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INDIANS AND INEQUALITY: A COMMENTARY ON

A.-G. Canada v. Canard

By DAVID PHILLIPS*

The recent judgment of the Supreme Court of Canada in *Canard*¹ represents the third decision of the Court since 1970 involving a possible conflict between provisions of the *Indian Act*² and section 1(b) of the *Canadian Bill of Rights*.³ Unfortunately, *Canard* does little to clear up the confusion which has resulted from the first two decisions. Instead, it creates more uncertainty about the proper application and effect of the Canadian Bill of Rights.

A.

The dispute in *Canard* arose when two administrators were successively appointed to administer the estate of Alexander Canard who was killed in a traffic accident during July, 1969. Canard, a status Indian under the terms of the *Indian Act*, died without leaving a will. The first of the two administrators to be appointed was William Rees, the local Superintendant of the Indian Affairs Department, who was named by the Minister of Indian Affairs. The legal basis for this appointment by the Minister is found in section 42 and 43 of the *Indian Act*.

Section 42 of the *Indian Act* gives the Minister "all jurisdiction and authority in relation to matters and causes testamentary with respect to deceased Indians". Section 43 lists a series of more specific powers which the Minister may exercise as part of the general grant of authority contained in the preceding section. Section 43(a), for instance; allows him to "appoint executors of wills and administrators of estates of deceased Indians, remove them and appoint others in their stead". Section 44 indicates that the Minister is not always obliged to exercise this jurisdiction himself for he may consent to have a testamentary matter referred for decision to the court that would have had jurisdiction if the deceased were not an Indian. These provisions were enacted by the federal Parliament under section 91(24) of the B.N.A. Act which enables Parliament to legislate in relation to "Indians and Lands Reserved for Indians". The effect of this legislation has been to oust the application of provincial intestacy laws to those Indians who are affected by the *Indian Act*. If the federal Parliament had not so legislated in respect of intestacy, then, by virtue of section 88 of the *Indian Act*, the provincial laws would apply equally to Indians and non-Indians alike who are resident in the province.

In addition to these provisions of the *Indian Act*, the federal government has also enacted the Indian Estate Regulations⁴ to guide the administra-

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¹ *A.G. Can. v. Canard* (1975), 52 D.L.R. (3d) 548; [1975], 3 W.W.R. 1.

² R.S.C. 1952, c. 149 (now R.S.C. 1970, c. I-6).

³ S.C. 1960, c. 44; R.S.C. 1970, Appendix III.

⁴ *Indian Estates Regulations*, P.C. 1955-1083, SOR/55-285.

tion of the intestacy regime of deceased Indians. These regulations provide, for instance, that after the death of an Indian, the local Superintendent is to forward to the Minister an itemized list of all the deceased's assets and liabilities. In order to perform this task, the Superintendent is to "act in the capacity of an administrator" in safeguarding the property of the deceased.⁵ Another regulation permits the Minister "to appoint an officer of the Indian Affairs Branch to be the administrator of estates and to supervise the administration of estates and of all the assets of deceased Indians".⁶

After his appointment by the Minister, Rees subsequently commenced an action in the Manitoba Court of Queen's Bench against three defendants arising from the fatal accident. Apparently, Mrs. Canard was not informed either that an administrator had been appointed under the terms of the *Indian Act* nor that actions for damages had been brought on behalf of her husband's estate. Instead, Mrs. Canard herself had already applied to the Surrogate Court in her district for letters of administration. These were issued to her in March, 1970.

When Mrs. Canard discovered that Rees had been appointed the administrator of her husband's estate by the Minister of Indian Affairs, she began proceedings in the Manitoba Court of Queen's Bench requesting declaratory judgment that would render her the sole legitimate administrator of the estate.

She succeeded in her claim in the Manitoba Court of Queen's Bench by taking advantage of a section of the *Indian Act* which provided an exemption from its intestacy provisions.⁷ Section 4(3) states that the intestacy provisions, along with other designated sections of the *Indian Act*, do not apply where the Indian does not ordinarily live on a reserve. Matas, J. found, on the basis of the factual evidence before him, that Canard had not been ordinarily resident on a reserve because at the time of his death he was living with his family on a farm where he worked for several weeks of the year.

When the case was appealed by the Crown to the Manitoba Court of Appeal,⁸ Dickson, J.A. (as he then was), speaking on behalf of the Court, reversed the Queen's Bench decision on this point. An examination of the facts, Dickson, J.A. felt, revealed that Mr. Canard possessed a house on a reserve to which he intended to return with his family after his summer work was completed and as such indicated that he was ordinarily resident on a reserve at the time of his death. Consequently, the intestacy provisions of the *Indian Act* did apply to the administration of his estate.

Dickson, J.A. also rejected a second argument put forward by counsel for Mrs. Canard that sections 42 and 43 were *ultra vires* the federal Parliament because the effect of the provisions was to oust the jurisdiction of a provincial court. Dickson, J.A. acknowledged that this was indeed the effect

⁵ *Id.*, Reg. 4.

⁶ *Id.*, Reg. 11.

⁷ *Supra*, note 2, s. 4(3).

⁸ (1972), 30 D.L.R. (3d) 9, [1972] 5 W.W.R. 678.

resulting from the operation of these sections but he found appropriate legislative authority in section 101 of the *B.N.A. Act* which grants to Parliament the power to establish courts "for the better Administration of the Laws of Canada". He concluded that the term could be construed to include the situation in which jurisdiction had been transferred from a provincial court to a federal Minister of the Crown.

Nevertheless, Dickson, J.A. did finally dismiss the Crown's appeal on the basis of a third argument advanced by counsel for Mrs. Canard that section 43 of the *Indian Act* denied Mrs. Canard equality of the Bill of Rights.

On appeal to the Supreme Court of Canada before a seven member panel, all three of Mrs. Canard's arguments were considered. The Court unanimously dismissed the first two upholding Dickson, J.A. on those points. Laskin, C.J. neatly summarized the attitude of members of the Court when he said in his judgment: "The only point for serious consideration in this appeal is whether any of the prescriptions of the *Canadian Bill of Rights* are offended by certain provisions of the *Indian Act*. . .".⁹

B.

The *Canard* decision can be analyzed in terms of three recurring issues which arise whenever the possible application of section 1(b) of the *Bill of Rights* is considered. These are the meaning of "equality before the law", the test for "inequality", and the question of whether a perceived inequality can be justified by a reasonable discrimination qualification.

The discussion in *Canard* centered on the second of these three issues mainly because *Canard* presented a new type of problem in the application of s. 1(b) of the *Bill of Rights*. The nature of this problem can be illustrated by examining the structure of analysis whenever an issue involving s. 1(b) of the *Bill of Rights* comes before a court.

Before section 1(b) can be given any operative effect, there must first be a finding by the court of an inequality before the law. The determination of whether or not an inequality exists obliges the court to undertake some form of comparison or balancing of rights under the law. The court enters into an inquiry in which it examines and weighs the rights accorded to one group in relation to a specific matter against the rights accorded to another group in relation to the same matter. When faced with this task of weighing or balancing rights under the law, the court must always be concerned with the appropriate method of comparison to be employed as the basis for a test of inequality. This concern with the method of comparison arises primarily from the fact that the *Bill of Rights* exists as a federal statute and its application is limited to statutes passed by the federal Parliament.

In the two previous decisions of the Supreme Court dealing with section 1(b) of the *Bill of Rights* and the *Indian Act*, the method of comparison consisted of balancing the rights emanating from federal legislation.. In

⁹ *Supra*, note 1 at 551 (D.L.R.); 3 (W.W.R.).

Drybones,¹⁰ the Court compared a liquor ordinance of the Northwest Territories with section 94(b) of the *Indian Act* as these provisions would affect a person intoxicated in a private place. The Court perceived an inequality under the law because whereas it was an offence for an Indian to be intoxicated off a reserve wherever he may be, a non-Indian would be committing an offence only if he were found intoxicated in a public place.

In *Lavell* the Court considered and balanced rights emanating from two sections of the *Indian Act*. Section 12(1) (b) of the *Act* had the effect of depriving a woman who married a non-Indian of her status as a registered Indian. Yet section 11(1) (f) which dealt with the situation where an Indian man married a non-Indian woman placed the man under no corresponding disqualification. The decision of the majority of the court that s. 12(1) (b) did not contravene the *Bill of Rights* reflected not so much a feeling that no inequality which did exist was not of the type comprehended by section 1(b) of the *Canadian Bill of Rights*. This latter position was presented by Ritchie, J. who provided a new meaning for "equality before the law" as "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".¹¹ Despite the varying treatment by the Court of the issues in these two cases the basic analyses in *Lavell* and *Drybones* are similar to the extent that in both the court considered and balanced the rights emanating from two sectors of legislation with the difference being that in *Lavell* the provisions were included in the same statute.

In *Canard*, the Court was faced with a situation where it seemed necessary to compare provisions of the *Indian Act* with provisions under provincial legislation in order to determine if there was inequality before the law. This raised an important issue concerning the operation of the *Bill of Rights*. Could rights emanating from provincial law be balanced against rights under federal law to determine if an inequality existed? If not, was there another method of comparison which would enable the Court to apply the *Bill of Rights* in situations similar to that in *Canard*? The two methods of comparison employed in *Drybones* and *Lavell* were not suited to the *Canard* situation. At issue, therefore, was whether a third legitimate method of comparison existed.

Although the court divided five to two on the third issue of this case in favour of the view that section 1(b) did not render section 43 and the Indian Estates Regulations inoperative, nevertheless it is possible to delineate three general approaches to the *Bill of Rights*' issues which arose in *Canard*. The first is that of Laskin, C.J. in dissent, who adopts but enlarges upon the reasoning of Dickson, J.A. in the Manitoba Court of Appeal. The second approach is that of Richie, J. reflecting the earlier legacy of *Lavell*. Finally, there is the approach of Beetz, J. who although agreeing in result with the

¹⁰ *R. v. Drybones* [1970] S.C.R. 282; 10 C.R.N.S. 334; [1970] 3 C.C.C. 355; 9 D.L.R. (3d) 473; 71 W.W.R. 161.

¹¹ *A.G. Can. v. Lavell; Isaac et al. v. Bedard*, [1974] S.C.R. 1349; (1973) 38 D.L.R. (3d) 481; 23 C.R.N.S. 197.

majority, nevertheless comes to a position on some of the issues remarkably close to that of Laskin, C.J.

C.

Since the judgment of Laskin, C.J. closely reflects the reasoning of the judgment in the Manitoba Court of Appeal, it is useful to first examine Dickson, J.A.'s treatment of the *Bill of Rights*' issue before proceeding to analyze Laskin, C.J.'s approach.

Dickson, J.A. was acutely aware of the difficulty posed by the apparent need to make a comparison between federal and provincial legislation in *Canard*. Yet, he was of the opinion that section 43 of the *Indian Act* did deny Mrs. Canard equality before the law. He expressed his concept of "equality before the law" by citing Ritchie, J.'s statement in *Drybones* that "equality before the law . . . means at least that no individual or group of individuals is to be treated more harshly than another under the law"¹² Dickson, J.A.'s judgment was rendered before the Supreme Court decision in *Lavell* in which Ritchie, J. apparently altered his previous definition of "equality before the law". One can only speculate as to whether Dickson, J.A.'s decision would have differed if it had been rendered after *Lavell*, since he, of course, did not sit when *Canard* came before the Supreme Court although he was a member of the Court at that time.

The basis for Dickson, J.A.'s decision seems to lie with his feeling that Mrs. Canard was being treated more harshly under the federal law than a non-Indian woman who enjoyed a right, he presumed, under provincial law to administer the estate of her husband. In effect, she was denied equality because the law had deemed her inferior to other Canadians solely on the basis of her race.

Dickson, J.A. attempted to avoid the problem of having to compare federal with provincial legislation by setting up a comparison between the legislative intention expressed by section 43 of the *Indian Act* and that contained in section 1(b) of the *Bill of Rights*. He expressed the first of these in the form of an imaginary statement made by Parliament: "because you are not an Indian you shall not administer the estate of your late husband". On the other hand, the *Bill of Rights*, he felt, "proclaimed an egalitarian doctrine" assuring Mrs. Canard of the right to equality before the law without discrimination by reason of race.¹³

Thus, Dickson, J.A. felt that the inequality did not arise from a conflict between federal and provincial legislation. Rather, it arose as the result of a conflict between the intent of the *Canadian Bill of Rights* and the contrary intent of a federal statute.

Laskin, C.J. found in Dickson, J.A.'s judgment a new approach to the problem of the operative effect of section 1(b) of the *Bill of Rights*. He

¹² *Supra*, note 10 at 297 (S.C.R.); 346-47 (C.R.N.S.); 365 (C.C.C.); 484 (D.L.R.);

¹³ *Supra*, note 8 at 20, 23 (D.L.R.); 688, 691 (W.W.R.).

agreed with Dickson, J.A.'s view that section 1(b) was a guarantee against which other statutes could be measured directly. This, he felt, avoided the need of always having to test the operation of section 1(b) by comparing two or more pieces of federal legislation with one another to see if they were in conformity as to the rights accorded to different classes or groups of people in respect of the same subject matter.

To illustrate his point, Laskin, C.J. took the example of *Drybones* and inquired as to the possible result if no liquor ordinance defining the rights of non-Indians had ever existed in the Northwest Territories. In such a situation there would have been no federal statute against which section 94(b) of the *Indian Act* could have been compared. Laskin, C.J. felt that this fact should make no difference and that it was the existence of the prohibition itself in the *Indian Act* which constituted the denial of equality before the law. There was no need for a touchstone of comparison in any other federal legislation. Similarly, Laskin, C.J. felt that any consideration of provincial legislation was irrelevant in the circumstances of *Canard* although he did not preclude the use of provincial legislation for comparison purposes at some future occasion.

Instead, Laskin, C.J. agreed with Dickson, J.A. that the provisions of the *Indian Act* and Regulations dealing with intestacy operated prohibitively against Mrs. Canard on the basis of her race and consequently were in violation of 1(b) of the *Canadian Bill of Rights*. He altered the decision of Dickson, J.A. by declaring only the Regulations to be inoperative and directed that section 43 be interpreted and applied in conformity with the *Canadian Bill of Rights*.¹⁴

A major difficulty with the approach developed by Laskin, C.J. and Dickson, J.A. is that it does not seem to successfully avoid the necessity of making some sort of initial comparison as the basis for a test of "inequality" even when a direct comparison is made between a single provision of federal legislation and section 1(b) of the *Canadian Bill of Rights*. The idea of an "inequality before the law" implies the existence of a norm against which an impugned law can be measured. Laskin, C.J. seemed to recognize this in his decision when he stated:

Of course, it is much easier for the Courts to apply the *Canadian Bill of Rights* to a federal legislative measure if Parliament itself provides a touchstone of comparison in other federal legislation. Yet, it may equally provide measure under challenge.¹⁵

Thus, Laskin, C.J. seems to indicate that while there is no reason why a touch-

¹⁴ The underlying reason for this alteration by Laskin C.J. of Dickson J.A.'s judgment can perhaps be found in the following statement from Laskin C.J.'s dissent in *R. v. Burnshire*, [1975] S.C.R. 693 at 714; (1974), 44 D.L.R. (3d) 584 at 599; [1974] 4 W.W.R. 49 at 65:

It is important to appreciate that the Canadian Bill of Rights does not invariably command a declaration of inoperability of any federal legislation affected by its terms. . . . The primary function of the Bill . . . is to determine whether a challenged measure is open to a compatible construction that would enable it to remain an effective enactment.

¹⁵ *Supra*, note 1 at 561 (D.L.R.); 14 (W.W.R.).

stone must always be found somewhere — albeit as a state of nature, or, one wonders, perhaps a provincial law.

Despite his assertion that provincial law in *Canard* is an irrelevant factor to be considered, the prohibitive terms of the *Indian Act* would not result in inequality before the law if a provincial law subjected non-Indians to the same prohibitions. Laskin, C.P.'s conclusion that Mrs. Canard was deprived of equality before the law appears, necessarily, to have been based on an implicit comparison of section 43 of the *Indian Act* with the provincial law governing the rights of non-Indians in respect of the administration of estates. Unfortunately, Laskin, C.J. does not examine the source of the wife's presumed right to administer the estate of her deceased husband in depth and consequently the norm inherent in his comparison does not emerge. Only Beetz, J. undertakes a detailed examination of this "right" as part of his analysis, largely because he bases his analysis on a different method of comparison.

D.

The approach of Ritchie, J. can generally be considered to represent the positions of Pigeon and Martland, JJ. In his judgment, Ritchie, J. clearly asserted that section 1(b) of the *Canadian Bill of Rights* did not contemplate that a right under federal law could be compared with a right under provincial law. He was most concerned with the "whittling away" effect which he felt the *Bill of Rights* would have upon any piece of federal legislation if an inequality could be measured in that manner.¹⁶

This effect would occur, Ritchie, J. feared, as the inevitable consequence of comparing a federal right with an analogous provincial right under provincial law since there would almost always be some difference between the federal and the provincial laws. The ultimate result would be, in effect, to repeal the *Indian Act*. He based this view on two arguments which are stated briefly in his judgment.

First, Ritchie, J. felt that section 1(b) of the *Bill of Rights* was designed to guarantee equality before the law exclusively in respect of laws passed under federal jurisdiction. Thus, he recognized the validity of comparing two federal statutes or the provisions of a single federal statute as part of a test for inequality. But this, he felt, should be the limit of the scope of comparison and it was an improper extension of section 1(b) to measure a right established under federal law against a right recognized under provincial law.

Secondly, Ritchie, J. restated the argument which he advanced in *Lavell* to the effect that the *Bill of Rights* must be interpreted to be consistent with the *B.N.A. Act*. He developed this proposition by referring to the preamble of the *Bill of Rights* which states that the guarantees contained therein were enacted so as to "reflect the respect of Parliament for its constitution". As a result, Ritchie, J. concluded that the Court was bound to recognize that section 91(24) of the *B.N.A. Act* gives Parliament legislative authority to pass laws which treat Indians differently from other citizens in the various prov-

¹⁶ *Id.*

inches. In other words, Ritchie, J. felt that the *Bill of Rights* could not be construed in such a way that it became a fetter on the legislative authority expressly granted Parliament under section 91(24).

Laskin, C.J.'s rebuttal to this latter position was to assert that the power to discriminate does not necessarily inhere in a grant of legislative authority.¹⁷ Furthermore, as Laskin, C.J. pointed out, nothing prevents Parliament, if it so desires, from protecting the *Indian Act* from the operation of the *Bill of Rights* simply by enacting that the *Act* shall have force notwithstanding the provisions of the *Canadian Bill of Rights*.¹⁸

The arguments advanced by Ritchie, J., and especially his fear of the "whittling away" effect, appear to be based upon an assumption that no reasonable discrimination qualification should be applied as a means of justifying certain inequalities in the face of section 1(b). Yet, this view seems to have been repudiated in the *Burnshine* case in which a majority of the Supreme Court of Canada recognized the validity of the reasonable discrimination qualification as the basis for its decision.¹⁹ In that case, Ritchie, J. concurred in the majority decision written by Martland, J.

Burnshine concerned sections 150 and 151 of the *Prisons and Reformatories Act*.²⁰ These provisions authorize a court in British Columbia to impose, in addition to the regular definite sentence for a crime, an indeterminate sentence of not more than two years less one day to be served at a rehabilitative institution rather than a prison. The application of the provision was restricted to juvenile offenders. The difficulty with the provision was that the combination of the definite and indeterminate terms could exceed the maximum term for the offence stipulated by the *Criminal Code*. In addition, except for a similar term extending the same authority to courts in Ontario, no authority to impose indeterminate sentences was given the courts of any other province. The counsel for *Burnshine* consequently argued that section 150 should be declared inoperative because it authorized a court in British Columbia to impose upon *Burnshine* a sentence greater than that which could have been imposed upon him by courts in the other provinces of Canada for the same offence.

Martland, J. looked at the legislative purpose of section 150 and concluded that it was not enacted to impose a harsher penalty upon juvenile offenders in B.C., but rather was designed to benefit these persons as part of a rehabilitation program. The reason that these provisions only applied in B.C. and Ontario, he stated, reflected the fact that the other provinces

¹⁷ *Id.* at 557 (D.L.R.); 9-10 (W.W.R.).

¹⁸ *Id.* at 558 (D.L.R.); 10 (W.W.R.). For a full critique of Ritchie J.'s B.N.A. Act argument see, for example, P.W. Hogg, *A.G. Can. v. Lavell-commentary* (1974), 52 Can. Bar Rev. 263; W.S. Tarnopolsky, *The Canadian Bill of Rights and the Supreme Court Decisions in Lavell and Burnshine: The Retreat from Drybones to Dicey* (1974), 7 Ottawa L. Rev. 1; as well as W. S. Tarnopolsky, *The Canadian Bill of Rights*, (Second Edition Revised), (Toronto: 1975, McCleland & Stewart).

¹⁹ *Supra*, note 14.

²⁰ R.S.C. 1970, c. P-21.

lacked suitable reform institutions and facilities. Consequently, he concluded that in enacting section 150 of the *Prisons and Reformatories Act*, Parliament was seeking a "valid federal objective".

It is interesting to see that, while concurring in the reasons given by Ritchie, J. in *Canard*, Martland, J. also applied his earlier approach in *Burnshire* when considering section 43 of the *Indian Act*. However, he did this merely by acknowledging that "there are legitimate reasons of policy for the enactment of such provisions . . ." without any attempt to outline the nature of these policy reasons.²¹

In the light of *Burnshire* the "whittling away" effect which Ritchie, J. fears seems more apparent than real. If a valid federal objective can provide a basis for excusing certain inequalities which may arise between two pieces of federal legislation, then there should be an analogous basis for excusing some inequalities which arise whenever federal legislation is compared with provincial law. When Ritchie, J. states that "the inequality referred to (in *Canard*) must of necessity be created because of the differences existing between the law of Canada . . . and the provincial laws . . ."²², he is really delineating a possible reasonable case in suggesting that all such federal legislation set in contra-distinction to provincial legislation would be rendered inoperative by the *Bill of Rights*. There need be no "whittling away" effect where the operation of section 1(b) can be tempered with a reasonable discrimination qualification. Yet Ritchie, J. gives no indication of the reason why he is prepared to accept the existence of reasonable types of discrimination when federal legislation is being compared to determine if there is inequality and not in situations where provincial law may be a factor.

If not all inequality created by federal law is to be considered in violation of the guarantee of "equality before the law", then there should be no great objection to using provincial legislation as the touchstone of comparison where this appears to be necessary. The Court should be concerned not with the fact of inequality but with the effect of inequality. Its inquiry, as evidenced by the judgments of Laskin, C.J., Dickson, J.A., and Beetz, J., should be directed at determining whether the class of persons affected by one law is treated more harshly than the class of persons affected by the other law and for not sufficient reason.

E.

Probably the most interesting discussion of the issues in *Canard* is found in the judgment of Beetz, J. He began his analysis of the problem in *Canard* by defining two specific issues to be determined. The first was "whether the vesting in the Minister of certain parts of the administration of the *Indian Act*, of itself, creates some inequality incompatible with the *Canadian Bill of Rights*". Secondly, he asked, "whether, in this particular case, the *Indian Act* has actually been administered in conformity with the principles of the *Canadian Bill of Rights*".²³

²¹ *Supra*, note 1 at 561 (D.L.R.); 14 (W.W.R.).

²² *Id.* at 563 (D.L.R.); 15-16 (W.W.R.).

²³ *Id.* at 577 (D.L.R.); 32 (W.W.R.).

This narrow definition of the issues reflected Beetz, J.'s close attention to the actual wording of the impugned provisions of the *Indian Act*. The intention of section 43, he determined, was to create a different forum for the administration of Indian estates than that which would normally exist in other testamentary causes. However, the creation of this special forum, he concluded, did not of itself constitute a form of "undue discrimination".

His use of the concept of "undue discrimination" indicates that Beetz, J. was prepared to apply some reasonable discrimination qualification to the problem. He obviously had in mind some corresponding concept of "due" or permissible discrimination which could justify a provision such as section 43 in the face of the *Bill of Rights*. The significant fact is that he was employing this concept in the context of a comparison between federal and provincial law.

Beetz, J.'s primary concern throughout this part of his analysis seemed to be to distinguish between inequality arising from different *forms* of treatment under the law and that arising from different *standards* of treatment. For instance, he could find nothing in the wording of sections 42 and 43 of the *Indian Act* which would prevent the Minister from appointing an Indian woman as the administrrix of her husband's estate. Although surrogate jurisdiction was exercised differently under the federal law than under provincial law, nevertheless there was nothing in the legislation itself to indicate that one form of jurisdiction would ultimately work more harshly than the other.

Beetz, J., however, decided to probe more deeply than the mere wording of the statute in order to determine if the standard of treatment was the same. For this reason, he inquired as to whether there had been racial discrimination in the administration and application of the legislation. The necessity of making this type of inquiry forced Beetz, J. to the inescapable conclusion that "some reference to the standards of provincial laws and practices may be unavoidable as there is no other basis of comparison . . .".²⁴ In other words, Beetz, J. needed a norm against which to compare the rights upon intestacy of those persons affected by the *Indian Act* and for that he looked to provincial law.

Beetz, J. next faced the problem of determining this norm in the presence of several provincial jurisdictions — each possibly with varying laws on intestacy. This difficulty was overcome with an imaginative solution. He proceeded to examine the provincial laws to see if there existed a general standard — "a sort of *ius gentium*".²⁵ which could serve as the touchstone of his comparison. This norm, he emphasized, in the case of a comparison involving provincial legislation, should consist of a general standard derived from features common to all or most of the provincial jurisdictions. Parliament is not bound, according to Beetz, J., to fulfill the impossible task of following all provincial enactments and practices in order to comply with the *Canadian Bill of Rights*.

²⁴ *Id.* at 579 (D.L.R.); 33 (W.W.R.).

²⁵ *Id.*

Beetz, J.'s search for the general standard led him to examine the *Manitoba Surrogate Court Act*²⁶ and the statute of 21 Henry VIII c. 5. He concluded that while a wife may have an "entitlement" under provincial law to administer the estate of her deceased husband, this "entitlement" could not strictly be considered a "right". Nevertheless, he felt that the entitlement did have the colour of right and consequently no wife should be deprived of the opportunity to administer her deceased husband's estate without good cause. It was Beetz, J.'s opinion that the Minister, to whom the surrogate power had been transferred from the courts, was under a duty to exercise the power judicially. Accordingly, he came to the conclusion that in the circumstances of *Canard* the requirement of equality before the law at least caused a burden to be placed on the government to indicate to the Court why Mrs. Canard should not have been named the administratrix by the Minister of Indian Affairs.

In addition, after examining the Indian Estates Regulations, Beetz, J. concluded that they did seem to contemplate that the wife of a deceased Indian would not likely be chosen administratrix of her husband's estate. For this reason, he decided that he "would have great doubts as to whether the Regulations were not *pro tanto* rendered inoperative by the *Canadian Bill of Rights*".²⁷ It is hard to imagine how Beetz, J. could have come any closer to declaring the Indian Estates Regulations inoperative. The reason he balked at doing so may be because he did not feel it necessary to his ultimate decision.

This ultimate decision was based on a question of the Court's jurisdiction. Although Beetz, J. would have preferred to send the matter back to the Minister for another determination, he found this to be impossible due to a jurisdiction obstacle.

The Minister's determination under section 43 of the *Indian Act* must be appealed to the Federal Court and from there to the Supreme Court.²⁸ The Supreme Court, sitting on appeal from a decision of the Manitoba Court of Appeal could have given.²⁹ Thus, it could not render a decision which only the Federal Court had jurisdiction to make unless the matter had come on appeal from that Court. Consequently, Beetz, J. felt constrained that the only course open to him was to declare the letters of administration issued to Mrs. Canard from the Surrogate Court a nullity and allow the appeal.

F.

If the period of time which extends between the date when a case is heard by the Supreme Court and the date when a decision is handed down can be used as an indication of the degree of difficulty encountered by the Court in making its decision, then *Canard* must have been a very difficult

²⁶ R.S.M. 1970, c. C290, s. 31.

²⁷ *Supra*, note 1 at 582 (D.L.R.); 36 (W.W.R.).

²⁸ See *Indian Act* R.S.C. 1970, C. 1-6, s. 47(1); and *Federal Court Act* S.C. 1971-72-73, s. 31.

²⁹ *Supreme Court Act*, R.S.C. 1970 s. S-19, s. 47.

decision indeed. The case was heard before the Supreme Court in early March, 1974 and the decision was finally rendered eleven months later, on January 28, 1975. The judgments themselves reflect the difficulties which the Court must have had in coming to its decision. On each of the three *Bill of Rights* issues above the Court exhibited significant splits.

First, on the issue of placing a reasonable discrimination qualification on the concept of inequality, the Court was divided. Beetz, J., Martland, J., and Ritchie, J., with the apparent concurrence of Pigeon, J. and Judson, J., seemed to accept the necessity for some type of reasonable discrimination qualification. Beetz, J. and Martland, J. were prepared to extend the application of this qualification further to comparisons between rights under federal with rights under provincial law. By so extending the application of the reasonable discrimination qualification, the "whittling away" effect of the *Canadian Bill of Rights* on federal legislation could be avoided, and the feasibility of comparisons between federal and provincial law as the basis for a test of inequality enhanced. Laskin, C.J., with Spence, J. concurring, seemed to reject any application of a reasonable discrimination qualification to the guarantees of the *Bill of Rights*.³⁰

On the second issue of the appropriate method of comparison as the basis of the test for inequality, Beetz, J. for the majority was the only member of the Court prepared to measure the rights of a class under federal legislation against a general standard of rights enjoyed under provincial legislation in respect of the same subject matter by a different class of persons. Nevertheless, Laskin, C.J. seemed implicitly to be making the same kind of comparison in his dissent.

Ritchie, J., Martland, J., and Pigeon, J. all rejected the possibility of basing a test for inequality before the law on a direct comparison between provincial and federal legislation. All three declined to concur in the reasons, as opposed to the actual decision, given by Beetz, J.

Finally, on the issue of the meaning of "equality before the law", it might have been expected in view of the apparent reversal in *Lavell* of his previous position in *Drybones* that Ritchie, J. might have taken this opportunity to clear up some of the confusion. Instead, he made no reference whatsoever to the meaning of "equality before the law". Indeed, none of the judgments contain any attempt to tackle once again the problem of defining section 1(b) of the *Bill of Rights*. Similarly, in another Supreme Court decision, handed down on the same day as *Canard* in which section 1(b) was an is-

³⁰ See Laskin J.'s (as he then was) dissent in *Lavell*, *supra*, note 11 at 1386 (S.C.R.); 510 (D.L.R.); 226 (C.R.N.S.):

Reference was made . . . to various judgments of the Supreme Court of the United States to illustrate the adoption by that Court of reasonable classifications to square with the due process clause of the Fifth Amendment and with due process and equal protection under the Fourteenth Amendment. Those cases have at best a marginal relevance because the *Canadian Bill of Rights* itself enumerates prohibited classifications which the judiciary is bound to respect.

sue,³¹ no reference was made by Martland, J. on behalf of the Court to a meaning for "equality before the law".

The failure in these two decisions³² to reaffirm the narrow concept of "equality before the law" employed by Ritchie, J. in *Lavell* seems to indicate a weakening of its hold on the Court. Instead, the decisions of Laskin, C.J., Beetz, J., and Dickson, J.A. in the Manitoba Court of Appeal, exhibiting a concern with "harshness" in the application of the law upon a defined class, may indicate the formulation of a working concept of "equality before the law" to be used in section 1(b) cases. Consequently, the recent silence of the Court on this issue may be a sign of an impending change in direction.

The continuing splits and lack of judicial consensus on fundamental issues involving the application of the *Canadian Bill of Rights* raises another broader question. Eleven years ago, D.A. Schmeiser summed up an assessment of the *Bill* in the following words:

What then, can we conclude about the Canadian Bill of Rights, its meaning, importance, and effect? On the one hand, it must be recognized that it was carelessly drafted in incredibly feeble language, and that its true perspective has never been presented to the general public. It is doubtful, for example, whether it will stand up against specific positive enactments which are clear and ambiguous. It must also be recognized that our Courts have done little, if anything, to vitalize the Bill; the cases so far are a hodge-podge of conflicting views.³³

Despite the expectations raised by the *Drybones* decision in 1970, these words remain largely true today. One is left to wonder, in light of the decision in *Canard*, whether it is possible that a body of coherent law could ever develop from a document such as the *Bill of Rights*. Perhaps now is the time for Parliament to step in with amendments to rescue all the judges, lawyers, law professors and students who must struggle continually with the ambiguities and inconsistencies of this piece of legislation. A clear expression of a Parliamentary intention which would eliminate even some of the uncertainty surrounding the application and effect of the *Bill of Rights* would do much to insure that the rights which the *Bill* is designed to affirm remain protected in the courts of the land.

Canard, then, is a baffling case, and much like *Lavell*, no clear *ratio* emerges from the mix of opinions — only lingering questions. In the absence of Parliamentary action, many of the unresolved issues arising from the application of section 1(b) of the *Canadian Bill of Rights* appear likely to remain unresolved far beyond such time when another case struggles its way up the judicial ladder into the Supreme Court of Canada.

³¹ *Prata v. Minister of Manpower and Immigration* (1975), 52 D.L.R. (3d) 383. This case chiefly concerned the interpretation of several sections of the Immigration Appeal Board Act, R.S.C. 1970, c. I-3 and s. 1(b) was raised in a secondary argument. The main significance of the decision on this point appears to be the upholding by the Court of its *Burnshine* decision.

³² This is actually three decisions if the *Morgenthaler* case (1975), 53 D.L.R. (3d) 361; 30 C.R.N.S. 209; 20 C.C.C. 449 is included where the application of s. 1(b) was briefly considered.

³³ D. A. Schmeiser, *Civil Liberties in Canada* (Toronto: Oxford University Press, 1964) at 52.