provision in the Canadian Bill of Rights.[147]

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

In all other cases before the Supreme Court, both before and after the *Drybones* decision, although the Supreme Court did not detract from the fundamental principle of the *Drybones* case discussed above, it was able to so "construe and apply" the laws in question as not to find a conflict with the Canadian Bill of Rights. Thus, some seven years before the *Drybones* case, in the first decision in which the Canadian Bill of Rights was a major issue, *Robertson and Rosetanni* v. *The Queen*,[147a] the majority of the Supreme Court held that the Lord's Day Act, which prohibited a person from carrying on his ordinary calling on a Sunday, was consistent with the "freedom of religion" protected by the Canadian Bill of Rights. Turning to the clause in s. 1 which provided that the freedoms therein recognized and declared "have existed and shall continue to exist," Mr. Justice Ritchie, who gave the judgment of the majority, held that the freedom of religion protected and guaranteed by the Canadian Bill of Rights was the freedom of religion as understood in 1960, and at that time the Lord's Day Act was not considered to detract from it.[147b]

However, at least in this judgment, unlike some of the subsequent majority judgments, Mr. Justice Ritchie did attempt to analyse the issues before him. Thus, he stated that one must look at the effect of the Lord's Day Act, not its purpose, in order to see whether its application results in the abrogation, abridgement, or infringement of religious freedom.[148] However, he concluded that its effect was a purely secular one which did not involve an infringement of the "freedom of religion" guaranteed by the Bill of Rights.[149]

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

---

[146] *Id.* at 949.
[147] *Id.* at 954.
[147a] [1963] S.C.R. 651.
[147b] *Id.* at 654-5.
[148] *Id.* at 657.
[149] *Id.* at 657-8.

Nevertheless, there is nothing in his majority judgment which would indicate any contradiction of Mr. Justice Cartwright's dissenting assertion that:[150]

> The imperative words of s. 2 of the Canadian Bill of Rights . . . appear to me to require the courts to refuse to apply any law, coming within the legislative authority of Parliament, which infringes freedom of religion unless it is expressly declared by an Act of Parliament that law which does so infringe shall operate notwithstanding the Canadian Bill of Rights. . . . in my opinion where there is irreconcilable conflict between another Act of Parliament and the Canadian Bill of Rights the latter must prevail.
>
> . . . [I]n enacting the Canadian Bill of Rights Parliament has thrown upon the courts the responsibility of deciding, in each case in which the question arises, whether such an imposition infringes freedom of religion in Canada. In the case at bar I have reached the conclusion that s. 4 of the Lord's Day Act does infringe the freedom of religion declared and preserved in the Canadian Bill of Rights and must therefore be treated as inoperative.

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

Some eighteen months after the *Drybones* case the Supreme Court held that a provision in the Income Tax Act for an election by the Attorney-General for Canada to proceed by indictment rather than by summary conviction was not a contravention of the "equality before the law" clause in s. 1(b) of the Canadian Bill of Rights because such a discretion, at the time of the enactment of the Canadian Bill of Rights, was part "of the British and Canadian conception of equality before the law."[151] Shortly thereafter[152] the court held that a statutory presumption which shifted the onus of disproof onto the accused was consistent with the definition of presumption of innocence as defined in the *Woolmington*[152a] case, because this was the definition of presumption of innocence understood in 1960. In two decisions in 1972, both concerned with breathalyzer tests, the Supreme Court unanimously agreed that compulsory breathalyzer tests did not contravene the "due process" clause in s. 1(a), or the "fair hearing" provisions in s. 2(e) and (f) of the Canadian Bill of Rights,[153] and that failure to provide an accused with a sample of his breath was not a denial of a "fair hearing" as required by s. 2(e) of the Canadian Bill of Rights.[154] In both cases it was held that these practices did not deny the accused an opportunity at his trial to make a full answer and defence. In effect, both cases restricted the pre-trial protections that might have been construed out of ss. 1(a) and 2(e) and (f).

Perhaps the most unfortunate decision of the Supreme Court on the effect of a clear contravention of one of the provisions of the Canadian Bill of Rights came in June, 1974, in the case of *Hogan* v. *The Queen*.[155] This case arose out of a charge of driving a motor vehicle with a blood alchohol content in excess of that prescribed by the Criminal Code. After being taken to the police station, but before the breathalyzer test was conducted, the accused's girl friend called a lawyer. The accused heard his lawyer enter the police station, and requested permission to consult with him before taking the test. However, the police officer in charge told him that he did not have the right to see anyone until after the test, and that if he refused to take the test, he would be charged for refusal to

---

[150] *Id.* at 662.

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

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

[152a] [1935] A.C. 462.

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

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

[155] (1974) 48 D.L.R. (3d) 427.

comply. Thereupon, the test was administered. At the trial it was contended that this evidence was inadmissible because it was obtained in violation of s. 2(c)(ii) of the Canadian Bill of Rights. However, seven of the nine members of the Supreme Court of Canada rejected that argument and confirmed the conviction.

Mr. Justice Ritchie, who once again gave judgment on behalf of the majority, ruled that the evidence was "clearly admissible at common law" and that the courts "were correct in accepting it in accordance with the rules of evidence governing the trial of criminal cases as they presently exist in this country."[156] Although he referred to the *Drybones* case as authority for the proposition that "any law of Canada which abrogates, abridges or infringes any of the rights guaranteed by the *Canadian Bill of Rights* should be declared inoperative and to this extent it accorded a degree of paramountcy to the provisions of that statute," nevertheless, he stated, "whatever view may be taken of the constitutional impact of the Bill of Rights," did not mean that a breach of one of its provisions justified the adoption of the American rule of "absolute exclusion," because this would be "in derogation of the common law rule long accepted in this country."[157] He said that he preferred the reasoning of Lord Hobson in *King* v. *The Queen*[158] where, in reference to the provisions of the Jamaican Constitution which provided, *inter alia:*

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

Lord Hobson stated:[159]

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

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

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

> The present case does not involve this Court in any reassessment of the principles underlying the admissibility of illegally-obtained evidence as they developed at common law. We have a statutory policy to administer, one which this court has properly recognized as giving primacy to the guarantees of the Canadian Bill of Rights by way of a positive, suppressive effect upon the operation and application of federal legislation. . . . The result may be, as in *Drybones,* to render federal legislation inoperative or, as in *Brownridge,* federal legislation may become inapplicable in the particular situation while otherwise remaining operative.[160]

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

With the greatest respect to the majority, I cannot see how, even if the Canadian Bill of Rights were deemed to be a mere statutory enactment, a Canadian court could possibly conclude that a common law rule cannot be

---

[156] *Id.* at 433.

[157] *Id.* at 454.

[158] [1969] 1 A.C. 304.

[159] *Id.* at 319.

[160] *Supra,* n. 155, at 438.

overruled by a statutory enactment, and a subsequent one at that. Even more, can I *not* see how the majority could agree with Lord Hobson that the discretion of the courts, based upon a common law rule, "has not been taken away by the declaration of the right in written form." That may be true in the U.K: it just cannot be so in Canada. Besides, "the discretion of the courts" would not be taken away if the Bill of Rights were to be applied, rather it would be reaffirmed. In the first place, the courts would still have to conclude that in the obtaining of the evidence sought to be admitted the Canadian Bill of Rights was contravened. Moreover, even in *Regina* v. *Wray*,[161] the common law rule on admissibility of evidence recognized a discretion in the trial judge to exclude the evidence on the ground of unfairness. Surely at the very least the Canadian Bill of Rights, whether considered to be a merely statutory, or a constitutional, instrument, must lead to the conclusion that submission of breathalyzer evidence obtained in the circumstances of this case, where the lawyer was already present in the police station, and could not delay the test beyond the two hour limit, amounts to the admission of evidence in circumstances of "unfairness".

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

Mr. Justice Ritchie did not deny that evidence in the *Hogan* case was illegally obtained because of contravention of s. 2(c)(ii) of the Canadian Bill of Rights. In fact, he must have reached that conclusion because his judgment deals almost totally with the issue of the admissibility of illegally-obtained evidence. By not providing a remedy, which the courts have been prepared to do to enforce contravention of the law by administrative agencies in other circumstances, he has in effect condoned the police action. At most, presumably, he would leave the accused to seek his remedy elsewhere. However, Laskin C.J.C. provided a short and complete answer to the possible suggestion that the illegalities attending the eliciting or discovering of evidence must receive their sanction through means other than exclusion of the evidence:[162]

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

---

[161] [1971] S.C.R. 272.

[162] *Supra*, n. 155, at 442.

He stated the policy question very clearly as follows:[163]

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

Furthermore, Ritchie J. rejected the American exclusionary rule on the basis that its adoption since *Mapp* v. *Ohio*[164] turns "on the interpretation of a Constitution basically different from our own and particularly on the effect to be given to the 'due process of law' provision in the Fourteenth Amendment of that Constitution".[165] However, as Laskin C.J.C. correctly showed, the exclusionary rule was developed to enforce the guarantees not only against the states through the Fourteenth Amendment, but against Congress through the first eight, and particularly the Fourth Amendment. He went on to make some very important observations which must be quoted in full:[166]

> The American exclusionary rule, in enforcement of constitutional guarantees, is as much a judicial creation as was the common law of admissibility. It is not dictated by the Constitution, but its rationale appears to be that the constitutional guarantees cannot be adequately served if their vindication is left to civil actions in tort or criminal presecutions, and that a check rein on illegal police activity which invades constitutional rights can best be held by excluding evidence obtained through such invasions . . .
> It may be said that the exclusion of relevant evidence is no way to control illegal police practices and that such exclusion merely allows a wrongdoer to escape conviction. Yet where constitutional guarantees are concerned, the more pertinent consideration is whether those guarantees, as fundamentals of a particular society, should be at the mercy of law enforcement officers and a blind eye turned to their invasion because it is more important to secure a conviction. The contention that it is the duty of the Courts to get at the truth has in it too much of the philosophy of the end justifying the means; it would equally challenge the present law as to confessions and other out-of-court statements by an accused.

He goes on to point out that although the Canadian Bill of Rights[167]

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

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

Finally, I must deal with the issue which has been before our Supreme Court most frequently in questions concerning the Bill of Rights, and that is

---

[163] *Id.*
[164] (1961) 367 U.S. 643.
[165] *Supra*, n. 155, at 434.
[166] *Id.* at 442-3.
[167] *Id.* at 443-4.

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

There are really two difficult questions that must be answered:

(1) In assessing equality or inequality before the law in a federal system, who does one compare with whom?

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

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

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

In the *Drybones* case, the Supreme Court had rejected an earlier interpretation of the British Columbia Court of Appeal[168] that a law which applied equally to all persons of the same race or group did not contravene s. 1(b) because, said the Supreme Court, this would justify "the most glaring discriminatory legislation against a racial group." The majority had no difficulty in deciding that[169] "Section 1(b) means at least that no individual or group of individuals is to be treated more harshly than another under that law."

One of the dissenting judges, Pigeon J., declined to join the majority largely because he was afraid that the majority decision could result in the whole of the Indian Act being held inoperative.[170] This apprehension, which I believe to be unjustified, he has reiterated time and again, and seems finally to have convinced the majority into retreating somewhat from the bold stand they took in *Drybones*.

---

[168] *Regina* v. *Gonzales* (1962) 32 D.L.R. (2d) 290.

[169] *Supra*, n. 133, at 297.

[170] *Id.* at 303-4.

Another major case to deal with the "equality before the law" clause, *A.-G. for Canada* v. *Lavell*,[171] dealt with a different provision of the Indian Act. Section 12(1)(b) provides that an Indian woman who marries a white man loses her membership in her Band, and her Indian status. There is no similar provision with respect to Indian men, in fact, a white woman who marries an Indian man joins his Band and becomes an Indian for the purposes of the Indian Act. Having become convinced by Pigeon J. that the whole of the Indian Act could be held invalid unless the "equality before the law" clause receives a more restricted meaning, Mr. Justice Ritchie, who gave the decision on behalf of four of the nine members of the court, retreated from his position in the *Drybones* case to his earlier interpretation in the *Robertson and Rosetanni* case to seek a meaning for the clause in the laws and concepts as understood at the time the Bill of Rights was enacted. This led him to adopt Dicey's definition, first rendered in the late nineteenth century, and to conclude that "equality before the law"[172] ". . . as employed in s. 1(b) of the Bill of Rights is to be treated as meaning equality in the administration or application of the law by the law enforcement authorities and the ordinary courts of the land."

With respect, I would suggest, first, that this interpretation totally ignores the juxtaposition of the "equality before the law" clause with the non-discrimination clause in the opening paragraph of s. 1. Second, it ignores the fact that by 1960 Canada had signed the Universal Declaration of Human Rights, that some of its leading jurists had participated in the work of the International Commission of Jurists in drafting a more modern mid-twentieth century definition of "rule of law" and "equality before the law," and that by 1960 most provinces in Canada had enacted anti-discrimination legislation. All of which indicates that even if one were to take Mr. Justice Ritchie's assertion that one looks to the clause as it was understood in Canada in 1960, its egalitarian aspect could not be ignored. Third, even Mr. Justice Ritchie himself, in the *Drybones* case, had applied an egalitarian concept and made no reference to Dicey's concept of equality before the law as part of his formulation of the "rule of law."

Moreover, even if one were to use the definition as proposed by Ritchie J., it is impossible to understand by what process of reasoning he reached the following conclusion:[173]

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

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

---

[171] (1973) 38 D.L.R. (3d) 481.

[172] *Id.* at 495.

[173] *Id.* at 499.

minor inequality dealt with in the *Drybones* case. One must conclude, therefore, that Laskin J. must be correct when he stated:[174]

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

In a subsequent decision, *Regina* v. *Burnshine*,[175] the Supreme Court was concerned with a provision of the federal Prisons and Reformatories Act by which courts in Ontario and British Columbia may sentence anyone, who is apparently under the age of 22, and who is convicted of an offence punishable by imprisonment for three months or more, to a fixed term of not less than three months, and an indeterminate period thereafter of not more than two years less one day to be served in a special correctional institution rather than a common gaol. Burnshine was sentenced to the maximum allowable, referred to above, even though the offence with which he had been charged had a maximum punishment of six months prescribed by the Criminal Code. By a decision of six to three the Supreme Court held that the provision in the Prisons and Reformatories Act did not contravene the "equality before the law" clause in s. 1(b) of the Bill of Rights. Interestingly enough, Laskin J. who dissented (with Spence and Dickson JJ. concurring), would not have found the provision inoperative, rather he would have so "construed and applied" the provision that the maximum term of detention could not have exceeded that provided under the Criminal Code.[176]

Mr. Justice Martland, who gave the majority opinion, paid lip service to the Ritchie formula for referring to 1960 and the law existing at the time to determine the meaning of the Bill of Rights. In fact, he went so far as to say that s. 2 "did not create new rights. Its purpose was to prevent infringement of existing rights."[177] If one were to take this *obiter* statement, without considering what he went on to state as the basis of his decision, it would appear to be futile to argue that any federal law enacted or in existence before 1960 can possibly contravene the Canadian Bill of Rights. And yet, this was done successfully in *Drybones*!

One suspects, therefore, that Martland J. would not want his judgment to be so circumscribed. After all, what he did go on to do was to examine the law. He was persuaded that its object was to reform young offenders, and since it was incarceration in an institution other than a gaol, and since such facilities were available only in British Columbia and Ontario, he adopted an earlier statement by Laskin J., who had suggested:[178]

> [C]ompelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government, which underlie the discharge of legislative authority under the *British North America Act*.

Martland J. went on to say:[179]

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

---

[174] *Id.* at 508.

[175] [1974] 4 W.W.R. 49.

[176] *Id.* at 67.

[177] *Id.* at 58.

[178] *Curr* v. *The Queen* [1972] S.C.R. 889, at 898-9.

[179] *Supra*, n. 175, at 60.

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

On January 28th last the Supreme Court rendered its most recent decision in which the main issue was the application of the Canadian Bill of Rights: *Attorney-General of Canada et al.* v. *Canard et al.*[180] The main issue in the case concerned the validity of testamentary provisions in the Indian Act in the light of the "equality before the law" clause. Under the applicable provisions (ss. 42-44) all jurisdiction and authority in relation to descent of property of deceased Indians is vested exclusively in the Minister of Indian and Northern Affairs. The Minister may appoint executors and administrators, remove them and appoint others in their stead, and for this purpose give any order or direction that in his opinion is necessary or desirable to carry out his authority. The regulations pursuant to these provisions seem to contemplate that the usual procedure would be to appoint an officer of the Department as administrator. In fact, Mrs. Canard, the widow of the deceased, was not even informed that an administrator had been appointed, and she had made her own application.

No member of the Supreme Court was prepared to hold that the impugned sections of the Indian Act were inoperative. Of the seven members of the Supreme Court who heard the case, only three were prepared to conclude that the way the regulations were being applied would probably contravene s. 1(b) of the Canadian Bill of Rights. However, one of these justices, Beetz J., declined to so hold on the ground that the wrong forum was chosen to indicate the action.[181] The other two, which included the Chief Justice, declared that the impugned sections were not inoperative, but must be applied consistently with the Bill of Rights, and that the particular provision in the regulations which most blatantly contravened 'equality before the law," was inoperative.[182] The other four,[183] however, held that the Bill of Rights was not contravened. Although there was some hint in their judgments that, in accordance with the *Burnshine* decision, they thought that the legislation was enacted "pursuant to a valid federal objective,"[184] the main reasons seem to be the continuing apprehension that to hold otherwise would render the whole Indian Act inoperative.[185]

One has to admit that the decision was not an easy one. Given that an assessment of inequality cannot arise out of a comparison between federal provisions and those of the provinces dealing with descent of property, how could one conclude that provisions in the Indian Act infringed "equality before the law" when there was no other federal legislation dealing with the administration of the estates of anyone else? In the Manitoba Court of Appeal, Dickson J.A. (now a member of the Supreme Court of Canada), had held that in these provisions Parliament had placed a legal roadblock in the way of one particular racial group, placing that racial group in a position of inequality before the law, in that it has said in effect "because you are an Indian you should not administer the estate of your late husband".[186] In the Supreme Court, Chief

---

[180] (1975) 52 D.L.R. (3d) 548.

[181] *Id.* at 583.

[182] *Id.* at 556-8.

[183] Judson, Martland, Pigeon and Ritchie JJ.

[184] *See e.g.*, Martland J., at 560-1.

[185] *See* particularly Pigeon J. at 564-5.

[186] (1972) 30 D.L.R. (3d) 9 at 23.

Justice Laskin agreed with Dickson J.A. that unjustified unequal treatment could arise out of a federal provision, even though there is no other federal provision on the same point with which it could be compared. He so concluded on the ground that in practice "it appears to be forbidden to Indians to become administrators of estates of Indian intestates, where no other class is singled out for disqualification."[187] Although it is not explicit in either judgment, it would appear that both justices concluded that it was normal practice, and not just because of provincial laws, but in the western world generally, that the widowed spouse of a deceased is at least entitled to priority in consideration of who should be appointed as administrator. Regardless of the legal and historical basis for such appointments, it is only just and humane today to come to that conclusion.

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

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

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

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

IV. SUMMARY AND CONCLUSIONS

My answer to the question I posed at the beginning: How civil libertarian was the Supreme Court? must be that the only time we have had a civil libertarian majority on the Supreme Court was during the period of Rand J. in the 1950's. Prior to that time, especially with respect to the egalitarian civil liberties, Supreme Court majorities were at least disappointingly unimaginative, if not actually, as in *Quong-Wing* v. *The King* and *Christie* v. *The York Corporation*, more considerate of the dominant majority groups than they

---

[187] *Supra*, n. 180, at 554.

were of the disadvantaged minority groups. If the reply were made during this time that the Supreme Court was subject to being reviewed by the Judicial Committee of the Privy Council, then let me respond by saying that the Judicial Committee in the *Edwards* case showed that there would have been at least some sympathy for an evolving interpretation which would recognize changing circumstances, certainly by 1939, when the *Christie* case was decided.

With respect to the political civil liberties, the record is much better. This is probably due to the civil libertarian majority of the 1950's, when several important cases involving the political civil liberties arose. But one could also take a cynical view and say that the issues involving the political civil liberties are those which concern everybody, and not just disadvantaged, perhaps unpopular, minorities.

As regards the Supreme Court majorities who considered the Canadian Bill of Rights, let me reiterate my view that although the result of their work is not yet irrevocable, and at least we have with us the important principle arising out of the *Drybones* decision, *i.e.*, that laws which can only be "construed and applied" in contravention of rights or freedoms protected by the Bill of Rights, must be held inoperative to the extent of the inconsistency. Even though the Supreme Court has avoided saying so, and in fact has come very close to asserting the opposite, this decision has recognized that the Canadian Bill of Rights has a constitutional status.

Personally, I do not see why the Supreme Court is so timid in recognizing that fact. An instrument does not have to be entrenched to be considered constitutional. Much of the B.N.A. Act is in no way entrenched as against amendment by simple Act of the provincial legislatures or of Parliament. Thus, for example, s. 63 of the B.N.A. Act has in effect been rendered inoperative by "simple" statutes of the Legislature of Ontario, *i.e.*, the Executive Council Act, and of Quebec, *i.e.*, the Executive Power Act. Similarily, s. 70 of the B.N.A. Act has been rendered inoperative by a "simple statute" of the Legislature of Ontario, *i.e.*, the Representation Act, and ss. 72, 73, 77 and 80 by a "simple statute" of the Legislature of Quebec, *i.e.*, the Legislature Act. Are any of these "simple statutes" of the Legislatures of Ontario or Quebec any the less constitutional than were the original provisions in the B.N.A. Act, whose effect was changed? It appears to me mistaken to argue that inclusion in, or exclusion from, the B.N.A. Act is a test of constitutionality. Any country which has a written Bill of Rights considers it to be a part of its Constitution. In our case, for historical reasons, and at the time of its enactment, for political reasons, the Bill of Rights was not added to the B.N.A. Act. However, during the constitutional debates of 1968-71 the inclusion of a Bill of Rights in a new Constitution was clearly accepted by all governments as a legitimate consideration.

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

Let me make just one further comment about the work of the Supreme Court with reference to the Canadian Bill of Rights. My objection is not so much to the actual decisions in the cases concerned, as it is to the process by which the conclusions are reached. I will take just two examples illustrating the difficulties I have in explaining to my students what the judgments mean. What is the basis of Mr. Justice Ritchie's conclusion in the *Lavell* case? He states:[188]

---

[188] *Supra*, n. 171, at 499.

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

In the second example, it is perhaps my own inadequacy that leads to my not understanding what Pigeon J. meant in the following concurring judgment in *Regina* v. *Burnshine*:[189]

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

I could provide other examples, but I think it is wiser if I do not.

What I do want to emphasize in conclusion is that judgments of the Supreme Court justices are not solely a determination of the rights and obligations of the particular litigants. They should, at the same time, provide guidance for all citizens, and especially lawyers, judges and public officials. For the sake of citizens one would expect expositions of the issues at stake, and elaboration of the principles being applied. These should not only be readily understood, but also, if at all possible, expressed in classic, enduring terms. For the sake of those involved in the administration of justice it should provide clear guidelines. Yet how is one to satisfy the need of the citizen or the need of public officials (including lawyers, civil servants, and judges), when in cases such as *Hogan* the majority judgment does not really come to grips with the issues raised in the minority judgment of the Chief Justice? What we need is the kind of dialogue which would provide guidance not only for law teachers and law students, but for lawyers, judges and public officials, and the rest of the country as well. What we need are the Olympian views and memorable phrases of a Holmes, a Sankey, or a Rand, especially with respect to civil liberties and the Canadian Bill of Rights. In *Drybones* the Supreme Court justices have shown that they could have been, like Martin Luther King, to the top of the mountain, but unlike him, they have not yet seen the promised land. Let us hope they do.

---

[189] *Supra*, n. 175, at 61.