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The decision of the Supreme Court of Canada in A.-G. Can. v. Lavell is a weak response to a question which generated great public interest because of its implications for Indians, for women and for the continued vitality of the Canadian Bill of Rights’ guarantee of “equality before the law”. The case concerned section 12(1)(b) of the Indian Act. This section provides that an Indian woman who marries “a person who is not an Indian” is not entitled to be “registered as an Indian”. The Registrar, an official in the Department of Indian Affairs and Northern Development, has the power to delete from “the Indian Register” the name of any Indian woman who has married a non-Indian man. By contrast, when an Indian man marries a non-Indian woman, the man does not lose his Indian status; instead, his wife acquires Indian status. Thus the Indian Act treats Indian women and Indian men quite differently in the same circumstances of marriage to a non-Indian.

The Lavell case was an appeal from two judgments. The first concerned Mrs. Lavell, who was a “status Indian” (an Indian within the meaning of the Indian Act) until she married a non-Indian. Her name was deleted from the Indian Register by the Registrar. She had not been living on a reserve for nine years prior to her marriage, and she did not claim to have been deprived of any property rights by the Registrar’s decision. She appealed from the decision to a County Court judge under section 9(3) of the Indian Act; he upheld the decision of the Registrar. She then appealed to the Federal Court of Appeal, which reversed

1 (1973), 38 D.L.R. (3d) 481.
3 Ibid., s. 7.
4 Ibid., s. 11(1)(f).
the County Court judge on the ground that section 12(1)(b) was inoperative by reason of conflict with the right to "equality before the law" in section 1(b) of the Canadian Bill of Rights.6

The second case concerned Mrs. Bedard, who was also a status Indian until she married a non-Indian in 1964. She separated from her husband in 1970, and returned to the reserve to live in a house which had been left to her under her mother's will. When she returned to the reserve the band council required her to dispose of the property and gave her permission to remain on the reserve only until she had disposed of the property. She disposed of the property to her brother, but he allowed her to continue to live in the house. The band council then resolved that the regional supervisor should be requested to serve a notice to quit the reserve on Mrs. Bedard. She responded by commencing an action for an injunction restraining the band council from expelling her from the reserve and claiming some other relief as well. Osler J. in the Supreme Court of Ontario granted the injunction; he followed the decision of the Federal Court of Appeal in the Lavell case and held section 12(b) to be inoperative as in conflict with the Bill of Rights.7

On appeal from both decisions, the Supreme Court of Canada, by the narrow majority of five to four, reversed the decisions of the Federal Court of Appeal and of Osler J., and held that section 12(1)(b) was not in conflict with the right to "equality before the law" in the Bill of Rights; it was therefore an operative provision, and Mrs. Lavell and Mrs. Bedard had legally lost their status as Indians. The principal majority opinion was written by Ritchie J. It will be recalled that it was Ritchie J. who wrote the principal majority opinion in R. v. Drybones,6 the first and so far still the only case in which the Supreme Court of Canada has held a statute to be inoperative for conflict with the Bill of Rights. Ritchie J. in Lavell is careful to reaffirm his earlier decision that the Bill of Rights does have the effect of rendering inoperative statutes which conflict with its precepts.6 But he concludes in Lavell that section 12(1)(b) is not in conflict with the Bill of Rights and that the Drybones doctrine is therefore inapplicable. He offers essentially two arguments in support of this result, which I have called "the British North America Act argument" and "the Dicey argument". Each of these arguments is considered later in this comment. Ritchie J.'s opinion was concurred in by Fauteux C.J., Martland and Judson JJ. The fifth vote was provided by Pigeon J. who had

6 (1971), 22 D.L.R. (3d) 188.
9 Supra, footnote 1, at p. 494.
dissented in *Drybones*. He wrote a short opinion agreeing in the result with Ritchie J., but dissociating himself from Ritchie J.'s reasoning. Pigeon J. made no attempt to determine whether or not section 12(1)(b) was in conflict with the Bill of Rights (although he implied that he thought it was). He avoided the issue by persisting in the view he had expressed in dissent in *Drybones* that the Bill of Rights does not in any event override inconsistent legislation. Section 12(1)(b) was therefore operative, whether or not it conflicted with the Bill of Rights.

The principal dissenting opinion was written by Laskin J. as he then was. He argued that there was no distinction between *Drybones* and *Lavell* and that section 12(1)(b) was in conflict with the equality guarantee in the Bill of Rights and was inoperative. Laskin J.'s opinion was concurred in by Hall and Spence JJ. Abbott J. wrote a separate dissenting opinion in which he agreed with Laskin J. and added some comments of his own, including the striking statements that the Bill of Rights "has substantially affected the doctrine of the supremacy of Parliament", and that such a result is "undesirable". Abbott J., like Pigeon J., had been one of the three dissenters in *Drybones* (the third one being Cartwright C.J.) who held that the Bill of Rights could not override inconsistent statutes. It is perhaps surprising that he apparently did not feel free to join Pigeon J. in persisting in this dissenting view, since in no decision after *Drybones* had the Bill of Rights actually been given the effect of rendering a statute inoperative. As a digression it may be noticed that Abbott J.'s opinions in three important civil liberties cases are very difficult to reconcile with each other. It will be recalled that it was Abbott J. in *Switzman v. Elbling*, the famous padlock case, who stated, *obiter*, that there was a bill of rights implied in the British North America Act, whereby neither Parliament nor the legislatures could abrogate the freedoms of expression and debate which were essential to the working of a parliamentary democracy. This opinion appeared to reflect a strong view of the desirability of limiting legislative supremacy by a bill of rights, because there is no such bill of rights explicit in the British North America Act, and no other judge of the Supreme Court of Canada has been prepared to assert clearly that one should be implied. Then in *Drybones* when Abbott J. was given the opportunity to join the majority in holding that the explicit Canadian Bill of Rights was a "true" bill of rights with overriding effect on inconsistent statutes he rejected the opportunity and held that the Bill of Rights was merely a canon of

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construction. Now in Lavell Abbott J. asserts that the Bill of Rights "has substantially affected the doctrine of the supremacy of Parliament" (this is inconsistent with his Drybones opinion), and that such a result is "undesirable" (this is inconsistent with his Switzman v. Elbling opinion).

The British North America Act Argument.

Ritchie J.'s first reason for upholding section 12(1)(b) is summarized in his own words: 13

... that the Bill of Rights is not effective to render inoperative legislation, such as s. 12(1)(b) of the Indian Act, passed by the Parliament of Canada in discharge of its constitutional function under s. 91(24) of the B.N.A. Act, to specify how and by whom Crown lands reserved for Indians are to be used.

Early in his judgment he emphasized that section 91(24) of the British North America Act assigned to the federal Parliament the subject of "Indians, and Lands reserved for [the] Indians". 14 This authority "could not have been effectively exercised without enacting laws establishing the qualifications required to entitle persons to status as Indians and to the use and benefit of Crown lands reserved for Indians". 15 The Bill of Rights "has [not] rendered Parliament powerless to exercise the authority entrusted to it under the Constitution"; 16 and "it is not effective to amend or in any way alter the terms of the B.N.A. Act". 17

This argument, which I have called the British North America Act argument, may perhaps be best understood by looking at another case, Canard v. A.-G. Can., 18 a decision of the Manitoba Court of Appeal written by Dickson J.A. (who has of course since been elevated to the Supreme Court of Canada). In Canard the court was concerned with section 43 of the Indian Act, a provision which gives to the Minister of Indian Affairs and Northern Development jurisdiction to appoint the executors and administrators of the estates of deceased Indians. For non-Indians that jurisdiction exists in the Surrogate Court (or other probate court) of the province in which the deceased is domiciled (or in which he leaves land) at the time of death. Dickson J.A., in an opinion which was agreed to by the other members of the court (Guy and Hall JJ.A.), held that section 43 was in conflict with the Bill of Rights because it denied "equality before the law" to the Indians; it was "a legal roadblock in the way of one particular racial group, placing that

13 Supra, footnote 1, at pp. 499-500.
14 Ibid., at p. 489.
15 Ibid., at p. 490.
16 Ibid.
17 Ibid., at p. 489.
18 (1972), 30 D.L.R. (3d) 9. Leave to appeal to the Supreme Court of Canada was granted on October 16th, 1972.
racial group in a position of inequality before the law; it was therefore inoperative. The learned judge also cast doubt on the other succession rules in the Indian Act.

This decision has always seemed to me to be wrong. Let us assume that there is a disadvantage to Indians in having their estates administered by the Minister of Indian Affairs instead of by the Surrogate Court. Section 91(24) of the British North America Act assigns legislative power over “Indians, and Lands reserved for the Indians” to the federal Parliament. It thereby envisages that legislation upon matters which would otherwise be within provincial competence, for instance, succession on death, can be enacted by the federal Parliament so long as it is in relation to “Indians, and Lands reserved for the Indians”. Obviously, the rules of the Indian Act concerning succession on death will apply only to Indians, for if they applied to any wider class of persons they would be unconstitutional. And, equally obviously, those rules will differ from the rules applicable to non-Indians, because the rules for Indians can only be enacted federally, while the rules for non-Indians can only be enacted provincially. To say that the rules of the Indian Act deny “equality before the law” because they are harsher than the provincial rules is to ignore the federal character of Canada. It is like saying that an Ontario law denies equality before the law because it is harsher than the comparable Quebec law. The essential feature of federalism is that it will accommodate differences of this kind.

The Bill of Rights could be interpreted as abolishing all special rules for Indians, or at least those which place Indians in a position which is disadvantageous in comparison with non-Indians. This point of view does not involve the proposition “that the Bill has rendered Parliament powerless to exercise the authority entrusted to it under the constitution”, or the proposition that the Bill is effective to “amend” or “alter” the terms of the British North America Act. These suggestions by Ritchie J. (quoted earlier in this comment) are clearly erroneous. A voluntary withdrawal by Parliament from a field entrusted to it under the constitution does not render Parliament “powerless” to re-enter that field; nor does it “amend” or “alter” the British North America Act. That Act does not impose a duty to enact special laws for the Indians; it does not compel Parliament or the legislatures to exercise any of their legislative powers to the full, or even at all. It is not necessary to set up Ritchie J.’s straw men in order to reject the

\[19\] Ibid., at p. 23.
\[20\] Ibid., at p. 22.
\[21\] This was in fact the decision of Osler J. in Isaac v. Davey, [1973] 3 O.R. 677; 38 D.L.R. (3d) 23. A dictum of Laskin J.’s in Lavell, supra, footnote 1, at pp. 511-512, suggests that he also holds this point of view.
argument that the Bill of Rights prohibits special laws for Indians. What seems to me to be wrong with the argument is that it is not plausible. There is no need to construe the vague phrase “equality before the law” as requiring such a radical result as the abolition of laws enacted by the federal Parliament which employ a racial classification when the use of that classification is essential to the validity of the laws under the British North America Act. It is much more plausible to construe the guarantee of equality as not intended to disturb the federal principle: inequalities between the laws of different legislative bodies within the federation should be deemed not to be inconsistent with equality before the law.22

If we accept that the guarantee of equality before the law should be qualified by the federal principle of diversity between legislative jurisdictions, then we have to conclude that Drybones was wrongly decided. The only reason why section 94(b) (now section 95(b)) of the Indian Act was held inoperativewas because it imposed a “harsher” liquor law on Indians than the law applicable to non-Indians. The difficulty with this reasoning was clearly stated by Pigeon J. in his dissenting judgment in Drybones. The “very object” of section 91(24) of the British North America Act, he said, “in so far as it relates to Indians, as opposed to Lands reserved for the Indians, is to enable the Parliament of Canada to make legislation applicable only to Indians as such and therefore not applicable to Canadian citizens generally”.23

22 Katz, The Indian Act and Equality Before the Law (1973), 6 Ottawa L. Rev. 277 agrees with this proposition, but he argues that the Indian Act may nevertheless be in violation of “equality before the law”. He would compare its provisions, not with provincial laws, but with the absence of similar federal laws for non-Indians; and where Parliament has no power to enact similar federal laws for non-Indians then he would compare the Indian Act provisions with the laws of the federal territories, even though the facts may arise far away from either of the territories. These arguments, while ingenious, seem to me to be unrealistic. The absence of federal laws in a field where the Parliament has power to enact laws may be explained by the existence of satisfactory provincial laws (which Katz will not use for purposes of comparison), or at least by a provincial occupation of the field which it is not politically feasible for the federal Parliament to disturb. The territorial laws are not a realistic basis for comparison either, because they are enacted for each territory not by the federal Parliament but by the local, mainly elected, Territorial Council (see next footnote); and although the power of each Council is merely delegated from the Parliament, there are obvious political constraints against direct federal parliamentary intervention in the local government of each territory.

23 Supra, footnote 8, at pp. 303 (S.C.R.), 489 (D.L.R.). The only possible escape from this argument lies in the fact that Drybones arose in the Northwest Territories over which the federal Parliament has full legislative authority under an 1871 amendment to the B.N.A. Act. In fact, however, the federal Parliament has delegated to a Territorial Council legislative powers equivalent to those of a provincial Legislature: Northwest Territories Act, R.S.C., 1970, c. N-22, s. 13; the Yukon Territory Act, R.S.C., 1970, c. Y-2, s. 16, is similar. The result is that the territorial ordinances
Ritchie J. in his majority judgment in Drybones did not attempt to answer this criticism. Now in Lavell we learn what his answer is: Drybones, we are told, was concerned with "conduct by Indians off a reserve"; Lavell, on the other hand, is concerned with "the internal regulation of the lives of Indians on Reserves of their right to the use and benefits of Crown lands thereon". The emphasis of "off" and "on" in these quotations is Ritchie J.'s own, and throughout his reasons for judgment he emphasizes that the Lavell case is concerned with the property and civil rights of Indians "on reserves".

Ritchie J.'s characterization of the issue in Lavell seems to me to be both wrong and irrelevant. The reason why it is wrong is that the issue in the case was whether or not Mrs. Lavell and Mrs. Bedard had been lawfully deprived of their status as Indians. Indian status certainly does carry with it the right to reside on, and acquire property in, a reserve, but it carries non-reserve consequences as well. Sections 42 to 52 make detailed provisions with respect to the property of Indians—all property whether situate on a reserve or not, and all Indians whether residing on a reserve or not. Thus, as we noticed in the Canard case, probate jurisdiction over the estates of deceased Indians is exercised by the Minister of Indian Affairs and Northern Development. The Minister has power to "declare the will of an Indian to be void in whole or in part" if he is satisfied of any one of a number of matters, including such extraordinary grounds as that the terms of the will are "vague, uncertain or capricious" or are "against the public interest". If an Indian dies intestate, the scheme of distribution of his estate is laid down in the Indian Act; that scheme differs very substantially from the Ontario scheme, for example. There are provisions for the administration of the property of mentally incompetent Indians and infant Indians; these provisions, like the other property and succession rules, apply to Indians and their property off as well as on reserves. Then, moving away from the private property rules, we find that the Act authorizes payments of money to Indians and the provision of services to Indians, and that these provisions are not always confined to Indians living on reserves. Then there is section 95, the section held to be inoperative in
Drybones (then section 94), making drunkenness (as well as possession or manufacture of intoxicants) off a reserve an offence for Indians. The provisions concerning education require Indian children to attend "such school as the Minister may designate," and they provide for the appointment and empowering of truant officers; these obligations are not confined to Indian children living on reserves, and the designated school need not be on a reserve. It is worth noting that the parent or guardian of a truant Indian child commits an offence under section 119 of the Act, so that Ritchie J. seems to be wrong when he says that "a careful reading of the Act discloses that section 95 (formerly 94) is the only provision therein made which creates an offence for any behaviour of an Indian off a reserve". It is surely plain that the issue for Mrs. Lavell and Mrs. Bedard was not exclusively concerned with their rights on reserves; the deprivation of Indian status was much wider than that.

Even if the Lavell case could be characterized in the narrow fashion attempted by Ritchie J. this would still not make the case materially different from Drybones. Section 91(24) of the British North America Act empowers the federal Parliament to legislate for "Indians, and lands reserved for the Indians". There are two heads of power here: "Indians" and "Lands reserved for the Indians". The distinction may be seen in the drunkenness provisions of the Indian Act. Thus section 95, making drunkenness an offence off a reserve, has to employ a racial classification and apply to "an Indian"; section 97, making drunkenness an offence on a reserve, need not employ a racial classification and it applies to "a person". If a distinction is to be drawn, the British North America Act argument applies with more force to those provisions of the Indian Act which apply off reserves. Such provisions are constitutional only if they are laws in relation to "Indians"; here the British North America Act seems to insist upon a racial classification, as the draftsman of section 95 clearly concluded. Provisions which apply on reserves are constitutional if they are in relation to "Lands reserved for the Indians"; it is possible to make some provisions for lands reserved for the Indians without using a racial classification, as the language of section 97 demonstrates. An argument might be constructed (which would not in my view be very strong) for the proposition that provisions employing a racial classification which apply off reserves do not offend the

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31 Ibid., ss 114-123.
32 Supra, footnote 1, at p. 498.
33 In R. v. Whiteman, [1971] 2 W.W.R. 316, McClelland D.C.J. (Sask.) refused to hold s. 97 (then s. 96) inoperative on the ground that, unlike s. 95 (then s. 94) which had been held inoperative in Drybones, s. 97 did not employ a racial classification.
Bill of Rights, but provisions employing a racial classification which apply on reserves do offend the Bill of Rights. Ritchie J.’s proposition is the exact reverse of this. It cannot be supported, and it cannot therefore provide a basis for distinguishing *Drybones* from *Lavell*.

I have taken the view that an analysis of “the British North America Act argument” is justified because it will obviously be of great significance in testing other parts of the Indian Act. The fact that it is relied upon by Ritchie J. stimulated the discussion. But in my view the argument is totally irrelevant to the issue in *Lavell*, and was not even worthy of mention in the case. The British North America Act argument is that where the Act uses a particular classification in order to confer legislative jurisdiction on the federal Parliament then the use by the federal Parliament of that classification should not be deemed in violation of the “equality before the law” guarantee in the Bill of Rights. Thus a law in relation to “aliens”\(^{34}\) should not be deemed in violation of equality before the law because it treats aliens more harshly than British subjects or citizens. A law in relation to “savings banks”\(^{35}\) should not be deemed in violation of equality before the law because it treats savings banks more harshly than insurance companies. But as soon as Parliament employs a classification which is different from that contained in the British North America Act’s grant of power, then the law does have to meet the test of equality. Thus a law which treats black aliens differently from white aliens would undoubtedly be in violation of the equality guarantee; a law which prohibits savings banks from accepting deposits from Roman Catholics would also be in violation. In these examples it is no answer to say that Parliament is exercising its authority over aliens and savings banks; it is the classification by colour and religion which is offensive and those classifications are not built into the British North America Act. Indeed, Parliament is always legislating in exercise of some power conferred by the British North America Act; if that fact alone exempted its products from the Bill of Rights, then the Bill of Rights could never be effective.

This rather obvious fallacy is the principal (though not the only) vice in Ritchie J.’s use of the British North America Act argument to sustain section 12(b) of the Indian Act in *Lavell*. He says that the provision is not offensive to “equality” because its rule was “imposed in discharge of Parliament’s constitutional function under section 91(24)”.\(^{36}\) But Mrs. Lavell and Mrs. Bedard did not claim to be discriminated against by reason of the fact that

\(^{34}\) B.N.A. Act, s. 91(25).
\(^{35}\) *Ibid.*, s. 91(16).
\(^{36}\) *Supra*, footnote 1, at p. 490.
they were Indians; if that had been their complaint then Ritchie J. could have replied that that kind of discrimination is inherent in the grant of legislative power over Indians in section 91 (24) of the British North America Act. What Mrs. Lavell and Mrs. Bedard complained of was discrimination by reason of the fact that they were women. If the British North America Act had granted power over “Indian women” the same reply would have been available to his Lordship. But the British North America Act in fact confers power over “Indians”; it is obvious that Indians is a term which is regardless of sex and that therefore sexual discrimination is not inherent in that grant of power. It is therefore a massive red herring to justify section 12(b) of the Indian Act on the ground that it was enacted in exercise of authority conferred by section 91(24). A provision of the Indian Act which can be justified on that ground is section 95, dealing with drunkenness by an “Indian”; but in Drybones, as we have noticed, Ritchie J. himself wrote the majority judgment of the Supreme Court of Canada holding section 95 (then section 94) to be inoperative as in conflict with the equality guarantee. Another provision is section 43, dealing with the estates of deceased “Indians”; but in Canard, as we have noticed, Dickson J.A., now one of Ritchie J.’s colleagues on the Supreme Court, wrote the unanimous judgment of the Manitoba Court of Appeal holding section 43 to be inoperative as in conflict with the equality guarantee.

My conclusion is that the British North America Act argument is sound, but inconsistent with the decision in Drybones and irrelevant to the issue in Lavell. Ritchie J.’s first reason for his decision in Lavell is therefore unsatisfactory.

The Dicey Argument.

Let us now turn to Ritchie J.’s second reason for upholding section 12(1)(b). It is summarized in his own words:37

... that equality before the law under the Bill of Rights means equality of treatment in the enforcement and application of the laws of Canada before the law enforcement authorities and the ordinary courts of the land, and no such inequality is necessarily entailed in the construction and application of s. 12(1)(b).

This definition of equality before the law is taken from Dicey’s famous definition of the “rule of law”. In The Law of the Constitution, written in 1885, Dicey described “the rule of law” as one of the two leading characteristics of the English constitution, the other being the sovereignty of Parliament. He offered three definitions of the rule of law; the second of these was “the universal

37 Ibid., at p. 500. The quoted passage is actually his third reason, but the second reason is an obiter dictum.
subjection of all classes to one law administered by the ordinary courts." According to Ritchie J., it is Dicey's second meaning of the rule of law which is embodied in the Bill of Rights guarantee of equality before the law:

... "equality before the law" as recognized by Dicey as a segment of the rule of law, carries the meaning of equal subjection of all classes to the ordinary law of the land as administered by the ordinary courts, and in my opinion the phrase "equality before the law" as employed in section 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.

Ritchie J. goes on to assert that section 12(1)(b) of the Indian Act does not involve any such inequality in the administration or application of the law. The sum total of the reasoning on this point is contained in a passage which attempts to distinguish Drybones from the present case:

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(1)(b) of the Indian Act.

The first point to be made about the Dicey argument is that Dicey would turn in his grave if he knew that his language was being used as a gloss on a bill of rights. Ritchie J. does not refer to Dicey's third meaning of the rule of law, but his third meaning is that civil liberties "are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts"; whereas under many foreign constitutions civil liberties are protected by a bill of rights in the constitution. It must also be remembered that Dicey in the same book described and extolled the doctrine of the sovereignty of Parliament, under which Parliament "can make or unmake any law whatever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament." It was Dicey's view that the great strength of the English constitution lay in the absence of any bill of rights or other constitutional restraint on legislative power. His second meaning of the rule of law (the one relied on by Ritchie J.) was intended to show how civil liberties were protected in England without a bill of rights. They were protected because anyone in-

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39 Supra, footnote 1, at p. 495.
40 Ibid., at p. 499.
42 Ibid., p. 40.
jured by a high official could sue that official for redress under the ordinary law in the ordinary courts. The point of equality before the law was that "with us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen". And he contrasted this happy situation with countries where "nobles, priests and others could defy the law", or even the France of his own time, which subjected official acts to a special system of law, namely, "official law administered by official bodies". There is no need to repeat the many criticisms which have been made of Dicey's concept of the rule of law. It is enough for our purpose to say that his concept of the rule of law cannot be enshrined in a bill of rights which overrides statutes, because a salient characteristic of the concept is that it is not enshrined in a bill of rights, or at least that it does nor in any degree disturb the sovereignty of Parliament. According to Ritchie J. it was the Diceyan definition which led to section 95 of the Indian Act being held inoperative in Drybones. Such a result would have been anathema to Dicey. In Dicey's scheme, a provision of an Act of Parliament had to be applied without question by the courts; Drybones' civil liberties would be adequately protected by the fact that he was tried in the ordinary courts; equality before the law would be irrelevant to the Drybones facts, but would involve the proposition that an Indian holding an official position (for instance, a cabinet minister or the chief of a band) would be subject to the same drunkenness law as Drybones.

One must conclude that Ritchie J. is wrong in believing that his definition of equality before the law is taken from Dicey. However, that does not prove that there is anything wrong with it. Let us therefore examine it on its own merits. The definition is "equality of treatment in the enforcement and application of the laws of Canada before the law enforcement authorities and the ordinary courts of the land". The example of its application, we are told, is Drybones, where "the impugned section could not be enforced without denying equality [in the sense defined]; on the other hand, we are told, the impugned section in Lavell does not lead to any such inequality".

A possible meaning of equality in the "enforcement and ap-
"application" of the law is that any given law should be administered or applied impartially to those persons to whom the law applies. In this sense the guarantee of equality would govern the conduct of the officials or courts charged with the enforcement of the law and would exclude bias, discrimination, or bad faith on their part. In this sense the concept would be agreeable to Dicey, for it would never result in the upsetting of the law itself. In the context of section 12(1)(b) of the Indian Act, this definition of equality would be satisfied if Mrs. Lavell and Mrs. Bedard were treated in the same way as other Indian women who marry non-Indians. In the context of section 95 of the Indian Act, equality in this sense would be satisfied if Drybones were treated in the same way as other Indians found similarly intoxicated in like circumstances; so long as the law was applied or enforced fairly, the Bill of Rights would be satisfied. This is exactly what was decided prior to Drybones by a majority of the British Columbia Court of Appeal in R. v. Gonzales. In Drybones Ritchie J. emphatically rejected this holding. He pointed out (perfectly correctly) "that the most glaring discriminatory legislation against a racial group would have to be construed as recognizing the right of each of its individual members 'to equality before the law', so long as all the other members are being discriminated against in the same way". And of course the actual decision in Drybones was inconsistent with this "administrative" definition of equality, because the Supreme Court of Canada held that Drybones had been denied equality before the law, although there was no suggestion that enforcing officers or courts had treated Drybones differently from other persons to whom the impugned law applied, that is, other Indians; and the Supreme Court distinctly held that the law itself, and not merely enforcement practice, was inoperative. So much for the definition of equality as requiring only equality of enforcement or administration.

It is clear that Ritchie J. in Lavell is not repenting of his decision in Drybones. He expressly states in Lavell, in a passage I quoted earlier, that the impugned law in Drybones "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". In what sense is this true? If a white man had been found with Drybones in the lobby of the Old Stope Hotel at Yellowknife in a similar state of intoxication, then the white man could not have been charged under the Indian Act; he would have to have been charged under the Liquor Ordinance of

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50 (1962), 32 D.L.R. (2d) 290.
51 Supra, footnote 8, at pp. 297 (S.C.R.), 484 (D.L.R.).
52 See quotation accompanying footnote 40, supra.
the Northwest Territories. Under the Liquor Ordinance there is no minimum penalty, and the maximum penalty is thirty days imprisonment; under the Indian Act there is a minimum penalty of a $10.00 fine and a maximum penalty of three months imprisonment. In fact Drybones was sentenced to the minimum fine of $10.00. The fine seems modest, and our hypothetical white man could have been given exactly the same (or a heavier) penalty. But it is also possible that the white man could be sentenced to a lesser fine than $10.00 whereas the Indian could be penalized no less than $10.00. The most that can be said in favour of Drybones' claim that he had been denied equality is that a white man in like circumstances could have been sentenced to a lesser penalty than Drybones. It must therefore be this possibility of a lesser penalty for a white man which is what Ritchie J. regards as a denial of "equality of treatment in the administration and enforcement of the law".

Now let us look at the Lavell facts. Suppose that an Indian man married a non-Indian at the same time as Mrs. Lavell (or Mrs. Bedard) did so. The consequence for the man is that he retains his Indian status, he remains free to reside on his reserve and to own property in the reserve, and he remains subject to the other benefits and burdens of Indian status. The consequence for the woman is that she loses her Indian status, she loses her right to reside on her reserve or to own property in the reserve, and she is denied the other benefits and burdens of Indian status. Obviously these differences are reflected in the "administration and enforcement of the law". The law was administered or enforced against Mrs. Lavell by the Registrar striking her name off the Indian Register; had she been a man, the Registrar would not and could not have struck the name off. The law was administered or enforced against Mrs. Bedard by the band council forcing her to sell her house and commencing to expel her from the reserve; had she been a man, the band council would not and could not have forced the sale of the house or the expulsion from the reserve. And, if it is thought to be important, these inequalities of treatment are ultimately enforced in the ordinary courts, as the course of proceedings in these two cases shows: Mrs. Lavell appealed

R.O.N.W.T., 1956, c. 60, s. 19.

Another difference between the Liquor Ordinance and the Indian Act is that the Liquor Ordinance makes drunkenness an offence only "in a public place", while the Indian Act makes it an offence anywhere "off a reserve", Ritchie J. in Drybones, supra, footnote 8, at pp. 290 (S.C.R.), 478-479 (D.L.R.), treats this difference as important, but a glance at the Liquor Ordinance (ibid., s. 2(1)(e)) reveals that the lobby of an hotel (where Drybones committed his offence) would be a "public place" within the meaning of the Liquor Ordinance, so that Drybones could not rely on that particular inequality.
The Registrar's decision into the ordinary (federal) court system; Mrs. Bedard sought an injunction from the ordinary (provincial) superior court. If Mrs. Lavell and Mrs. Bedard had chosen not to take any legal initiative, but had refused to accept their loss of status, their loss of status would ultimately have been enforced by the courts, probably in legal proceedings to remove them from the reserves, but at the very latest on their deaths, when the question would arise (as it did in the Canard case mentioned earlier) whether the Surrogate Court or the Minister of Indian Affairs had jurisdiction to administer their estates.

The inequality in treatment of Indian men and women which is required by the Indian Act's status provisions is not materially different from that authorized by the drunkenness provisions. Indeed, what differences do exist make Lavell a clearer case than Drybones. On the facts of Lavell the status provisions compel enforcement officers and courts to treat women differently from men; the officials have no discretion, but are obliged to treat Mrs. Lavell (or Mrs. Bedard) differently from a man. On the facts of Drybones the drunkenness provisions allow, but do not compel, the enforcement officers and courts to treat Indians differently from non-Indians; the provisions give a sufficiently wide discretion to enable the officials to treat Drybones in the same way as a non-Indian. Another difference between the two cases is that the consequences of discrimination in Drybones were criminal whereas the consequences in Lavell were civil. But no one believes that criminal consequences are necessarily more severe than civil consequences, and the Bill of Rights is not confined to criminal consequences. In fact the civil consequences of a denial of status are very much more severe than the added penalties for drunkenness. In Drybones the possible discrimination between Indians and non-Indians could be measured in dollars and cents or days in prison. These are not trivial matters, certainly, but they do not compare in severity with the impact of the denial of Indian status on a woman who is proud to be an Indian and who wishes to live with her own people. A final difference is that the discrimination in Drybones was based on race, whereas the discrimination in Lavell was based on sex. But section 1 of the Bill of Rights specifically forbids "discrimination by reason of" either "race" or "sex". If there is a difference between "race" and "sex" as a basis for discrimination it is the qualification implicit in section 91(24) of the British North America Act granting legislative power over "Indians"; as we have seen, this suggests that the "Indian" classification which was in issue in Drybones is admissible; it does not give any ground for argument that a classification by sex is admissible.
The conclusion is that the Diceyan definition of equality before the law, or any other definition which depends upon such abstractions as inequality in administration or enforcement of the law, cannot explain the different results in *Drybones* and *Lavell*.

*Reasonableness of Classification.*

The crucial question which the court never reached in its reasons for judgment in *Lavell* (or in *Drybones* for that matter) is whether there is any rational and acceptable policy justification for the discriminatory provision under review in that case. In other words, is there any reason to be found in Indian history or current needs which would justify the defining of Indian status in a way which discriminates against women? And if such a reason can be found, it is sufficiently strong to outweigh the more general community value of the equality of the sexes?

The reason why these questions have to be addressed is that nearly all laws impose burdens or confer benefits on special groups in the community, and deny the burdens or benefits to other groups. The guarantee of "equality before the law" cannot therefore condemn all legislative classifications; it must condemn only those which lack acceptable justification in policy. Even such classifications as "race", "national origin" or "sex" (which are enumerated in section I of the Bill of Rights) are not necessarily objectionable. For example, we may want laws which provide special assistance for disadvantaged groups such as native peoples (race) and women (sex); we may want to confine certain rights and privileges, such as the vote, to Canadian citizens or British subjects (national origin); we may want to impose disabilities on aliens or foreign-owned corporations (national origin); and there

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85 The guarantee of "equality before the law" should not however be confined to laws which classify on the basis of the enumerated classifications ("race, national origin, colour, religion or sex") for the reasons given in Sinclair, *The Queen v. Drybones* (1970), 8 Osgoode Hall L.J. 599, at p. 615. This appears to me to be what Laskin J. said in *Curr v. The Queen*, [1972] S.C.R. 889, at pp. 896-897; 26 D.L.R. (3d) 603, at p. 611. In *Lavell*, however, Laskin J., without specifically denying this proposition, relied on his dictum in *Curr* as supporting the quite distinct proposition that all legislative classifications of "race, national origin, colour, religion or sex" are offensive to the Bill of Rights, and that there is no need to enquire into their justification: supra, footnote 1, at p. 510. The same passage from *Curr* is quoted and given yet another interpretation (I think) by Ritchie J. in *Lavell* in a difficult passage in his reasons for judgment, at p. 492.

It is worth repeating here too that, in my opinion, where the B.N.A. Act has allocated legislative power by using a classification such as "Indians" or "Aliens", then the use by the federal Parliament of that classification is likely to be a prerequisite of validity, and should not be treated as offensive to the Bill of Rights. In other words the use of a particular classification in the grant of power in the B.N.A. Act is by itself a sufficient justification for the use of that classification in a statute enacted under the grant of power. This is explored earlier in this Comment in the text headed "The B.N.A. Act Argument".
may even be physical differences which justify discriminatory treatment, as in the law of rape, an offence which under the Criminal Code can only be committed by a man; no doubt, other examples of "acceptable" discrimination can be found in the statute books or can be imagined. The need to examine the policy justification of a law which is alleged to violate the guarantee of equality emerges clearly from the jurisprudence which has developed around the "equal protection clause" of the Fourteenth Amendment of the United States Constitution.56 The mere fact that a law "discriminates" against a particular group does not make that law a denial of equal protection; rather it forces a judicial enquiry into whether the law's classification is a reasonable means of securing a legitimate legislative purpose.57

There is nothing peculiarly American about the doctrine of reasonable classification. It springs from the inherently "unequal" nature of legal rules, whether American or Canadian (or Egyptian for that matter). Unless the Canadian courts abandon the decision in *Drybones* and relinquish the power there assumed to strike down laws for violation of equality, they must develop some criteria of inequality like the American doctrine of reasonable classification.58 And yet in *Lavell* both Ritchie and Laskin JJ., in language which is admittedly not unequivocal, appeared to deny the relevance of the American doctrine.59 It is easy to see why they find such a doctrine unpalatable. It forces the court to leave the safe area of conventional legal materials, and embark on an enquiry into the rationality and acceptability of policy. The court does not have the means to acquire the broad range of facts and policy considerations which are necessary to make a wise judgment as to legislative policy. Nor are the judges equipped by their legal backgrounds to evaluate "those social, political and economic considerations which are the raw material of the law maker".60 Nor are they likely to welcome the public controversy which surrounds the making of community policy, or the public interest which is taken in the backgrounds and political attitudes of policy-

56 The best-known article among the enormous literature is probably Tussman and tenBroek, Equal Protection of the Laws (1949), 37 Cal. L. Rev. 341; a more recent, excellent analysis may be found in Note, Legislative Purpose, Rationality and Equal Protection (1972), 82 Yale L.J. 123.

57 Formulations vary, and some tend to obscure the policy choices which are involved: See Note, Legislative Purpose, Rationality and Equal Protection, *ibid*.


59 *Supra*, footnote 1, at p. 494, per Ritchie J., at p. 510, per Laskin J.

60 Sinclair, *op. cit.*, footnote 8, at p. 608.
makers. After the Lavell decision at least one women's group publicly attacked the court as prejudiced against women. This hardly fits into the Canadian tradition of civilized legal criticism, but it is part and parcel of normal political polemic. The Minister of Justice, Otto Lang, responded with dismay that the Lavell decision "does not indicate a bias against women, but centres on a technical legal question." No doubt the response is correct as to the court's lack of prejudice against women. But the bit about technical legal questions will have to be repeated every time the court rules on a controversial law, and no amount of repetition will make it convincing.

P. W. Hogg*

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81 When Laskin J. was elevated to the position of Chief Justice a letter in the correspondence column of The Globe and Mail, January 11th, 1974, praised the appointment on the ground that "he is aware of the changing role of women in society and convinced that our laws must reflect this change".


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2 Ibid., at pp. 90-91, per Viscount Dilhorne; at pp. 100, 102-103, per Lord Cohen; at pp. 103, 109-110, per Lord Hodson; at pp. 125-130, per Lord Upjohn. See also the examples given by Wilberforce J., [1964] 1 W.L.R. 993, at pp. 1009-1010, accepted by Lord Denning M.R., [1965] 2 W.L.R. 839, at pp. 860.


4 As Frankfurter J., put it: "But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?" S.E.C. v. Chenery Corp. (1943), 318 U.S. 80, at pp. 85-86.

Similar is the analysis of Lord Upjohn in Boardman v. Phipps, supra, footnote 1, at p. 127 which was recently applied by Roskill J., in Industrial Development Consultants Ltd. v. Cooley, [1972] 2 All E.R. 162, at p. 173.