CASE COMMENTS AND NOTES

THE CANADIAN BILL OF RIGHTS—s.94(b) INDIAN ACT—IRRECONCILABLE CONFLICT—EQUALITY BEFORE THE LAW—*REGINA* v. *DRYBONES*

Ever since the Canadian Bill of Rights Act[1] became law almost ten years ago there has been uncertainty as to whether the Bill empowers a court to declare ineffective or inoperative a provision in a law of Canada which in the opinion of the court abrogates, abridges or infringes any of the rights or freedoms specified in the Bill. Most of the decisions pointed to a negative answer. In *Reg.* v. *Drybones*,[2] however, the Supreme Court of Canada has held that the court does have such power.

The Bill of Rights Act in s. 1[3] declares that six fundamental rights and freedoms have existed and shall continue to exist without discrimination by reason of race. One of the rights is "the right of the individual to equality before the law and the protection of the law." The Bill then provides in s. 2[4] that every law of Canada is to be "construed and applied" as not to abrogate the six rights and freedoms or various other rights specified in s. 2 and connected with judicial or administrative proceedings, especially criminal trials. There is however in s. 2 a *non obstante* clause which permits Parliament to include in any law of Canada an express provision that it shall apply notwithstanding the

1 S.C. 1960, c. 44.

2 (1969) 71 W.W.R. 161, *aff'g* (1967) 61 W.W.R. 370 and (1967) 60 W.W.R. 321.

3 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
(b) the right of the individual to equality before the law and the protection of the law;
(c) freedom of religion;
(d) freedom of speech;
(e) freedom of assembly and association; and
(f) freedom of the press.

4 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
(a) authorize or effect the arbitrary detention, imprisonment or exile of any person
(b) impose or authorize the imposition of cruel and unusual treatment or punishment;
(c) deprive a person who has been arrested or detained
(i) of the right to be informed promptly of the reason for his arrest or
(ii) of the right to retain and instruct counsel without delay, or
(iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;
(d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;
(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;
(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or
(g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

Bill of Rights. Then s. 5(2)[5] provides that "law of Canada" means an Act of Parliament enacted before or after the Bill.

The Indian Act[6] provides by s. 94:

An Indian who

(a) has intoxicants in his possession,

(b) is intoxicated, or

(c) makes or manufactures intoxicants

off a reserve, is guilty of an offence and is liable on summary conviction to a fine of not less than ten dollars and not more than fifty dollars or to imprisonment for a term not exceeding three months or to both fine and imprisonment.

Drybones was intoxicated in a hotel in Yellowknife in the Northwest Territories. Charged under s. 94(b) he pleaded guilty before a Magistrate. On appeal by way of trial *de novo* before Mr. Justice Morrow of the Supreme Court of the Northwest Territories he was allowed to change his plea and to invoke the Bill of Rights Act. His Lordship found that Drybones was an Indian and that he was intoxicated and that he was off a reserve. One argument of the accused was that he could not be off a reserve when there is none in the Territories. This argument failed. The principal defence was that the Bill of Rights Act renders inoperative s. 94 of the Indian Act.

This issue had arisen in British Columbia in *Reg.* v. *Gonzales*[7] and the judgments in the Court of Appeal in that case became the focal point in *Drybones*. Gonzales was an Indian charged with possession of liquor under s. 94(a). He was convicted before a Magistrate. On appeal by way of stated case, Maclean J. dismissed the appeal and Gonzales appealed to the Court of Appeal on the ground that s. 94(a) infringes the right to equality before the law which the Bill declares. The judgment of Davey J.A. is important because the main issue in *Drybones* was whether that judgment is correct. Davey J.A. first considered the meaning of "equality before the law". He was not sure that s. 94 is a denial of equality but assuming that it is he went on to consider whether s. 2 of the Bill renders s. 94 inoperative. He concluded that it does not repeal any legislation in existence when the Bill became law.

> On the contrary, it expressly recognizes the continued existence of such legislation, but provides that it shall be construed and applied so as not to derogate from those rights and freedoms. By that it seems merely to provide a canon or rule of interpretation for such legislation. The very language of s. 2, "be so construed and applied as not to abrogate" assumes that the prior Act may be sensibly construed and applied in a way that will avoid derogating from the rights and freedoms declared in s. 1. If the prior legislation cannot be so construed and applied sensibly, then the effect of s. 2 is exhausted, and the prior legislation must prevail according to its plain meaning.

Tysoe J.A., with whom Bird J.A. concurred, reached the same result but on a different ground. He pointed out that there are many statutes which treat one class of person differently from all others and he cited the example from the Judges' Act which prohibits all Federal Judges from voting in Federal elections. He concluded that

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5 5(2) The expression "law of Canada" in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

6 R.S.C. 1952, c. 149.

7 (1962) 32 D.L.R. (2d) 290, aff'g 130 C.C.C. 400 and 130 C.C.C. 206; see also *A.G. of B.C.* v. *McDonald* (1962) 131 C.C.C. 126: contra *Richards* v. *Cote* (1962) 40 W.W.R. 340 (Sask.).

"equality before the law" in s. 1(b) of the Bill means "in the presence of". That is to say, the Bill does not prevent discrimination between groups but only between persons within a group to which special legislation applies. Equality before the law does not mean the same as equal laws for everyone. The appellant's argument would result in invalidation of much of the Indian Act and Tysoe J.A. was not prepared to give to the Bill such an effect.

A second case which played an important role in *Drybones* is *Robertson & Rosetanni* v. *The Queen*.[8] In *Robertson* the accused were convicted of operating a bowling alley on Sunday in contravention of s. 4 of the Lord's Day Act. They contended that the Bill of Rights renders s. 4 inoperative, and specifically that it infringes their freedom of religion which is one of the freedoms declared in the Bill.

In the hearing before the Supreme Court of Canada five judges sat. Ritchie J. wrote the majority judgment in which Taschereau C.J., Fauteux and Abbott JJ. concurred. Ritchie J. held that the Lord's Day Act did not abridge freedom of religion so therefore did not need to consider the question as to whether the Bill renders inoperative a statute which does abridge that freedom. There is, however, an important passage in his judgment which points out that the Bill is concerned with rights and freedoms *that existed in Canada* on passage of the Bill. He had in mind s. 1 which declares that these rights *have existed* and also s. 5(2) which defines "law of Canada" to include existing statutes. Then he proceeded to examine religious freedom as it was understood prior to the Bill, concluding that the Lord's Day Act is not an abridgement of that freedom. This passage might lead one to think that Ritchie J. was saying that no existing statute could ever be in violation of the Bill. We shall see that in *Drybones* he explained that this was not what he meant.

Of great interest is the dissent of Mr. Justice Cartwright who subsequently became Chief Justice. He found, contrary to the majority, that s. 4 of the Lord's Day Act infringes freedom of religion as that term is used in the Bill, and the fact that the Lord's Day Act had been in force for over a half a century before the Bill is irrelevant. Thus he was obliged to determine whether the Bill renders s. 4 inoperative. He addressed himself to the reasons for judgment of Davey J.A. in *Gonzales*. After setting out the key passage (which has already been quoted) he said:

> With the greatest respect I find myself unable to agree with this view. The imperative words of s. 2 of the *Canadian Bill of Rights*, quoted above, appear to me to require the Courts to refuse to apply any law, coming within the legislative authority of Parliament, which infringes freedom of religion unless it is expressly declared by an Act of Parliament that the law which does so infringe shall operate notwithstanding the *Canadian Bill of Rights*. As already pointed out s. 5(2), quoted above, makes it plain that the *Canadian Bill of Rights* is to apply to all laws of Canada already in existence at the time it came into force as well as to those thereafter enacted. In my opinion where there is irreconcilable conflict between another Act of Parliament and the *Canadian Bill of Rights* the latter must prevail.
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> Whether the imposition, under penal sanctions, of a certain standard of religious conduct on the whole population is desirable is, of course, a question for Parliament to decide. But in enacting the *Canadian Bill of Rights* Parliament has thrown upon the Courts the responsibility of deciding, in each case in which the question arises, whether such an imposition infringes the freedom

8 [1963] S.C.R. 651.

> 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 was the first time after the passage of the Bill that a member of the Supreme Court had held that the effect of the Bill is to render ineffective a provision in a pre-existing Federal Statute. Since his judgment was a dissent it did not affect the result, and the conviction stood.

The *Gonzales* and *Robertson* cases provide the issues in *Drybones*. Morrow J. quoted a statement from Ritchie J. in *Robertson* that the *effect* rather than the *purpose* of a statute must be examined to determine whether it is in conflict with the Bill. He held that the effect of the liquor provisions is discriminatory. Thus he was required to determine the question whether the Bill renders the liquor provisions inoperative. He quoted from *Robertson* the first paragraph of the passage set out above from the judgment of Cartwright J. and applied it. Thus the accused was acquitted.

The Crown applied for leave to appeal to the Court of Appeal of the Northwest Territories, consisting of three members of the Appellate Division of the Supreme Court of Alberta. Mr. Justice Johnson wrote the judgment while Smith C.J.A. and Allen J.A. concurred. In refusing leave to appeal Johnson J.A. specifically preferred the judgment of Cartwright J. in *Robertson* to that of Davey J.A. in *Gonzales*. It is clear that the court was influenced by the existence of the "unless it is expressly declared" clause in s. 2 of the Bill.

As to the reasoning of Tysoe J.A. in *Gonzales*, Johnson J.A. rejected it. It would restrict the Bill so as to permit discrimination between racial groups as long as all those in the group are discriminated against equally. Johnson J.A. answers the illustration of judges' disqualification from voting by saying that the Bill prevents discrimination only on the grounds specified in the Bill namely, race, national origin, colour, religion or sex.

The Crown obtained leave to appeal to the Supreme Court of Canada and the appeal was argued on its merits, the single issue being whether the Bill renders s. 94 inoperative. The appeal was dismissed, six judges to three. Ritchie J. wrote the majority judgment, with Fauteux, Martland, Judson, Hall and Spence, JJ. concurring. On the central issue, Mr. Justice Ritchie disagreed with Davey J.A. in *Gonzales* and quoted with approval the views of Cartwright J. in *Robertson*. Like the Court of Appeal, he emphasized the "unless" clause in s. 2. It must not be treated as superfluous. Section 2 does not repeal s. 94 but makes it "inoperative".

Ritchie J. then explained his comments in *Robertson* which imply that laws existing before the Bill are of necessity consonant with the Bill because of the statement in s. 1 that the enumerated rights had existed. He had not meant to say this: his reference in *Robertson* to existing laws was for the purpose of examining the decided cases to determine the meaning of freedom of religion as it was understood immediately before enactment of the Bill. He had not said that the Bill is of necessity subject to the Lord's Day Act merely because the

latter was an existing statute. Such an opinion would have been contrary to s. 5(2) which declares "law of Canada" to include existing statutes of Canada.

Turning to the meaning of "equality before the law" he held it to mean that no group is to be treated more harshly than another under that law; "an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty." Thus s. 94(b) is inoperative.

Hall J. while concurring in the majority judgment added his specific disagreement with the reasons of Tysoe J. in *Gonzales*.

The dissent of Chief Justice Cartwright is notable in that he reconsidered his opinion in *Robertson* and concluded that the view of Davey J. A. which he had rejected in *Robertson* is in fact the better one. If Parliament intended to confer upon the courts the power and responsibility of declaring inoperative a provision in a statute of Canada, then every Justice of the Peace, Magistrate and Judge of any court has this power and responsibility. Had Parliament so intended it would have added in s. 2 some such words as the following: "and if any law of Canada cannot be so construed and applied it shall be regarded as inoperative or *pro tanto* repealed". His own error in *Robertson* was in the statement that the Bill requires the courts to refuse to apply any law of Canada which infringes one of the declared rights or freedoms. In fact the Bill directs the courts to apply a law of Canada, not to refuse to apply it.

Abbott J. took a similar position. The majority view implies a wide delegation of the legislative authority of Parliament to the courts. It would require the plainest words to impute to Parliament an intention to extend to the courts such an invitation to engage in judicial legislation. With respect to existing legislation, s. 2 of the Bill provides merely a canon or rule of interpretation.

The dissent of Pigeon J. puts emphasis on the opening part of s. 1 of the Bill. The reference to existing law gives precision to the broad phrases used to describe the six enumerated rights and freedoms. The British North America Act itself specifically gives Parliament power to enact legislation in relation to Indians. If the Bill renders inoperative all the legal provisions whereby Indians as such are not dealt with in the same way as the general public, then Parliament has indirectly altered the status of the Indian and has required the insertion of a *non obstante* clause whenever Parliament wishes to legislate under s. 91(24) of the B.N.A. Act. The "construed and applied" clause is one of construction. Pigeon J. faced the fact that the *non obstante* clause provides the strongest argument against his view. He concluded that proper effect can be given to it without using it to strike down legislation already in existence. Inroads on parliamentary sovereignty should not be implied.

Which interpretation of the Bill is justified on the terms of the Bill? The writer sees much force in the view of Davey J.A. and of the three dissents in *Drybones*. On the other hand the injunction in

s. 2 that every law of Canada shall be so "construed and applied" as not to abrogate any of the enumerated rights or freedoms, together with the *non obstante* clause, is apt language to justify the opinion of the majority.

It is elementary that a court may not examine committee reports and debates in Hansard as an aid in construing a statute. However a commentator is under no such selfcensorship. The original 1958 draft of the Bill[9] did not clearly confer on the court the power to declare inoperative a provision which in the opinion of the court is in contravention of the proposed Bill. The Bill which Prime Minister Diefenbaker reintroduced on June 27, 1960, had been substantially amended. After debate the House of Commons established a special committee to study the Bill. In the committee the Honourable Paul Martin quoted from a letter from Andrew Brewin of Toronto to the Chairman of the Committee:

> The declaration by Parliament in general terms could not be said to have the effect of repealing or amending any existing statute which might be thought to be inconsistent with it, nor, in my opinion, would it have the effect of preventing Parliament in future passing any enactment inconsistent with the bill of rights.[10]

Later in the Committee Proceedings[11] the Honourable Mr. Martin proposed an amendment to the Interpretation Act. This amendment provided for the repeal of any existing acts which abrogate any of the declared rights or freedoms. The Committee did not vote on the proposal. However after the Committee reported on 29 July the proposed Bill was debated in the House of Commons on August 1-4. The Honourable Mr. Martin then proposed the same amendment.[12] The Honourable E. D. Fulton, Minister of Justice, opposed the amendment on the ground *inter alia,* that it was not necessary; that the draft Bill as it then stood (and as later passed) and particularly the opening part of s. 2 had precisely the same effect as the Honourable Mr. Martin's amendment to the Interpretation Act would have.[13] The amendment was defeated.[14]

Accepting the construction which the majority put on the Bill, there is one argument which the Crown advanced both in *Gonzales* and *Drybones* without success but which seems to the writer to have considerable force. It is the argument that the Indian Act including the liquor provisions are protective and not discriminatory. The British

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9 (1959) 37 Can. Bar Rev. 1.
10 Special Committee on Human Rights and Fundamental Freedoms, p. 648 (1960).
11 *Id.* at 678.
12 Debates, House of Commons, 1960 Vol. VII p. 7474.
The amendment reads:
"The Interpretation Act is amended by adding thereto under the heading of "rules of construction" immediately before section 9 thereof, the following section as section 8(A).
'8(A) 1. Every act of the Parliament of Canada and every order, rule and regulation thereunder in force at the commencement of this section, and all laws in Canada that are subject to be repealed, abolished or altered by the Parliament of Canada in force at the commencement of this section, are hereby amended by repealing or revoking them to the extent that any provision thereof would abrogate, abridge, or authorize the abrogation, abridgement or infringement of any of the rights or freedoms declared to exist in Canada by the Canadian Bill of Rights.'
'2. No act of the Parliament of Canada, passed hereafter, shall, unless it is otherwise expressly stated in it be interpreted to abrogate, abridge or infringe, or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms declared to exist in Canada by the Canadian Bill of Rights.'
'3. No act, order, rule or regulation or law mentioned in subsection 1, and, unless it is expressly otherwise stated therein, no act hereafter passed, shall be construed or have effect to.' "
13 *Id.* at 7475-77.
14 *Id.* at 7482.

North America Act specifically gives Parliament jurisdiction over Indians and Indian lands. At the first session of the First Parliament of the Dominion of Canada in 1868 a statute establishing the office of Secretary of State dealt in large measure with Indian lands. In addition it forbade the sale or gift of liquor to Indians, and the taking of pawns from Indians for liquor.[15]

In 1876 Parliament passed a comprehensive Indian Act. It contained seven sections dealing with intoxicants, two of which include the prohibitions now contained in s. 94.[16] It is unnecessary to trace the various amendments from 1876 to the present time. There has been some relaxation, particularly in the 1956 amendments which provide for proclamations permitting sale of liquor to Indians and possession of liquor by Indians in accordance with provincial law.[17]

It may be that the efforts to keep liquor from Indians have not succeeded in their purpose and that the remaining prohibitions should be repealed. The recent study by the Canadian Corrections Association,[18] and the brief of the Department of Indian Affairs and Northern Development to the Select Committee of the Senate on Poverty[19] indicate that liquor is still a serious problem but that Indians themselves on the whole would prefer the repeal of the special restrictions relating to them. Granted all this, the liquor provisions were in their inception clearly intended to be protective. Is an enactment respecting Indians necessarily discriminatory and a deprivation of equality because it imposes penalties on them for conduct that others may pursue with impunity? Implicit in the *Drybones* decision is an affirmative answer. My submission is that an enactment respecting Indians can still be protective even though it subjects them to penalties. "We are doing this for your own good" can apply to Indians as well as to children who are chastised by their parents. Moreover, lack of wisdom in a policy or ultimate failure of a policy surely does not convert its quality from protective to discriminatory.

It is not clear from *Drybones* as to the vulnerability of all the liquor provisions. Ritchie J. specifically confined his holding to s. 94(b); Morrow J. to the sections dealing with intoxicants; and the Court of Appeal seems to extend its ratio to all the provisions in the Act which restrict Indians. Is s. 32 restricting sale by Indians of natural products open to attack? Or s. 46 giving to the Minister power in specific circumstances to declare void the will of an Indian?

It is interesting to note the position that the Supreme Court of the United States has taken with respect to Indians. Almost from the beginning Congress passed special legislation relating to Indian lands and sale or gift of liquor to Indians. Under the Constitution the only specific power of Congress over Indians is in the Commerce clause, which gives power "to regulate Commerce . . . with the Indian tribes". Yet an unbroken line of decisions has held that Congress has in addition the power to legislate with respect to Indians because they are in a state of pupillage or wardship, and the decision to abandon its guardian-

15 S.C. 1868, c. 42, ss. 12 & 13.
16 S.C. 1876, c. 18, ss. 79 & 83.
17 S.C. 1956, c. 40, s. 23.
18 Indians and the Law (1967) esp. c. IV.
19 Special Senate Committee on Poverty, No. 14, Jan. 20, 1970, esp. at 92-94.

ship rests in Congress; the Court will not overrule the judgment of Congress.[20] It is true that over the years Congress has relaxed its control substantially; it is true too that Congress is not bound by the equal protection clause which restricts the States. However, it is bound by the due process clause which has been widely construed in other areas, and it is not insignificant that the Supreme Court has refrained from striking down Acts of Congress dealing specially with Indians.

As for state laws, every state is enjoined by the Fourteenth Amendment not to "deny to any person within its jurisdiction the equal protection of the laws." Although Tysoe J.A. in *Gonzales* thought that equal protection of the laws is different from equality before the law, the writer cannot define any difference.

There is a valuable case from Idaho, *State* v. *Rorvick*,[21] in which the charge was for sale of intoxicating liquor to an Indian contrary to an Idaho statute. The court was divided. The majority judgment gives a valuable survey of legislation respecting Indians. It points out that President Jefferson was concerned with the effect of liquor on Indians. Congress has always assumed the duty "to protect Indians from well recognized weaknesses". Several cases from other states uphold state legislation of this kind. "Sale to Indians was not prohibited because of their copper colored skin" but "because history proves the [liquor] has cursed and demoralized the Indian". Arguments against the legislation should be addressed to the legislature, not the Court.

The suggestion I have been making is that protective legislation is not discriminatory. This is merely an example of a broader proposition that is well established in the United States in connection with the equal protection clause. That clause does not forbid all classifications; a statute may be invulnerable to attack even though it singles out a special class of persons for treatment that may *prima facie* seem to discriminate against them (or for them and against all others). A Michigan statute forbidding women from obtaining a bartender's license except for the wife or daughter of the male owner of the bar was upheld;[22] also a law excluding aliens from operating pool halls;[23] and a Louisiana statute which in effect ensured that only relatives and friends of river pilots could become pilots;[24] and state laws barring aliens ineligible to citizenship from land ownership.[25] The principle reiterated innumerable times is that the test for denial of equal protection is "whether the challenged classification rests on grounds wholly irrelevant to the achievement of a valid state objective."[26] The application of the test rests with the court. At times the court has been quite willing to find no valid state objective: at others it has deferred to the legislative judgment. If our courts are to use the power to declare an act of

20 *U.S.* v. *Kagama* (1880) 118 U.S. 375; *Re Heff* (1905) 197 U.S. 488; *U.S.* v. *Sandoval* (1913) 231 U.S. 28; *U.S.* v. *Nice* (1917) 241 U.S. 591; *U.S.* v. *McGowan* (1937) 302 U.S. 535. All but the first of these cases have to do with liquor. The present federal prohibitions against dispensing liquor to Indians are found in 18 U.S.C.A. 1154-56, 1161. It may be noted that *Nice* overrules *Heff* on interpretation of an Act of Congress but both cases support the statement in the text.

21 (1954) 277 P. 2d 566. The writer is indebted to Tarnopolsky, *The Canadian Bill of Rights* (1966), 214 for this reference.

22 *Goesaert* v. *Cleary* (1948) 335 U.S. 464.

23 *Clarke* v. *Deckebach* (1927) 274 U.S. 392.

24 *Kotch* v. *River Commissioners* (1947) 330 U.S. 552.

25 *Terrace* v. *Thompson* (1923) 263 U.S. 197; *Porterfield* v. *Webb* (1923) 263 U.S. 225. These cases may be weakened by *Oyama* v. *California* (1948) 332 U.S. 633 and *Takakashi* v. *Fish & Game Commission* (1948) 334 U.S. 410.

26 *Turner* v. *Fouche* (1970) 90 S.C. 532 at 541.

Parliament to be a denial of equality before the law then surely they will have to evolve some kind of a test that will permit the preservation of some statutes which deal specially with one group or another.

Returning to the Indian Act, I recognize that Parliament could preserve s. 94, or the whole Act for that matter, by adding a *non obstante* clause; but it is scarcely satisfactory to proceed in this way. One objection to the power which *Drybones* assures to the courts is that the power is essentially negative. We do not satisfactorily deal with Indians by an Act which confers on the court the power to declare inoperative sections of the Indian Act. The Supreme Court (or lower courts subject to appeal) can nibble away at the Indian Act section by section. They can thus create a vacuum but cannot fill it. The device rendered possible by the Bill is not the way to try to solve the "Indian problem", which admittedly is difficult. The responsibility should be that of the legislature.

There is one point that *Drybones* raises which could have implications in future and which could possibly restrict the scope of the Bill. It has been noted that the six rights and liberties in s. 1 are declared to have existed and to continue to exist "without discrimination by reason of race, national origin, colour, religion or sex". This part of s. 1 was given particular emphasis by the Court of Appeal in *Drybones*. Let us suppose that a statute of Canada infringes any of the six basic rights or freedoms—the right to due process of law and equality before the law and the freedoms of religion, speech, assembly and press. However, the infringement is not based on discrimination by reason of race, national origin, colour, religion or sex. In the view of the Court of Appeal such discrimination is not within the protection of the Bill. If this interpretation is correct, which the writer doubts, the Bill is exceedingly narrow in scope. A statute may abridge freedom of press, for example, or due process of law without having anything to do with racial or religious discrimination.

Now that the power of the court is established the main concern is whether the courts will be astute to declare inoperative subsections, sections or whole statutes. As Pigeon J. said in *Drybones* there is a vast difference between the power of a court to construe a statute and a power to declare it inoperative.

Courts often have construed statutes in conformity with the spirit of the rights and freedoms which the court considers fundamental. The Supreme Court in *Boucher* v. *The King*[27] construed seditious intention in a way that protected from prosecution a person who published a bitter attack on the Catholic Church and the Quebec Courts. Since he did not incite others to violence he did not have a seditious intention. This decision makes freedom of speech mean something.

In another area of human rights, that of fairness in criminal procedure the courts within limits can construe the Criminal Code or the Narcotic Control Act in a way to avoid harshness. *Beaver* v. *The Queen*[28] is an example. In spite of the stringent wording of the Opium and Narcotic Act, the Supreme Court held it did not prevent the accused from showing an absence of *mens rea*.

27 [1951] S.C.R. 265.
28 [1957] S.C.R. 531.

Decisions like these may be regarded as wise or unwise, right or wrong. Under our traditional system Parliament may be content to leave the statute as it is, or may decide to amend it. However, should Parliament now wish to "reverse" a decision holding that a statutory provision is inoperative because of conflict with the Bill, it must now add a *non obstante* clause.

If one were to go through the statute book he would doubtless find many provisions which *might* be inoperative. Section 16 of the Criminal Code which requires an accused to show insanity by a preponderance of evidence might be a denial of due process or of the presumption of innocence declared in s. 2(f); and the provisions in the Code[29] for trials in camera might be ineffective because of s. 2(f) of the Bill which requires a public hearing;[30] and s. 5 of the Canada Evidence Act might be an infringement of protection against self-incrimination which is declared in s. 2(d) of the Bill.

The device of trying to secure the enumerated rights and freedoms through the power which the Bill accords to the court has three vices: (1) it is essentially negative, (2) it creates uncertainty, (3) it permits Parliament to evade its responsibility.[31]

—W. F. BOWKER, Q.C.*

29 ss. 427, 428; also 451(j) dealing with preliminary hearings.
30 MacPherson J. in *Benning* v. *A.G. Sask.* (1963) 41 W.W.R. 497 held that the Bill does not supersede the Code.
31 The writer acknowledges with thanks the help he received from a paper *The Indian Act and the Canadian Bill of Rights* by Colin Taylor, a student in second year law at the University of Alberta. He does not associate Mr. Taylor with the views here expressed.
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"WHIPLASH" INJURIES—A RADIOLOGIST'S VIEW

Whiplash injuries are not uncommon in today's traffic conditions. I understand that a considerable proportion of trial work in connection with motor vehicle accidents involves consideration of this type of injury. Because of possible injury to the bones, the radiologist is invariably called in to assist in determining the nature and extent of the injury. Lawyer friends of mine have often complained that with the high degree of specialization involved, the radiologist, in common with most medical men, tends to lose sight of the fact in reporting that the average lawyer finds some difficulty in appreciating all aspects of a medical report. This article is written in the hope that it will clarify the nature of the injuries, and assist lawyers to reach an accurate assessment of the injuries for which compensation is claimed.

Whiplash can be defined as a condition resulting from a sudden, violent, involuntary, to-and-fro movement of the neck or body, like the cracking of a whip.

If a car strikes another car, it will transmit to the car which has been struck a considerable force. Part of this force is transmitted to the body. The head first snaps back. Next, the head is snapped forward before there is any opportunity to recover. See Figure 1.

In judicial hanging the sudden jerk of the body breaks the neck; in this instance the force applied is that of the body weight only. It is