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THE CANADIAN BILL OF RIGHTS
AND SEX-BASED DIFFERENTIALS
IN CANADIAN FEDERAL LAW

BY ROBERT W. KERR*

A. INTRODUCTION

1. The Drybones and Lavell Conundrum

In 1969 the Supreme Court of Canada rendered a decision in R. v. Drybones¹ of which the legal effect, stated succinctly, appeared to be the following: notwithstanding the specific power of the Canadian Parliament under section 91(24) of the British North America Act, 1867, to make special laws respecting Indians, a statutory provision which in effect discriminated against an Indian on grounds of race was inoperative because Parliament has provided in the Canadian Bill of Rights² that no federal law is to be applied so as to infringe the right to individual equality before the law and that this right is to exist without discrimination because of race.

Four years later the Supreme Court, with the principal opinion written and concurred in by a majority of the same judges, rendered a decision in Attorney-General of Canada v. Lavell³ of which the legal effect, stated succinctly, appears to be the following: notwithstanding that Parliament has provided in the Canadian Bill of Rights that no federal law is to be applied so as to infringe the right to individual equality before the law and that this right is to exist without discrimination because of sex, a statutory provision which in effect discriminated against an Indian woman on grounds of sex was operative because of the specific power of the Canadian Parliament under section 91(24) of the British North America Act, 1867, to make laws respecting Indians.

Obviously these two propositions are logically inconsistent. It must be admitted that both concentrate on the results of the cases in question, rather than on the reasoning given by the Court. Often apparently inconsistent results are satisfactorily explained by the judicial reasoning involved. Yet both of these propositions draw substantially from the rationale, as well as the results, of the particular decisions. In consequence, they lead to the conclusion that judicial interpretation of the right to equality before the law under the Canadian Bill of Rights at the present time is not merely in a state of uncertainty, which is likely to be a perpetual condition in view of the inherent vagueness of the concept, but indeed in a state of profound confusion.

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² R.S.C. 1970, App. III.

This confusion is compounded by the fact that there was no clear majority in the Lavell case for any one rationale for reaching the result. Eight judges reasoned on the basis that Drybones was correctly decided. Four, speaking through Ritchie, J., and including Fauteux, C.J.C. and Martland and Judson, JJ. found Drybones distinguishable. Four, speaking through Laskin, J. (as he then was) and including Abbott, Hall and Spence, JJ. found Drybones indistinguishable. The ninth member of the Court, Pigeon, J. was inclined to agree with the minority that Drybones was indistinguishable but, since he had dissented in Drybones, he saw no obligation to reverse his views now that most of those he had disagreed with in Drybones reached a different result.4

In other words, although the vast majority of the Court in Lavell seemed to regard Drybones as good law, there was not only a majority for reaching a different result, consisting of Pigeon, J. and the four judges who distinguished Drybones, but also a majority for reaching the conclusion that Drybones was being overruled by the result, consisting of Pigeon, J. and the four judges who found Drybones indistinguishable.

The unpredictability of subsequent decisions is increased by the fact that there have been three new appointments to the Court since Lavell was decided.5 While respect for stare decisis would ordinarily give some durability to the Lavell decision, the approach taken by Pigeon, J. provides a clear precedent for the minority in Lavell to disregard stare decisis if they find support for their position among the new members of the Court in a subsequent case6 and in a different context.7

2. The Scope of the Problem

One does not have to search far in Canadian federal legislation to find sex-based differentials. While such provisions are perhaps few in number when compared to the total volume of federal legislation, they appear in places where they affect individuals in their daily lives.

4 As a matter of interest, the other dissenter in Drybones who was still on the Court, Abbott, J. voted in favour of following Drybones since he found it indistinguishable. Thus, he again found himself in dissent, along with two members of the majority in Drybones, Hall and Spence, JJ. and the only new member of the Court, Laskin, J.

5 The first of the new appointees, Dickson, J. wrote the judgment of the Manitoba Court of Appeal in Canard v. Attorney General of Canada, [1972] 5 W.W.R. 678; 30 D.L.R. (3d) 9, holding the testamentary provisions of the Indian Act to be a denial of equality before the law. This case is discussed below. The other two appointees are de Grandpré, J. and Beetz, J. It may also be noted that Laskin, J. who gave the reasons for the minority view in Lavell, has since been appointed Chief Justice of Canada. However, this has less significance than the new appointments to the Court since the Chief Justice does not traditionally exercise any special influence on judgments of the Court as compared to the influence of other members of the Court.

6 Under the rule of res judicata, the cases of Lavell and Bedard, whose Indian rights were in dispute in the Lavell case, are now finally determined, barring legislative change of a sort giving rise to new rights that could be asserted independently of the rights ruled on in Lavell.

7 Given the historical respect for stare decisis in Canadian jurisprudence, the validity of the specific sex differential which Lavell involved is probably settled, although it is conceivable that the Court might reconsider this specific provision in another case.
After the decision in *Drybones* the possibility of striking down such differentials on the basis of the Canadian Bill of Rights was explored in litigation involving a gradually widening sector of the relevant legislation. While this litigation enjoyed its most substantial success in striking down the very legislation which the *Lavell* case ultimately upheld, this limited success suggested that this line of attack had some potential as a technique for removing sex discrimination from federal law in Canada.

The result in the *Lavell* case has cast considerable doubt on this potential. This doubt is increased by the possibility that the only completely satisfactory explanation of the *Lavell* decision may be that it simply overruled the *Drybones* decision, even though the Court in *Lavell* purports to reaffirm *Drybones*. Since all of the intervening litigation on the Bill of Rights and sex differentials was based on the *Drybones* decision, an overruling of *Drybones* would destroy the very foundation of this litigation.

This paper will review the *Drybones* and *Lavell* decisions and the intervening litigation with two objectives in mind. The first objective will be to set forth the present state of the law and its development as to the impact of the Canadian Bill of Rights on sex-based differentials in Canadian federal law. Since, as already tentatively noted, the present state of the law is in a state of some uncertainty and confusion, the second objective will be to make some projections for the future on the basis of what the existing judgments indicate about the attitude of the courts on this issue and what lines of argument remain open for future development.

This paper will concentrate on a limited selection of provisions in federal legislation containing sex-based differentials. The selection will include differentials under the Indian Act, the Divorce Act, the Canadian Citizenship Act, the Criminal Code, the Income Tax Act, and the Canada Pension Plan Act, although no attempt is made to be comprehensive even within these statutes.

In part this selection is reflective of the litigation that has already occurred under the Indian Act, the Divorce Act, the Canadian Citizenship Act, and some Criminal Code provisions. In the case of other Criminal Code provisions, the Income Tax Act and the Canada Pension Plan Act, the selection is based on the practical potential that these provisions have as sources of future litigation because of their impact on the liberty or property of potential individual litigants.

**B. THE STANDARDS FOR JUDICIAL REVIEW OF LEGISLATION**

The tradition of judicial review of legislation in Canada has not rested on a bill of individual rights, since there is no such bill of rights in the British North

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Rather, it has rested almost exclusively on the division of powers between the federal and provincial levels of government, as found primarily in sections 91 and 92 of the Act. These are among the provisions which lie beyond the power of any legislative body in Canada to alter. They are a classic example of the superior law that courts purport to apply when carrying out judicial review of legislation.

In 1960, Parliament passed the Canadian Bill of Rights. As a federal statute it is formally subject to amendment by subsequent legislation of Parliament. Its effect is limited, both by its terms and by the limitation on federal power imposed by the division of powers under the B.N.A. Act, to the protection of individual rights from encroachments by the federal government.

Put in other words, this means that in terms of any hierarchy of laws in Canada, the Bill of Rights is at a level inferior to sections 91 and 92 of the British North America Act. At the same time, the wording of the Bill supports an argument that the Canadian Bill of Rights is at a level superior to any other legislation of Parliament and provides a basis for judicial review of other legislation as a form of superior law. This is the argument that found favour in the Drybones case and which the Supreme Court verbally reaffirmed in the Lavell case.

1. The Canadian Bill of Rights in Outline

Closely inter-related to the question of the effect of the Bill of Rights on conflicting legislation is the question of what constitutes the substantive content of the rights set out in the Bill. This is a question less clearly answered in Drybones, and one to which Lavell suggests answers contradictory to those in Drybones.

The scope of these rights is a crucial determinant of the impact they may have on other laws. If that scope is as limited as language in Lavell indicates it may be, the rule that the Bill of Rights takes precedence can be deprived of any practical effect by invariable findings that the impugned legislation does not infringe upon the rights set out in the Bill.

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16 An argument can be made, with some support from judicial dicta, that the protection of fundamental rights is a general power of the federal government. The judicial statements supporting this argument are found in cases in which, in line with the traditional form of judicial review of legislation on the basis of the division of powers, provincial legislation which violated fundamental rights was struck down as involving a matter within federal, rather than provincial, power. See the discussion of the "implied" bill of rights in J. N. Lyon and R. G. Atkey, Canadian Constitutional Law in a Modern Perspective, (Toronto, University of Toronto Press, 1970) at 391-394.

From these cases it could follow that federal legislation protecting fundamental rights could be a valid exercise of federal power which would prevail over provincial legislation under the federal supremacy doctrine. While appealing to civil libertarians, this argument is unlikely to find judicial acceptance if put to the test. In any event, the present wording of the Bill, which expressly limits its effect to laws that are otherwise within the powers of Parliament, would undoubtedly be found by any court to bar its application to laws that are otherwise within the powers of provincial legislatures.
The main provisions of the Canadian Bill of Rights are found in sections 1 and 2. Section 1 is a declaration of "human rights and fundamental freedoms". The freedoms listed are religion, speech, assembly and association, and the press. The rights are "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" and "the right of the individual to equality before the law and the protection of the law". The declaration is accompanied by the provision that these rights and freedoms exist "without discrimination by reason of race, national origin, colour, religion or sex".

Section 2 is the operative section of the Bill. It provides that federal law is to "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". It also includes a series of more specific provisions reflecting primarily the common law concepts of procedural fair play when persons are subjected to potential deprivation of liberty or property through the agencies of the state, such as the right to a fair hearing and the right to counsel. Section 2 also contains a proviso that its effect can be avoided by an express provision that a statute is to operate notwithstanding the Bill.

The right to equality before the law and the discrimination clause in section 1 of the Bill of Rights would seem the provisions most relevant to the validity of sex-based differentials. These are the provisions which have been considered in relation to this issue to date.

2. The Discrimination Clause

Since the specific reference to "sex" in the discrimination clause would seem to offer the most direct indication that there is something wrong with sex-based differentials, an important question is whether this clause by itself has an invalidating effect on discriminatory legislation. Grammatically it appears not to have such an effect. The clause appears in a section in which a number of rights and freedoms are specifically listed, but a right to be free from discrimination is not one of the listed rights or freedoms. Literally the section says only that the listed rights and freedoms exist without discrimination, not that discrimination per se is prohibited.

The position of the Supreme Court on this question is uncertain. The issue was discussed in Lavell, but only by the eight judges who purported to accept the Drybones decision. The four who were in the majority in the result held that discrimination by itself did not render legislation inoperative. To have that effect, in their view, there had to be an infringement of one of the listed rights or freedoms, although discrimination would provide an additional factor in rendering inoperative legislation which infringed one of the listed rights or freedoms. Ritchie, J. stated that.\(^{17}\)

\[\ldots\] There is no language anywhere in the Bill of Rights stipulating that the laws of Canada are to be construed without discrimination unless the discrimination involves the denial of one of the guaranteed rights and freedoms, but when, as in the case of

R. v. Drybones, denial of one of the enumerated rights is occasioned by reason of discrimination, then as Mr. Justice Laskin has said, the discrimination affords an "additional lever to which federal legislation must respond."

The four members of the minority related the question of the effect of the discrimination clause specifically to the right to "equality before the law". They were of the view that legislation which might otherwise be compatible with "equality before the law" could be rendered inoperative if it discriminated on any of the prohibited grounds. They proceeded to recognize that this would, in effect, give discrimination a force independent of, and not merely in association with, the listed rights and freedoms. To quote from Laskin, J.18

...[F]ederal legislation, which might be compatible with the command of "equality before the law" taken alone, may none the less be inoperative if it manifests any of the prohibited forms of discrimination. In short, the prescribed discriminations in s.1 have a force either independent of the subsequently enumerated paras. (a) to (f) or, if they are found in any federal legislation, they offend those clauses because each must be read as if the prohibited forms of discrimination were recited therein as a part thereof.

Both of these views cited the judgment of Laskin, J. in Curr v. The Queen,19 in which he spoke for six members of the Court. In that case Laskin, J. was dealing with the converse question of whether infringement of a listed right or freedom could render legislation inoperative in the absence of any discrimination of the types referred to in the discrimination clause. He held that infringement of a listed right or freedom may render legislation inoperative even though there is no prohibited form of discrimination. In view of the grammatical structure of section 2 of the Bill, this holding does not compel a conclusion either for or against giving the discrimination clause an independent effect where there is no infringement of a listed right or freedom.

3. Equality Before the Law in Drybones and Lavell

Unless the discrimination clause is given independent effect, the right whose definition is most critical to the determination of whether the Canadian Bill of Rights affects sex-based differentials in federal law is the right to "equality before the law".

One possible interpretation is that there is a special relationship between equality before the law and discrimination on one of the prohibited grounds of race, national origin, colour, religion or sex. Such a special relationship is supported by the comments of Laskin, J. referred to above in the Curr and Lavell cases. It also finds support in the reasoning of Ritchie, J. speaking for the majority in the Drybones case, but is thrown into grave doubt by the same judge's reasoning in Lavell.

In Drybones Ritchie, J. declined to attempt any extensive definition of the right to equality before the law. He emphasized by repetition that his reasons were limited to a situation in which, under the laws of Canada, it is made an offence punishable at law on account of race, for a person to do something

which all Canadians who are not members of that race may do with impunity.\textsuperscript{20} Thus, not only were his comments on “equality before the law” limited in scope, but also he indicated that they were limited in application. This left the way open for the philosophically contradictory approach which he adopted in \textit{Lavell}.

Development of legal principles frequently involves the ultimate discarding of limitations such as those with which Ritchie, J. hedged his judgment in \textit{Drybones}. Lawyers and judges were justified, therefore, in looking past these limitations to other parts of the judgment for clues as to the meaning of “equality before the law”. The \textit{Lavell} decision, however, may have foreclosed such attempts to pursue a broader view.

\textit{Drybones} marked the culmination of a substantial volume of litigation revolving around the effect of the Canadian Bill of Rights on the liquor provisions of the Indian Act.\textsuperscript{21} Generally these provisions were designed to impose a form of liquor prohibition on Indians, although by 1969 numerous exceptions had been enacted so that in many, although not all, parts of Canada Indians had substantially the same access to alcoholic beverages as other Canadians.

One provision which was not affected by these exceptions, and which was more severe than the laws applying to other Canadians, made it an offence for an Indian to be intoxicated anywhere off a reserve. A comparable provision applicable to most other Canadians at the time did make it an offence to be intoxicated in a public place, but private intoxication was not an offence.

It must be noted that for the most part the liquor laws applying to other Canadians are provincial, rather than federal. Some of the litigation on these provisions involved cases of conflict between federal and provincial legislation and raised the difficult question of whether the Bill of Rights rendered inoperative a federal law which had a discriminatory effect where the discrimination resulted only from the differing provisions of federal and provincial law.\textsuperscript{22}

This issue did not have to be resolved in \textit{Drybones} since the case arose in the Northwest Territories where the federal government has the jurisdiction that


\textsuperscript{21} The same provisions are still on the statute books today. See the Indian Act, R.S.C. 1970, C.I-6, ss. 94, 95.

\textsuperscript{22} For further discussion of this issue, see W. Tarnopolsky, \textit{The Canadian Bill of Rights from Diefenbaker to Drybones} (1971), 17 McGill L.J. 436 at 456-457. As noted by Tarnopolsky, this aspect of the problem was not resolved in \textit{Drybones} and, as a result, has produced further litigation since \textit{Drybones}.


On the other hand, a resolution of this issue in \textit{Canard} may not necessarily be applicable to the liquor provisions. Parliament's only power to legislate in relation to testamentary matters derives from its power in relation to Indians. Thus, discrimination may be a necessary incident of the exercise of power in this area.

Parliament could enact provisions applicable to all Canadians identical to the liquor provisions of the Indian Act under other powers such as the criminal law power. Thus, discrimination may not be a necessary incident of the exercise of power in this area. Discrimination may be valid under the Bill of Rights where it is a necessary incident of the exercise of federal power, but invalid where it is not.
provincial governments have in the provinces. Although a territorial legislature was responsible for the law which applied to non-Indians, the territorial legislature exercised its powers by delegation from Parliament, and not as a legislature with its own source of power under the British North America Act. As a result, all of the law relevant to the case was subject to the provisions of the Bill of Rights.

The problem of race discrimination created by the combined effect of federal and provincial laws arises from the power of Parliament to make special laws in relation to Indians under section 91(24) of the British North America Act, while power to make comparable laws for other Canadians lies with the provinces. Since there is no similar power of Parliament to make special laws with respect to other groups distinguishable by race, national origin, colour, religion or sex, this problem should not ordinarily arise in other contexts, such as discrimination based on sex.

The litigation on the effect of the Bill of Rights on the liquor provisions of the Indian Act before Drybones was decided by the Supreme Court had gone both ways. The most authoritative decisions were that of the British Columbia Court of Appeal in R. v. Gonzales, holding the Indian Act provisions operative, and that of the Alberta Court of Appeal, in its capacity as the Court of Appeal for the Northwest Territories, in R. v. Drybones, holding these provisions inoperative. Since Gonzales involved the combined effect of federal and provincial laws, rather than the purely federal law involved in Drybones, the results in these cases were not irreconcilable, but the reasoning was.

The British Columbia Court of Appeal decision in Gonzales was one of the earliest appellate court decisions on the interpretation of the Canadian Bill of Rights, which had been enacted only two years earlier. As a consequence, it enjoyed some persuasive influence on the general reluctance of Canadian courts to give any substantial effect to the Bill of Rights until the Drybones case was decided by the Supreme Court.

One of the three member Court of Appeal in Gonzales, Davey, J.A., concluded that the Bill of Rights was merely an interpretation statute and, as such, could not be used to render ineffective any legislation which was clearly inconsistent with the Bill of Rights. As noted above, this conclusion was specifically rejected by the Supreme Court in Drybones, and on this point the Lavell case affirms Drybones. In ruling against this argument in Drybones, Ritchie, J. noted that the effect of the argument was to render meaningless the proviso for an express clause that a statute operate notwithstanding the Bill of Rights. Under the approach of Davey, J.A. any legislation inconsistent with the Bill of Rights would have this effect, regardless of whether it contained a non obstante clause.

The majority of the British Columbia Court of Appeal had turned their attention to the definition of "equality before the law". They arrived at a defin-

tion on the basis of which they concluded there was no infringement of the right by the Indian Act. This definition, found in the judgment of Tysoe, J.A., was as follows:

... a right of every person to whom a particular law relates or extends, no matter what may be a person's race, national origin, colour, religion or sex, to stand on an equal footing with every other person to whom that particular law relates or extends.27

Since Indians were the only persons to whom the challenged provisions of the Indian Act related, and since they applied equally to all those persons, that is to all Indians, Tysoe, J.A. concluded there was no denial of equality before the law.

In Drybones the only significant clue to a general definition of “equality before the law” which would move beyond the limits Ritchie, J. otherwise sets upon the scope of his judgment is found in his comments on the definition proposed by Tysoe, J.A. in Gonzales. Ritchie, J. stated:

Like the members of the Courts below, I cannot agree with this interpretation pursuant to which it seems to me 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.28

From this statement one might draw the conclusion that there is some inconsistency between “equality before the law” and “glaring discriminatory legislation against a racial group”, and, by interpolation from the discrimination clause, similar legislation against a group distinguished by national origin, colour, religion or sex. This approach to “equality before the law” seemed to underlie the lower court decisions holding sex discrimination under the Indian Act inoperative in the two cases which were ultimately reversed by the Supreme Court in the Lavell case.

The Lavell case involved those provisions of the Indian Act which determine who has Indian status under the Act.29 In general those provisions create a patrilineal determination of who is an Indian and a unity of status among the members of the conventional nuclear family. Thus, an Indian woman upon marriage takes the status of her husband, whether that involves a transfer of membership from one Indian band to another band, or a loss of Indian status if she marries an non-Indian. Similarly, a non-Indian woman who marries an Indian acquires Indian status.

In Lavell v. Attorney General of Canada30 the Federal Court of Appeal held that the provision denying Indian status to an Indian woman who married a non-Indian was a denial of equality before the law because it worked a disadvantage to an Indian woman on the basis of sex. In Bedard v. Isaac31 this deci-

29 R.S.C. 1970, c. I-6, ss. 11, 12.
sion was followed by a judge of the Ontario High Court with the comment that

... the loss of status as an Indian and the loss of the right to be registered and to occupy property upon a reserve is discrimination which is adverse to the interest of Indian women.\(^{32}\)

As already noted, the decision of the Supreme Court in *Lavell*, which reversed the lower court decisions in both the *Lavell* and *Bedard* cases, involved a split majority. The most influential opinion, unless and until the meaning of “equality before the law” and the discrimination clause are relitigated before the Supreme Court, would appear to be that of Ritchie, J. who spoke for four of the five-member majority. His opinion appears to be built on three major propositions.

The first proposition, which is reflected in the tentative statement of the rule of the case at the beginning of this paper, was that the definition of Indian status is a fundamental exercise of Parliament's specific power to legislate in relation to Indians. To render such legislation inoperative would require plain language expressly enacted for that purpose. The broad general language of the Bill of Rights is not sufficient.

In so far as the definition of Indian status involves a racially-based differential in Canadian law, this proposition has considerable force.\(^{33}\) The problem with using this proposition to support the result in *Lavell* is that it is not clear why a fundamental exercise of a power to discriminate racially needs to be exercised in violation of a fundamental right to equality before the law without regard to sex.

In exercising its power to legislate in relation to Indians, Parliament has the power to make laws which discriminate racially. It may even have an obligation to make such laws since the federal power in relation to Indians is arguably intended to protect the position of Indian bands as a form of sub-national entity, rather than merely to enhance the power of the federal government. Since this power is racially defined, its exercise inevitably involves racial differentials. Since the British North America Act prevails over the Bill of Rights in the hierarchy of Canadian law, it would be reasonable to conclude that Parliament did not intend to effectively abrogate its power over Indians by passing the Bill of Rights. This argument, it should be noted, would tend to support even the legislation that was held inoperative in *Drybones*.


\(^{33}\) For discussion of the question whether the definition is in fact racially based, see D.E. Sanders, *The Bill of Rights and Indian Status* (1972), 7 U.B.C. L. Rev. 81 at 93-95. As Sanders points out, the definition does not turn on race in the sense of blood, a sense in which the term is commonly used.

It is possible for a full-blooded Indian to be legally a non-Indian. This applies not only to Indian women who marry non-Indians, but also to Indians who may abandon their status by what is called enfranchisement, although this term is now a misnomer. The term “enfranchisement” reflected the fact that for most of Canadian history only enfranchised Indians could vote. The same government that introduced the Bill of Rights also extended the right to vote to Indians generally.

To a more limited extent a person without Indian blood can be legally an Indian, as where a woman without Indian blood marries an Indian.

As Sanders points out, the dictionary definition of “race” is broad enough to cover the type of group defined as Indian by the Indian Act.
On the other hand, the discrimination complained of in the Lavell case was sexual, not racial. It is not apparent how that fact is changed by characterizing this discrimination as a fundamental exercise of a power to discriminate racially. While Parliament may not have intended by the Bill of Rights to effectively abrogate its specific power in relation to Indians, it does not follow that it did not intend to effectively abrogate its unspecified power to discriminate on the basis of other racial groupings, or on the basis of national origin, colour, religion or sex.

The first proposition of Ritchie, J. tends to undermine the holding of Drybones that the Bill of Rights will prevail over conflicting legislation, even though Ritchie, J. purports to reaffirm Drybones. It is implicit in this first proposition that there is some conflict between the Bill of Rights and the provisions of the Indian Act, but that the Indian Act prevails due to a predominating Parliamentary intention, as well as because of the implications of the power relating to Indians. To the extent that the Indian Act goes beyond race discrimination into sex discrimination, it would seem that it prevails entirely because of some assumed predominating Parliamentary intent, and quite apart from the implications of the power relating to Indians.\(^4\)

If the sex discrimination in the Indian Act prevails because of predominating Parliamentary intent, it does so without the benefit of a clause that the Act operates notwithstanding the Canadian Bill of Rights. A significant part of the reasoning for holding that the Bill of Rights prevailed over conflicting legislation in Drybones was, as already noted, that otherwise the proviso for a non obstante clause was rendered meaningless. But if conflicting legislation can be found to prevail over the Bill of Rights on the basis of a predominating Parliamentary intention and without a non obstante clause, the proviso is meaningless anyway. In that event, it is questionable whether there is sufficient basis left for the holding that the Bill of Rights prevails over conflicting legislation.

Even if there survives the bare holding that the Bill of Rights can be used to strike down conflicting legislation, it is doubtful whether that holding has much practical significance if a predominating Parliamentary intent can be found even in the absence of a non obstante clause. The traditional high respect of Canadian courts for the decisions of the legislature, even on questions such as the division of powers which are clearly subject to judicial review, makes it unlikely that a court will strike down legislation if it can find any basis for upholding the legislation.

\(^{34}\) Sanders, \textit{id.}, at 103-105 contends that something like the present definition of status under the Indian Act is in fact practically necessary. As counsel for the organized Indian community in the Lavell case, he was apparently able to convince the majority of the Supreme Court of this.

However, earlier portions of his own paper, at 83-85, would suggest that there are workable alternatives not based on sex differentials. While a century of experience under the sexually discriminatory approach chosen by the Canadian government certainly may make it the most workable system at the present time in terms of pure expediency, it is not clear that this justified continuing that system when Parliament has now ordered in the Bill of Rights that equality before the law is to be protected without sex discrimination.
From Parliament’s viewpoint the necessity of flagging legislation intended to violate the Bill of Rights with a non obstante clause would seem to be a substantial deterrent to the adoption of such legislation. If a predominating legislative intent can be expressed without a non obstante clause, it will be relatively easy and politically safe for Parliament to simply disregard the Bill of Rights.

The non obstante clause requirement is also the only barrier to a purely inadvertent violation of the Bill of Rights by Parliament. Since it may be expected that Parliament will not lightly disregard the Bill of Rights even if the courts make it easy for Parliament to do so, inadvertent violations are the type which are most likely to occur. Since Canadian courts officially deny themselves access to the legislative history when interpreting legislation, there is no assurance that the courts will be able to distinguish an inadvertent violation of the Bill of Rights from a deliberate one if the non obstante clause requirement is disregarded.

The second proposition of Ritchie, J. in Lavell was that discrimination on one of the grounds enumerated in section 1 of the Canadian Bill of Rights is not by itself a basis for setting aside other federal legislation. It must be coupled with a violation of one of the listed rights or freedoms. This proposition, and the numerically equal minority view to the contrary, was discussed above. While, if adopted, this proposition disposes of one possible basis for setting aside the challenged sex discrimination in the Indian Act, it still leaves the question of whether this discrimination violates the right to equality before the law. This is the subject of the third proposition put forward by Ritchie, J.

The third proposition was that the right to equality before the law refers to the concept of the rule of law, rather than to general egalitarianism. It means the

equal subjection of all classes to the ordinary law of the land as administered by the ordinary Courts, and . . . equality in the administration or application of the law by the law enforcement authorities and the ordinary Courts of the land.35

The major difficulty with this definition is that it seems to lead back to the position stated by Tysoe, J.A. that equality before the law is upheld as long as the law is applied equally to everyone to whom it applies. As already noted, Ritchie, J. seemed to have appropriately discredited that sort of reasoning in Drybones.

Even if the definition proposed by Ritchie, J. in Lavell means something different from the definition he rejected in Drybones, it is not clear how that distinguishes Lavell from Drybones. In both cases it was the inequality created by the law itself, not inequality in subjection to the law, that created the problem.

In interpreting the substantive content of the right to equality before the law, Ritchie, J. also applied a technique which throws additional doubt on whether the Bill of Rights really has any effect on other legislation and on whether Lavell is really distinguishable from Drybones. He construed the con-

tent of equality before the law in light of the law existing in Canada when the Bill of Rights was adopted.\(^{36}\)

This approach was not novel. Indeed it was the prevailing approach in the entire series of litigation prior to _Drybones_ in which it appeared that the courts would give no significant effect to the Bill of Rights.\(^{37}\)

This approach finds textual support from the phraseology of section 1 of the Bill of Rights that the rights and freedoms listed "have existed". If they have existed, then arguably the existing law indicates what they are. The weakness of this reasoning is that the Bill of Rights does not say that these rights have not been violated in the past.

Since Canadian law in 1960 was not perfect from a civil libertarian point of view, an interpretation of the Bill of Rights in terms of 1960 law would leave substantial opportunity for continuing, and even new but comparable, violations of the rights contained in the Bill.

Since the law that was set aside in _Drybones_ existed in 1960, it seems impossible to distinguish _Drybones_ from _Lavell_ under this approach. Thus, this approach reinforces the possibility that _Lavell_ simply overrules _Drybones_.

Since sex differentials in particular were not uncommon in Canadian law in 1960, this approach strongly implies that such differentials may withstand challenge under the Bill of Rights.

In attempting to distinguish _Lavell_ from _Drybones_, Ritchie, J. understandably fell back upon the limitation that he expressly stated to his decision in _Drybones_, that is, that it was limited to a provision making it an offence punishable at law on account of race for a person to do something other Canadians could do with impunity. He emphasized the role of the definition of Indian status and most other provisions of the Indian Act as internal regulation of the lives of Indians on reserves and of their right to the use and benefit of reserve lands.\(^{38}\)

This is suggestive of a characterization of such provisions as benign discrimination. As with the proposition that this is a fundamental exercise of the federal power in relation to Indians, it is not clear how this argument jumps the gap from discrimination against Indians, which may be benign in many of the Indian Act provisions, to discrimination against Indian women, which is hardly benign when the resulting status is compared to that of Indian men.

In concluding his opinion, Ritchie, J. proposed that the fundamental dis-

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\(^{37}\) See J.N. Lyon, _Drybones and Stare Decisis_ (1971), 17 McGill L.J. 594, in which the author advances the thesis that _Drybones_ in effect overruled the case of _Robertson and Rosetanni v. The Queen_, [1963] S.C.R. 651; [1964] 1 C.C.C. 1; 41 D.L.R. (2d) 485, in which an earlier judgment of Ritchie, J. was the leading illustration of this approach in interpreting the Bill of Rights. If Lyon is right in his thesis, then clearly Ritchie, J. has overruled himself for the second time in _Lavell_.

distinction between *Lavell* and *Drybones* was that the challenged provision in *Drybones*
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\ldots \text{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 the definition of Indian status.}^{39}
\]

In so far as this distinction implies that the court should look to the actual effects of the legislation in question,\(^{40}\) there is support for it in *Drybones*.\(^{41}\) One difficulty with this approach is that it may involve the courts unduly in weighing economic and social policy considerations of particular legislation. This is a task which is more appropriate for the legislature. The courts should concentrate on developing a more generalized legal standard.

In any event there was, at least in Bedard's case, an actual inequality of treatment between Indian men and women. However, one possibility is that the issue of actual inequality of effect was not raised by the facts as Ritchie, J. viewed them. Bedard was seeking to maintain possession of a house on Indian lands which she had inherited from her father. The Indian band had resolved to evict her because as a non-Indian by marriage she was not entitled to live on Indian lands. Ritchie, J. noted, in his statement of the facts, that no notice to quit had been served on Bedard before her action was commenced.\(^{42}\) Therefore, she had not been, at the time of bringing the action, subject to any actual discrimination.

This may indicate that Ritchie, J. regarded Bedard's claim as premature in so far as a showing of practical inequality may be necessary to render legislation inoperative under the Bill of Rights. If this is so, however, it would have been preferable if this rather narrow and technical ground for decision had been made clear. Since Ritchie, J. did not narrow his language in this way, in contrast to the way in which he carefully circumscribed his views in *Drybones*, it would seem that his fundamental distinction must refer to something other than mere factual inequality of effect.

\[^{39}\text{Attorney-General of Canada v. Lavell (1973), 38 D.L.R. (3d) 481 at 499.}\]
\[^{40}\text{As noted by Fowler, The Canadian Bill of Rights — A Compromise Between Parliamentary and Judicial Supremacy (1973), 21 Am. J. Comp. Law 712 at 741-742, this sort of practical analysis was not attempted in the lower courts in *Lavell* and *Bedard* and could, if applied, have supported differing results between the two cases.}\]
\[^{42}\text{Attorney-General of Canada v. Lavell (1973), 38 D.L.R. (3d) 481 at 487.}\]
It may be that the critical words in the fundamental distinction drawn by Ritchie, J. between Drybones and Lavell are “necessary result”. This would accord with an interesting approach taken by the judge who initially ruled against Lavell prior to her appeal to the Federal Court of Appeal. He held that there was no inequality before the law because Lavell was in effect placed on a level of equality with all other married women in Canada. In short, she was not being subjected to sex discrimination; she was being liberated from race discrimination.

However, as a method of distinguishing Lavell from Drybones, the element of necessary result is unpersuasive. It was no more necessary as a result of the intoxication provisions that Indians be discriminated against than it was that Indian women be discriminated against by the definition of Indian status. Just as Indian women do not have to marry non-Indians, or having married non-Indians will not necessarily become dependent on Indian rights for their support, so Indians do not have to become intoxicated off reserves, or having become so intoxicated will not necessarily be charged and convicted of the intoxication offence.

While the matter of not being charged and convicted may differ in legal theory from the matter of not becoming dependent, it is questionable whether they differ in terms of effect, if effect is the standard to be applied in determining whether legislation conflicts with the Bill of Rights. This is particularly so when it is recognized that as a matter of law enforcement policy Indians are probably not sought out and charged for private intoxication. In effect, the Indian Act provision probably operated no differently from the public intoxication offence for non-Indians which existed concurrently as part of the relevant law of Canada.

The only other significant possibility for distinguishing between Lavell and Drybones on the basis of the so-called fundamental distinction quoted above is in the reference to “administration and enforcement of the law before the ordinary Courts of the land”. This would certainly distinguish the cases. The administration of the status provisions of the Indian Act proceeds under the primary supervision of the executive branch of the government. If prosecutorial discretion in enforcement is disregarded, as it commonly is by the courts when they view the administration of penal laws conceptually, the primary supervision of the intoxication provisions is under the judicial branch. However, in a modern welfare state, the idea that the judicial branch must observe equality...
before the law, while the executive branch does not, leaves the individual's right to equality before the law open to rather blatant infringement.\[45\]

If it is the penal element, rather than the nature of the enforcing agency, which distinguishes Drybones from Lavell, this distinction seems equally unacceptable in the context of the welfare state. The inequitable denial of public benefits may harm the individual as substantially as an inequitable subjection to a penalty does.

If the right to equality before the law affects only legislation enforced by the courts or only penal legislation, it will have little impact on sex-based differentials in federal law. Most of these differentials are administratively enforced and non-penal. Differentials such as those in the Prisons and Reformatories Act and the Criminal Code would be candidates for judicial review under this approach but, as is discussed below, most sex differentials in these statutes are likely to be upheld by the courts for other reasons.

While the definition of "equality before the law" by Ritchie, J. in Lavell is difficult to reconcile with his decision in Drybones on any satisfactory basis, it was the only definition offered by the members of the Supreme Court. The minority did not attempt to define this right, preferring instead to rely on the view that the discrimination clause itself made sex discrimination inoperative.

4. Another Look at Equality Before the Law in Burnshine

Since its decision in Lavell, the Supreme Court has again considered the definition of "equality before the law" in R. v. Burnshine.\[46\] Although sex discrimination was raised on the periphery of this case, neither the British Columbia Court of Appeal,\[47\] which held section 150 of the Prisons and Reformatories Act\[48\] inoperative, nor the Supreme Court, which upheld the section, discussed the sex discrimination aspect, probably because it was not really raised by the facts before the Courts. However, Burnshine is relevant to the issue of sex-based differentials because of its comments on equality before the law.

Because of the way in which the administration of the penal system in Canada is shared between the federal government and the provinces, the Prisons and Reformatories Act has a different set of provisions for each province with respect to persons imprisoned in provincial institutions under federal law.

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\[45\] The reference to "the ordinary Courts" stems from Dicey's concept of the rule of law. As pointed out by Professor E.C.S. Wade in his Introduction to A.V. Dicey, Law of the Constitution, (10th ed., London, MacMillan, 1959) at cxiii-cxix, Dicey placed primary emphasis on the role of the courts in implementing fundamental rights. Dicey contrasted the English system in which the exercise of government power was subject to the principles of the general common law under the jurisdiction of the ordinary courts with the French system in which administrative law was administered by a separate system of courts under the Conseil d'Etat. If this concept of the rule of law was not overly narrow in Dicey's day, it is certainly so today in view of the vast growth of administrative tribunals. See also Professor Wade's review of Dicey's own later views on this subject at cxliv-xl.


These provisions are designed to accommodate the differences which exist between provincial penal systems, whether these differences reflect different penal and reform philosophies or simply the exigencies of provincial budgetary priorities.

Since British Columbia has a reformatory system for young adult offenders under which the indeterminate sentence is used as a tool in rehabilitation, the federal provisions applicable in British Columbia authorize the use of the indeterminate sentence for young adult offenders. This sentence can be longer than the determinate sentence for the same offence under federal law in another province. Similar provisions apply in Ontario, but in no other province.

The British Columbia Court of Appeal in Burnshine held that the indeterminate sentence provision violated the right to equality before the law because it discriminated by subjecting the young adult offender in British Columbia to potentially longer imprisonment than would occur for the same offence in most other parts of Canada and for most other adult offenders. The Supreme Court disagreed, finding these provisions to be rehabilitative, not penal. In view of the rehabilitative purpose, Martland, J., speaking for the majority, concluded that there was no denial of equality before the law.

While Martland, J. did not frame the conclusion expressly in terms of benign discrimination, the decision in Burnshine supports the proposition that discrimination which the courts find beneficial, rather than detrimental, to the differentiated class will be upheld.

Fortuity in the sequence in which legal issues were submitted to the judicial system for decision was a factor in the decision of the Supreme Court in Burnshine, although one can only speculate as to whether it was crucial. The effective discrimination complained of was that the indeterminate sentence might in fact be longer than the determinate sentence to which a person committing the same offence was subject elsewhere in view of the maximum sentences prescribed by the Criminal Code. It was arguable that section 150 was subject to the specific maximum sentences prescribed for specific offences by the Code, so that there would be no effective discrimination. The issue of whether section 150 was subject to these maximum limits was submitted to the Supreme Court in an earlier case shortly after the decision in Drybones. However, it was submitted without any argument based on the Bill of Rights.

In Turcotte v. The Queen the Court decided that the then equivalent of section 150 was not limited by the maximum sentence provisions of the Criminal Code. As Laskin, J. pointed out in his dissent in Burnshine, it is difficult to say what interpretation might have been reached by the Court in Turcotte if the potential Bill of Rights issue had been argued before them at that time. On the other hand, Martland, J. indicated that, notwithstanding the lack of argument, in his view it was significant that no member of the Court in Turcotte made reference to the Bill of Rights since the case was heard so shortly after the decision in Drybones. The respect of the Court for stare decisis no doubt played some role in the result in Burnshine. To adopt either the conclu-

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sion of the British Columbia Court of Appeal, or the conclusion of Laskin, J. who would have interpreted section 150 as subject to the maximum sentences in the Criminal Code, would have meant overruling the result in Turcotte.

In defining “equality before the law” Martland, J. emphasized, even more so than Ritchie, J. did in Lavell, that the Bill of Rights should be interpreted in light of the law existing when the Bill was adopted. He also quoted at length from Lavell and cited earlier sources, predating the Bill of Rights, which would relate “equality before the law” to Dicey’s concept of the rule of law, that is, that it involves the administration of the ordinary law before the ordinary courts.

Of course, since sentencing is performed by the ordinary courts, Burn- shine could not be distinguished from Drybones on this basis, as Lavell could be. The ultimate basis of the decision in Burnshine is apparently the benificent purpose of the legislation as viewed by the Court. While one may disagree with the Court’s findings on this question, one can hardly dispute their right to make it.

The Court’s willingness to look at the purpose of the legislation in Burn- shine does introduce a new element in the definition of “equality before the law”. If the purpose of the legislation is relevant, then the law itself, and not merely its administration by the ordinary courts and law enforcement authorities, seems open to scrutiny. One can only query how this reasoning should be read back into Lavell where the purpose of the legislation was, it is sub- mitted, blatantly discriminatory against women, rather than benificent toward them. If anything, this serves to reinforce the possibility that the whole issue is still open to review by the Court.

C. THE LITIGATION BETWEEN DRYBONES AND LAVELL

1. Under the Indian Act

After the Federal Court of Appeal decision in Lavell and before the Supreme Court decision was rendered, another part of the patrilineal definition of Indian status was challenged on the grounds of sex discrimination in Re Froman. This case involved a provision disqualifying from Indian status the illegitimate child of an Indian woman where the father is determined to have been a non-Indian.

The judge decided that the provision was not rendered invalid by the Federal Court of Appeal decision in Lavell because there was no discrimination in effect. In reaching this conclusion he compared the effect of the provisions of the Act where the father is an Indian and the mother a non-Indian with that where the mother is an Indian and the father a non-Indian. He interpreted the basic patrilineal definition of Indian status by descent through the male line as incorporating the common law definition of “descendant”, so that only legitimate children were included. Thus, the illegitimate child of an Indian father and a non-Indian mother would not qualify as an Indian, which is the same result the Act specifically provides for the illegitimate child of an Indian mother and a non-Indian father.

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This case illustrates another difficulty with the 'effect of the legislation' approach in that, in a particular case, it may result in a superficial treatment of the real legal issue. In Froman it provided an overly facile way of evading the underlying implications of the Federal Court of Appeal decision in Lavell, which represented the prevailing law at the time.

While the Federal Court of Appeal had specifically ruled inoperative only the provision as to the status of Indian women who marry non-Indian men, all of the provisions defining Indian status are part of an integrated scheme involving a patrilineal determination of status, both as to Indian women and as to Indian children. If the determination as to Indian women was inoperative, basic doubts were raised whether the determination as to children could still stand. It was evasive to say simply, as the judge in Froman did, that "the question is a different one". 52

The basic question was not whether particular sets of parallel circumstances produced unlike, and therefore discriminatory, results. It was whether the entire patrilineal system was a form of subtle, or even not so subtle, sex discrimination which could not operate in the face of the Bill of Rights protection for equality before the law without discrimination by reason of sex.

Leaving aside the question of race discrimination, it may be noted that discrimination in effect would occur in certain circumstances under the provisions as to Indian status of children even using the type of analysis undertaken in Froman, but it would seem related to legitimacy, rather than sex. The children of Indian fathers and non-Indian mothers would be Indians if legitimate, but non-Indians if illegitimate. The question of whether this type of discrimination, while not specifically listed in the Bill of Rights, might be vulnerable to the test of equality before the law was not raised. 53

52 Re Froman (1973), 33 D.L.R. (3d) 676 at 682.

53 Whether discrimination on grounds other than those listed in the discrimination clause of the Bill of Rights may violate the right to equality before the law is another question which awaits a final answer.

The language of Laskin, J. in the Curr case, [1972] S.C.R. 889 at 896; 26 D.L.R. (3d) at 611, that a violation of the discrimination clause is not essential to constitute a violation of the Bill of Rights leaves the door open to finding other forms of discrimination to be violative of the right to equality before the law.

The British Columbia Court of Appeal in Burnshine (1973), 39 D.L.R. (3d) 161 at 169-170, 186-187, held, citing Curr, that the list of grounds in the discrimination clause is not exhaustive of the right to equality before the law. Although the British Columbia Court's decision was reversed by the Supreme Court, as discussed above, Martland, J. who spoke for the majority reached the same conclusion as the B.C. Court on this issue, again citing Curr.

On the other hand, the decision in Re Prata and Minister of Manpower and Immigration, [1972] F.C. 1405; 31 D.L.R. (3d) 465 (C.A.), is illustrative of judicial reluctance which is likely to be encountered in considering challenges based on forms of discrimination which lack textual reference in the discrimination clause. The Prata case involved different treatment in deportation proceedings which are accorded aliens who are declared to be undesirables by an unreviewable determination of two federal Ministers made without a hearing, as compared to the treatment of other aliens in such proceedings. The Court found there to be obvious acceptable legislative reasons for making the distinction.

In light of the Lavell case, the question of whether other forms of discrimination violate equality before the law may perhaps appropriately be postponed until it is clarified to what extent even discrimination on the listed grounds will violate the Bill of Rights.
The practical implications of a decision rendering legislative provisions inoperative under the Bill of Rights are illustrated by the provisions involved in the Froman case, although these implications were avoided in the result in that case by the holding that the provisions were operative. If the patrilineal definition of Indian status were held inoperative, a serious question arises as to how Indian status is determined, particularly in the case of children. This, and not the individual status of the Indian woman who marries a non-Indian, would seem to be the center of concern of the Indian community which led to their extensive and successful intervention in the Lavell case.\(^{64}\)

The Supreme Court’s next opportunity to express its views on the Indian Act is in the case of Canard v. Attorney-General of Canada.\(^{55}\) The case involves provisions in the Indian Act giving the Minister of Indian Affairs and Northern Development jurisdiction over the testamentary affairs of deceased Indians.\(^{56}\) The Manitoba Court of Appeal, citing Drybones and the Federal Court of Appeal in Lavell, held these provisions inoperative because they deprived a woman on the ground of race of the civil right enjoyed by other Canadians to administer the estate of her husband. An appeal from this decision was filed in the Supreme Court before the Lavell decision was rendered.

Even without the precedent of the Lavell decision, it is doubtful whether the Manitoba Court of Appeal decision in Canard could survive. By the reasoning in the case, most of the Indian Act would be rendered inoperative. While some of the remarks of Laskin, J. in his dissent in Lavell would suggest a willingness to go this far, it is doubtful whether he would simply rule the entire Indian Act inoperative. He is more likely to engage in careful analysis of its individual provisions as raised by litigation to determine whether they are discriminatory.\(^{57}\)

The provisions involved in Canard are closely related to the proprietary aspect of Indian matters. A determination that these provisions fall within an area of benign discrimination is a strong possibility.

Since the administration of an estate might be assigned to someone other than the spouse by will, and is generally subject to judicial supervision whether or not any appointment is made by will, it is questionable whether there is a civil right of a woman to administer the estate of her husband in the unqualified sense inferred in the judgment of the Manitoba Court. It is arguable that the insertion of supervision by a federal Minister, whose concern extends to such matters as the special proprietary interest of the Indian band in Indian lands, is no different for the purposes of the Bill of Rights from the supervision of provincial judicial officers to which all administrations are subject.

\(^{64}\) Sanders, supra, note 34, deals with this question throughout his entire article, but poses the real and practical problem of maintaining some stability in the population of Indian bands at p. 104.


\(^{56}\) R.S.C. 1970, c. 1-6, ss. 42-46.

\(^{57}\) See the remarks of Laskin, J. in Attorney-General v. Lavell (1973), 38 D.L.R. 481 at 511-512.

One case decided in the interval between Drybones and Lavell did hold that the Bill of Rights rendered the Indian Act inoperative in its entirety; Isaac v. Davey, [1973] 3 O.R. 677; 38 D.L.R. (3d) 22 (H.C.). Since the case turned entirely on the question of race discrimination, it has no general relevance to the sex discrimination question.
The *Canard* case clearly poses the issue of whether discrimination resulting from the combined operation of *federal and provincial* law is violative of the Bill of Rights. As noted above, however, this issue would appear to have little relevance to types of discrimination not involving the Indian and non-Indian differential.

Since the particular Indian Act provisions in dispute in *Canard* do not involve a sex differential, any Supreme Court decision is unlikely to throw much light on the sex discrimination issue. Only in the improbable event that the Supreme Court uses the *Canard* case to express an early disavowal of the *Lavell* result would this case appear to affect the sex differential question.

2. **Under the Divorce Act**

The effect of the Canadian Bill of Rights on sex-based differentials in Canadian federal law was actually first raised with respect to the Divorce Act a few months before *Drybones* was decided by the Supreme Court. In *Joseph v. Joseph* a rule of court being applied under the Divorce Act was challenged because it authorized an order of security for costs to be granted in favour of a wife, while there was no authorization for such an order in favour of a husband.

The Divorce Act itself, which was drafted several years after the Bill of Rights came into being, indicates an effort to deliberately eliminate sex-based discrimination from Canadian divorce law. For instance, it provides that the domicile of a married woman for the purposes of divorce is to be determined as if she were unmarried. It also specifically provides for maintenance orders against either spouse in favour of the other spouse and the children.

The discrimination alleged in the *Joseph* case resulted indirectly from the fact that the rules of court being applied under the Divorce Act were provincially drafted. These rules continued to reflect historical attitudes that had been imbedded in the law over the century when Canadian divorce law consisted primarily of pre-Confederation provincial law.

The British Columbia Court rejected the argument that the security for costs rule conflicted with the right to equality before the law. In doing so, it relied on the definition of “equality before the law” propounded in the *Gonzales* case, that is, the equal application of a law to every person to whom the law applies. Since this rule by its terms applied in favour of women and against men, there was no inequality in so applying it.

As already discussed, the *Gonzales* reasoning was rejected by the majority opinion in the *Drybones* case. There was a strong argument, therefore, that the holding in *Joseph* was overruled by *Drybones*. The law has moved in that direction, but it has done so without further reference to the Bill of Rights.

For example, in *Schribar v. Schribar* an Alberta Court gave an order for security for costs against a wife and in favour of a husband. Although the rules

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59 Divorce Act, R.S.C. 1970, c. D-8, s. 6.
60 Divorce Act, R.S.C. 1970, c. D-8, s. 11.
of court, as they did in British Columbia when Joseph was decided, provided specifically only for an order of security for costs against a husband and in favour of a wife, the Court used its general power to make such order as to security for costs as appears just.

In Saskatchewan a similar specific rule authorizing an order of security for costs in favour of a wife and against a husband came under scrutiny in Walker v. Walker. Walker claimed that she was entitled to such an order because of this specific rule. Her husband, who was the petitioner for divorce, argued against the order on grounds of impoverishment. The Court refused to grant the order. The judge noted that the effect of granting the order would be to make it more difficult for impoverished husbands to apply for divorce than for impoverished wives to do so. Without reference to the Bill of Rights, he concluded:

I do not think our modern society has any desire to tolerate such inequality between the sexes.

3. Under the Canadian Citizenship Act

The question of sex discrimination under the Canadian Citizenship Act arose in Re Schmitz. The Act provides that the wife of a Canadian citizen may be granted citizenship after one year of residency in Canada, but for most other persons, including the husbands of Canadian citizens, the minimum residency requirement is five years.

Schmitz was an American man who had married a Canadian woman. He had attended law school in Canada and was seeking admission to the British Columbia Bar, but Canadian citizenship was a prerequisite for admission. He sought to have the one year residency provision applied to him, as it would have been applicable in the case of an American woman married to a Canadian man.

The Court rejected Schmitz's application. It found the differentiation made with respect to married women to be in accord with historical concepts under which the wife may be deemed to take the status of her husband. In any event, if there were discrimination, the Court saw no way of granting the application for citizenship. That would have involved adding a provision to the statute, rather than holding a provision inoperative. The Court could conceive of no such remedial power.

4. Under the Criminal Code

The Criminal Code contains a number of provisions which differentiate sexually. While most of these involve the so-called sex offences, they also include infanticide.

Two sex differentials in the Criminal Code have come under judicial scrutiny on the basis of the Bill of Rights. One was a now non-existent pro-
vision creating the offence of vagrancy where a female prostitute failed to give a good account of herself if found in a public place.\textsuperscript{67}

Since the offence of vagrancy by a female prostitute was repealed by Parliament after the litigation concerning it arose under the Bill of Rights, the issue of its validity under the Bill of Rights is now moot. However, the litigation is deserving of a brief review because it is revealing of judicial attitudes on the question of sex differentials in the law.

In \textit{R. v. Viens}\textsuperscript{68} the judge acquitted the accused on the basis that the offence of vagrancy by a prostitute violated the right to equality before the law since it was clear under the statute that it applied only to the female sex. This holding was rejected by subsequent cases in which the same argument was raised. In \textit{R. v. Beaulne}\textsuperscript{69} and \textit{R. v. Lavoie}\textsuperscript{70} the sex discrimination argument was rejected on the basis that the offence related to conduct, not to sex. There was no discrimination merely because the statute prohibited conduct of a type in which only females could engage.\textsuperscript{71}

Because it concentrates on the sex of the victim, rather than the offender, the offence of indecent assault on a female presents a different practical question, although in terms of pure legal theory it may be difficult to satisfactorily justify the distinction. Sex discrimination as to victims is still sex discrimination.

In \textit{R. v. Halliday}\textsuperscript{72} the Court rejected an argument that the sex differential as to the victim rendered this provision inoperative under the Bill of Rights. After noting that there was no discrimination as between offenders, the judge turned the argument around by stating that to render the provision inoperative would deny females the right to the protection of the law. While this reasoning involves a rather neat semantic technique (since the protection of the law appears as a correlative of equality before the law in the same clause of the Bill of Rights) the logic is elusive. If the indecent assault offence were held inoperative, the female victim would still enjoy the protection of the criminal and civil law provisions respecting ordinary assault, which is the only protection her male counterpart enjoys. The Court does not indicate why protection should be at the expense of equality.

On the other hand, given that the indecent assault provision involves sex discrimination, the question must be asked whether the offender should have standing to raise it. It is a difficult question whether someone who has engaged in admittedly anti-social conduct should be permitted to escape the consequences merely because he chose his victim without due regard to the Criminal Code,

\textsuperscript{67} Criminal Code, R.S.C. 1970, c. C-34, s. 175(1), repealed by S.C. 1972, c. 13, s. 12.
\textsuperscript{68} (1970), 10 C.R.N.S. 363 (Ont. Prov. Ct.).
\textsuperscript{72} Criminal Code, R.S.C. 1970, c. C-34, s. 149(1).
rather than his own physical desires, even if regard for the Code would have compelled him to a sexually discriminatory choice, particularly when his personal choice was probably sexually discriminatory itself.

This does, of course, raise the further question of how such discriminations in the law can be challenged through the judicial process at all. The male victim of an indecent assault, who is the real sufferer as a result of this discrimination, would also seem to lack the standing to raise it, since he would not be a party to any potential criminal proceeding in which the issue might be raised. His problem is like that of the aspiring lawyer in the Schmitz case who simply could not bring himself within the statute. In the converse case, when the one assaulting a female is charged or the alien wife of a Canadian is applying for citizenship after one year of residency, there is no one at hand who is discriminated against to raise the issue.

One interesting aspect of the judgment in Halliday is that, although it was rendered after the Supreme Court decision in Lavell, there is no reference to Lavell. This may be explained by the fact that the first published report of the Supreme Court decision in Lavell was not available when the judgment was delivered in Halliday. On the other hand, the Lavell decision received national publicity as soon as it was issued. The judge in Halliday must have been aware of the Lavell result and of its possible implications on the sex discrimination issue. Moreover, although advance sheets of Supreme Court judgments are not widely circulated, they are readily available. The lack of reference to Lavell in Halliday may indicate, therefore, that Lavell was not considered relevant. By contrast, the judge refers favourably to the Drybones decision which struck down legislation on the grounds of discrimination with respect to the offender, as distinct from the victim.

D. THE FUTURE PROSPECTS

1. Arguments Available

In the development of future arguments against sex-based differentials in federal law on the basis of the Canadian Bill of Rights, one possibility is that the Lavell case was simply wrongly decided. This possibility is given some foundation by the strong dissent in Lavell and by the four to four to one division by which the case was decided.

On the other hand, given the tradition of judicial adherence to the doctrine of stare decisis in Canada, it would be folly for those challenging sex differentials to rely on an overruling of Lavell. This is particularly so in the lower courts in which future arguments will have to be raised in the first instance.

The principal alternative argument is that the Lavell reasoning should be limited to the particular circumstances of sex discrimination in the Indian Act. The nature of the federal power under which the Indian Act was passed implies, or even necessitates, discrimination in its exercise. Although it is suggested above that this discriminatory implication did not necessarily extend to sex discrimination, Ritchie, J. in Lavell apparently concluded that it did so extend. This conclusion does not support sex discrimination in other contexts.

In other words, the effect of Lavell is arguably limited to the proposition
that the challenged legislation in the case was a fundamental exercise of the federal power in relation to Indians. Since Parliament has no other powers necessarily implying discrimination on the grounds set out in the Bill of Rights, Lavell simply does not apply to other legislation.

In view of the comment of Ritchie, J. that no inequality of treatment flowed as a necessary result of the application of the challenged provision, and in light of the tendency for courts to look at the practical effect of the legislative differential in cases such as Froman, future challenges will need to pay attention to showing how discrimination in practice results from the statutory differential.

As already noted, reliance on practical effects as the standard of validity of legislation under the right to equality before the law carries on the one hand the danger of involving the courts too heavily in questions of social policy which are better dealt with by the legislature, and at the other extreme, risks the superficial type of review found in the Froman case.

It would seem preferable if, at least in the case of a differential listed in the discrimination clause of the Bill of Rights, the mere existence of one of these suspect differentials might be regarded as a prima facie denial of equality before the law. There is some support for such an argument in the dissent of Laskin, J. in Lavell. In light of the precedents, however, attention to practical effects seems an essential part of any argument challenging legislation as a denial of equality before the law. In making this part of the argument, it will be necessary to distinguish the case of Bedard as dealt with by Ritchie, J. in Lavell on the basis of the suggestion in the statement of facts that she had not suffered any actual detriment as of the time her action was commenced.

On the basis of Burnshine attention will also need to be paid to the purpose of the legislation. Since Canadian courts are reluctant to look at legislative history, the effect of the legislation is likely to be the best evidence of its purpose. Thus, arguments on effect and purpose will normally be tied together.

2. Challengeable Provisions

The sex offences in the Criminal Code provide some of the most obvious examples of sex differentials in federal law. Since these provisions fall within the area of penal law, they involve the one area in which a consensus amenable to challenges under the Canadian Bill of Rights can be found in both Drybones and Lavell. There exists a real likelihood that a direct challenge will be made to these provisions under the Bill of Rights and carried to the Supreme Court.

It may be unfortunate if the next major attack on statutory discrimination is made under these provisions. As indicated by the decisions in Lavoie and Beaulne, judges are going to be extremely reluctant to strike down any offence under the Criminal Code on grounds of sex discrimination.

It will be a rare judge who will dismiss a rape charge because the offence

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73 (1973), 23 C.R.N.S. 332 (Ont. Co. Ct.).
discriminates against men. The danger is that the reasoning judges may use in upholding the charge in such a case may unduly limit the potential for application of the Bill of Rights to other forms of statutory discrimination.

Sex differentials in the Income Tax Act and the Canada Pension Plan Act may provide a less hazardous territory for future litigation under the Bill of Rights. A prime example of sex discrimination in the Income Tax Act is the provision which permits a woman to deduct child care expenses in calculating her taxable income as a matter of right, while a man can only deduct such expenses if he is unmarried or if his wife is absent or incapable of caring for children.76

Under the Canada Pension Plan Act similar discrimination is found in a provision which entitles a widow to a pension on the basis of her husband's contributions if she is over thirty-five or has dependent children when he dies, or is disabled. It entitles a widower to such a pension only if he is disabled.77

If these provisions are challenged under the Bill of Rights, particular attention will have to be paid to showing their discriminatory effect. Both provisions reflect existing social conditions so that in many, if not most, cases they may tend to equalize the situations of particular men and women, rather than treat one sex more harshly than the other. It is even arguable that in the case of the child care expense provision an attempt is being made to compensate for past discrimination against women in that the provision helps offset the social pressure on a woman with child care responsibilities to devote herself exclusively to those responsibilities and provides some incentive for her to seek other employment, in comparison to the position of men who are under no such social pressure where they have such responsibilities. Under the same argument there is no actual discrimination in effect against men, on the other hand, since the provision is available to men who need it.

Where the clearest case of effective discrimination between men and women under the child care expense provision arises is in the case where the woman's choice whether to be employed outside the home is not a free choice because she cannot find a job. For many women the problem of finding a job is compounded, as it is for some men, by a need for job training. If a man is unemployed while his spouse is working, the child care deduction of the wife is unaffected. The man can be free to devote his full efforts to seeking new employment, including any necessary training. If a woman is unemployed while her spouse is working, however, the couple have no child care deduction. This tends to throw the child care responsibility on the woman. It hampers her efforts to seek new employment and particularly impedes any necessary training.

There would seem to be two major obstacles to successful litigation to eliminate sex differentials like those in the Income Tax Act and the Canada Pension Plan Act. The first is that the courts may view them as a reasonable

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76 S.C. 1970-71, c. 63, s. 63.
77 R.S.C. 1970, c. C-5, s. 44(1). Note, however, that Bill C-19 which was introduced in the 1974 spring session of Parliament proposed to eliminate sex-based discrimination from this Act. Such legislation is likely to be re-introduced in the future.
legislative response to economic and social realities, promoting substantial equality, rather than inequality.

The second obstacle is the difficulty the courts face from a remedial point of view in giving effect to such a challenge, even if they sympathize with it. Courts will be reluctant to deny statutory benefits to those entitled to them on the face of the legislation, if anyone can be found with status to raise the issue in such cases. In the converse case of someone seeking a benefit conferred on the opposite sex, courts will be hard-pressed to find judicial power to extend the statutory benefits, as demonstrated by the Schmitz case.

While the court in the Schribar case saw its way clear to extending an order of security for costs against a wife in a divorce action where the rules provided only for an order against a husband, it did so on the basis of a broader and well-established court power to make any just order of security for costs. No parallel power to revise the Income Tax and Canada Pension Plan schemes is likely to be found by the courts. This problem is discussed further below in relation to remedies.

3. Judicial Attitudes

The attitudes of the courts towards sex differentials in the law indicates a rather predictable tendency to accept traditional concepts of sex roles. In the Lavell case this attitude was evident in the initial opinion of the County Court judge in which he emphasized that Lavell's right to equality was to the rights and privileges, not of other Canadians, but of other Canadian married women with all the capacities and incapacities that such a status entails.78

While there was no similar clear traditional role assumption in the Supreme Court opinions in Lavell, other than that which necessarily followed from the result, inferences may be drawn from emphasis which Ritchie, J. added to certain wording in his quotation of the preamble of the Bill of Rights. The preamble is a recital of some broad principles on which the Bill is said to be based. Among the concepts to which Ritchie, J. added emphasis were "the position of the family" and "respect for moral and spiritual values".79 While it may be reading too much into this emphasis and it must be noted that these are not the only words to which Ritchie, J. added emphasis, it is at least possible that the particular words chosen indicate a judgment based on a traditional role assumption, when viewed in the light of the result. If this assessment is correct, one might say that the feminist position has been hoist upon a platitude.

Other cases illustrate the traditional role assumption in a variety of ways. In Schmitz it underlay the conclusion that the Canadian Citizenship Act does not violate equality before the law because it reflects the historical concept that a wife takes the citizenship and domicile of her husband and

accords with the theory, historically at least, if not subscribed to by females today, that the husband is the head of the house.80

In *Joseph* the attitude appeared in the recitation of the common law basis for the rule that a husband must provide security for costs to the wife in a divorce proceeding. This provision derived from his duty to provide necessaries. In *Froman* the view was implied in the suggestion that, because no legislature can change the biological differences between men and women, the centuries-old legal recognition of the consequences as they effect children supports similar legal recognition today. In *Halliday* it pervaded the proposition that women have a right to the protection of the law from indecent assault even though that right has not been granted to men. The role assumption took on a different character, but was none the less traditional, when it was stated by the Courts in *Lavoie* and *Beaulne* that only a woman can be a prostitute.

There are illustrations on the other side, particularly in the statement in *Walker* that our society does not wish to tolerate inequality between the sexes, and in the reasoned submission of Laskin, J. in *Lavell* that discrimination on the grounds listed in the Bill of Rights is altogether barred. The views of Laskin, J. were summed up in the following words:

> ... the Canadian Bill of Rights itself enumerates prohibited classifications which the judiciary is bound to respect; and, moreover, I doubt whether discrimination on account of sex, where as here it has no biological or physiological rationale, could be sustained as a reasonable classification even if the direction against it was not as explicit as it is in the Canadian Bill of Rights.

Such views are in the minority in the reported cases. As long as the traditional role assumption predominates, judicial review will be a somewhat uncertain method of attacking sex-based differentials in Canadian federal law.

4. Judicial Remedies

The problem of what remedy can be provided if a court finds a denial of equality before the law has been raised above in the context of the party seeking a benefit which under the terms of the law is available only to other persons on an allegedly discriminatory basis. In this context the courts have indicated that they cannot extend the benefit to the party not entitled under the statute.

The only remedy which appears to be available is that of declaring the discriminatory provision inoperative, which was applied in *Drybones*. This remedy works most satisfactorily in situations where other general provisions of law are available to fill the gap that is left by the inoperative provision. In *Drybones* there were available the general liquor laws of the territory to fill any

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82 *Re Froman* (1973), 33 D.L.R. (3d) 676 at 682-683.
gap created by striking down the liquor provisions of the Indian Act. If Walker had been decided under the Bill of Rights and had proceeded by striking down the rule authorizing only an order of security for costs in favour of the wife in a divorce proceeding, there was available the general power of the courts to order security for costs which the Court in Schribar in fact applied to order security for costs in favour of the husband.

Much of the law which may be reviewed under the Bill of Rights is public law. Two general principles of public law make the remedy of declaring a provision inoperative workable in much of the public law field even where no alternative provisions exist. These principles are "What is not prohibited is permitted" and its corollary "What is not covered by regulation is left unregulated."

In spite of the workability of the remedy under legislation such as the Criminal Code, where any offence which is inoperative is simply no longer an offence, the courts have shown hesitation to apply the remedy where the effect may be to wipe out significant parts of the legislative structure. This hesitation is likely to be even greater in a case where the challenged provisions are a pivotal part of the existing legislative scheme. This may be the real explanation of the result in Lavell, in view of the problems discussed above which a different result in Lavell would have created with respect to the status of Indian children, problems posed but evaded in the Froman case.

In the United States the courts have developed the remedy of extending benefits, which are legislatively allocated on a discriminatory basis, to the group discriminated against, if it is concluded the legislature would have preferred this to elimination of the benefits altogether. In view of the preeminence of the principle of legislative supremacy in the Canadian legal system with its implication that the courts should play a very limited role in law-making, as contrasted with the principles of separation of powers and checks and balances which are widely favoured in the United States, it is doubtful whether this remedy would be accepted in Canada.

It is arguable that there is a textual basis for such a remedy in section 2 of the Canadian Bill of Rights. Section 2 says that laws are to "be so construed and applied as not to" infringe fundamental rights and freedoms. By contrast, section 2 provides that "no law of Canada shall be construed or applied so as to" violate the protections of procedural fair play. From this it might be implied that, while laws which violate procedural protections are not to be applied at all (that is, they are to be rendered inoperative) laws which violate fundamental rights and freedoms are to be applied, but with such revisions as may be necessary to accommodate fundamental rights and freedoms.

It is more likely that the variation in wording in section 2 was not intended to have any such significance. Certainly the implications of this argument in

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91 See the judgment of Ritchie, J. in 38 D.L.R. (3d) 481 at 490.
92 See Moritz v. Commissioner of Internal Revenue (1972), 469 F. (2d) 466; cert. denied (1973), 412 U.S. 905; 93 S. Ct. 2291; 36 L. Ed. (2d) 971; and Frontiero v. Richardson (1973), 411 U.S. 677; 93 S. Ct. 1764; 36 L. Ed. (2d) 583.
a case like *Drybones* are somewhat worrisome, since the only way to apply the intoxication offence provision in the Indian Act without discrimination would seem to be to apply it to all Canadians.

5. Tactical Considerations

In view of the lack of success which challenges to sex discrimination have had under the Bill of Rights, the prevalence of judicial attitudes based on the traditional assumption as to proper sex roles, and the limited nature of the remedy which is available from the courts, the basic tactical question which faces the proponents of equality between the sexes is whether to attempt further challenges in the courts or to concentrate on legislative reform. While it must be noted that the same attitudes seem to prevail in the legislature, the wider remedial opportunities would seem to outweigh this. The critical question is the comparative chances for success in the legislative and judicial forums.

The opinion of Laskin, J. in *Lavell*, combined with subsequent changes in the membership of the Court, including the appointment of Mr. Justice Laskin as Chief Justice of Canada, hold out some potential for future success in the judicial forum for challenges to sex differentials in federal law.

On the other hand, the judicial forum is a difficult route. It requires a party who is willing to carry out the issue in litigation all the way to the Supreme Court, if necessary. Since the validity of a federal statute is in question, it may be assumed that the Attorney-General is likely to appeal any unfavourable decision at the trial and provincial appellate levels, with all the advantages of public financing behind him. The individual litigant, for financial or other reasons, may well give up in the event of an unfavourable decision at any level. This may tend to create a preponderance of decisions rendered at the lower court levels against the application of the Bill of Rights simply because such decisions are not appealed.

The *Gonzales* and *Drybones* cases illustrate this problem. When the British Columbia Court of Appeal found against Mr. Gonzales, he gave up. When the Northwest Territories Court of Appeal found in favour of Mr. Drybones, the Crown appealed to the Supreme Court. Although the Supreme Court in *Drybones* ultimately rejected the reasoning that was applied in *Gonzales*, in the intervening seven years the *Gonzales* case enjoyed major influence on judicial attitudes in applying the Bill of Rights. The disapproval of the *Gonzales* reasoning in *Drybones* may not effectively erase that influence because it has become imbedded in other reasoning in which the fallacies dealt with in *Drybones* may not be apparent. The definition of “equality before the law” by Ritchie, J. in *Lavell* may reflect this very influence since it can be interpreted as a mere reformulation of the definition adopted by Tysoe, J.A. in *Gonzales* which Ritchie, J. specifically discredited in *Drybones*.

Some support for the individual litigant may be forthcoming from organizations such as the Canadian Civil Liberties Association, but the resources of such organizations are relatively limited. The Canadian Civil Liberties Association itself has recently indicated a preference for legislative (rather than judicial) reform in the case of one discriminatory provision in the Canadian
Canadian Citizenship Act. This provision gives automatic Canadian citizenship to the child of a Canadian father, while the child of a Canadian mother is automatically a Canadian citizen only if born in Canada. The Association's preference for legislation is based on the problem that litigation may only succeed in eliminating the provision now applying to the children of Canadian fathers, without providing any remedy to the children of Canadian mothers.

Given the heterogeneity of the Canadian electorate, it is by no means clear that in the long run individual liberties will be better protected by judicial activism than by legislative reform. The argument that appointed judges with security of tenure may be able to stand as a bulwark against majority repression of individual rights is attractive, but the experience in the United States, which has the archetypal system for testing this hypothesis, suggests that it is by no means clear to what extent the judiciary can withstand majority pressure or whether, to the extent they can do so, the judiciary will invariably withstand such pressure in a way favourable to individual rights. In any event, this question is mooted under the Canadian Bill of Rights by the express proviso allowing a declaration that other legislation is to operate notwithstanding the Bill of Rights.

The remedial powers of the legislature are a major advantage to the use of legislative reform in preference to judicial reform. At the same time that provisions in apparent conflict with the principle of equality before the law are being eliminated, new measures can be taken to redress any consequent inequities. In many cases what is called for is clarification or neutralization of definitions within the statute, not the elimination of provisions.

More importantly, under the Canadian legislative system the chances of obtaining legislative reform are reasonable. Because the Cabinet controls the votes of its party supporters in the legislature, one has achieved a major task in the implementation of a reform by convincing the Cabinet of the need for it. This may be no more difficult than the task of convincing the judiciary, although this does not imply it is a simple task. Political constraints and restrictions on Parliamentary time are both major considerations, and one has only to look at the time elapsed between the issuance of the Report of the Royal Commission on the Status of Women and the implementations of its recommendations for an illustration of one of the weaknesses associated with legislative reform.

Nevertheless, it is submitted that the weight of considerations of viability favours legislative reform over judicial reform in implementing the command of the Canadian Bill of Rights that individuals are entitled to equality before the law without discrimination by reason of sex. This is not to say that the potential of litigation should be disregarded. Litigation may even provide a prod to the legislators. But it is doubtful whether litigation can satisfactorily eliminate the sex-based differentials which exist in Canadian federal law.

93 (1974), 8 Civil Liberties No. 1.