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J. GRANT SINCLAIR

The recent decision of the Supreme Court of Canada in the case of *The Queen v. Drybones* has been hailed by many as one of the most significant decisions of that court in the history of Canadian constitutional law. On its facts, the *Drybones* case had a rather inauspicious beginning. On April 8th, 1967, Joseph Drybones was found intoxicated in the lobby of the Old Stope Hotel at Yellowknife in the Northwest Territories. He was charged and convicted for being an *Indian*, who was intoxicated off a reserve, contrary to s. 94 (b) of the *Indian Act*. Section 94 provides:

An Indian who
(a) has intoxicants in his possession,
(b) is intoxicated, or
(c) makes or manufactures intoxicants off a reserve, is guilty of an offence and is liable on summary conviction to a fine of not less than ten dollars and not more than fifty dollars or to imprisonment for a term not exceeding three months or to both fine and imprisonment.

At the time Drybones was charged, there was in effect in the Northwest Territories, the *Liquor Ordinance* which made it an offence for any one to be intoxicated in a public place. Under s. 19 (1) of the Ordinance, there is no minimum fine provided, and the maximum term of imprisonment is 30 days. A further distinction between these two laws arises from the particular fact that there are no Indian reserves in the Northwest Territories. Hence an Indian, who was found intoxicated in his own home, would be subject to prosecution, whereas similar conduct by a non-Indian would not make him liable to punishment.

Drybones successfully appealed his conviction, and on appeal by the Crown to the Supreme Court of Canada, a majority of that court held s. 94 (b) inoperative because it denied, on account of race, the right of the individual to equality before the law, contrary to the *Canadian Bill of Rights*. The significance of the *Drybones* case depends on the conclusion that the Canadian Bill of Rights is now to be applied, and *should* be applied, by the

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2 R.S.C. 1952, c. 149.
3 R.O.N.W.T. 1956, c. 60.
5 S.C. 1960, c. 44.
courts as a law capable of imposing restraints on legislative and administrative action which infringes any of its guarantees. The purpose of this article is to consider the validity of this conclusion.

I

A Bill of Rights does two things. First, it designates those fundamental rights and freedoms which are to be protected. Secondly, it guarantees their protection by imposing obligations on some institution or person to act so as not to abridge these protected liberties. The Canadian Bill of Rights is a unique example of the essential model of a Bill of Rights. The guaranteed rights and freedoms are set out in s. 1 and s. 2 of the Bill. Section 1 provides:

It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely:

a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
b) the right of the individual to equality before the law and the protection of the law;
c) freedom of religion;
d) freedom of speech;
e) freedom of assembly and association; and
f) freedom of the press.

Under the latter part of s. 2:

... no law of Canada shall be construed or applied so as to:

a) authorize or effect the arbitrary detention, imprisonment or exile of any person;
b) impose or authorize the imposition of cruel and unusual treatment or punishment;
c) deprive a person who has been arrested or detained
   i) of the right to be informed promptly of the reason for his arrest or detention,
   ii) of the right to retain and instruct counsel without delay, or
   iii) of the remedy by way of habeas corpus for the determination of the validity of his detention and for his release if the detention is not lawful;
d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self criminalation or other constitutional safeguards;
e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;
f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or
g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted."

The main directive of the Bill is found in the opening clause of s. 2:

Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of
Right, 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. .6

For the purposes of s. 2, a “law of Canada” is defined by s. 5 (2) as “an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada”.

In the years following the enactment of the Bill of Rights its direct impact on federal legislation was negligible. This can be attributed, in large part, to the uncertainty created by the language of Sections 1 and 2, particularly the directive contained within the opening words of the latter section. The central question with respect to s. 2 is how are the words construed and applied to be read? If given a conjunctive interpretation, the result would be that the Bill of Rights is simply a rule of construction for federal statutes and could not have an overriding effect on inconsistent legislation.7 That is, s. 2 requires the courts to construe legislation in light of the guarantees of the Bill and apply the statute as interpreted. A law which could not be construed in conformity with the Bill was, nonetheless, to be applied according to its terms. The Bill of Rights, then, could have meaningful effect only when the provisions of the law were ambiguous or capable of more than one meaning. Alternatively, it could be argued that the formula in s. 2 means that no law of Canada is to be construed or applied so as to infringe any of the protected rights and freedoms. If the language of a statute is capable of two constructions, one which infringes the Bill, and one which conforms to the Bill, the latter interpretation is to be preferred. Where, however, a statute cannot be construed to avoid a conflict with any provision of the Bill of Rights, it is not to be applied, and is inoperative to the extent of the conflict. Thus, the Canadian Bill of Rights would override inconsistent legislation and would accomplish a pro tanto amendment or repeal of the legislation.8

That the Canadian Bill of Rights was to have this effect was the understanding of Prime Minister Diefenbaker, the person most responsible for the Canadian Bill of Rights. In moving second reading in Parliament he stated:

. . . If any of these several rights should be violated under legislation now existing the courts in interpreting the particular laws or statutes which have been passed will hereafter, if this bill is passed, [the Canadian Bill of Rights] be required to interpret those statutes of today in the light of the fact that wherever there is a violation of any of these declarations or freedoms the statute in question is to that extent non-operative and was never intended to be operative.9

Although legislative debates do not govern the interpretation of a particular statute, I would argue in the case of the Bill of Rights that the expectation of

6 See also s. 3 of the Bill of Rights.
8 At least until the Bill is expressly repealed or amended, or made subject to such legislation through the application of the notwithstanding clause of s. 2.
9 Hansard, 1960, 5646.
Mr. Diefenbaker is supported by the wording of s. 2. If the words “construed and applied” are considered together with the “notwithstanding clause” the conclusion must be that the Bill of Rights is more than an aid for the interpretation of federal statutes whose meaning is vague or unclear. If a clearly expressed, but inconsistent law, prevailed over the Bill, the necessity to use the non-obstante clause would never arise.

The difficulty with this conclusion is that the Canadian Bill of Rights is an ordinary statute of the Parliament of Canada, subject to amendment or repeal at any time. On what basis can it be argued that the Bill is to be applied as a law superior to any other enactment of Parliament? One answer to this question is to regard s. 2 as suspending the ordinary rules of statutory interpretation. Normally, where two federal laws conflict, the later, inconsistent statute repeals or amends the earlier one to the extent of the repugnancy; or the earlier, specific enactment prevails over the later, general one. What Parliament has done, in enacting s. 2, is to provide a special rule giving the Bill priority in the case of a conflict, unless the law contains an express declaration that it shall operate notwithstanding the Canadian Bill of Rights.

This was the effect attributed to s. 2 by Mr. Elmer Driedger, the Chief Parliamentary Draftsman and one who, it may be assumed, had a great deal to do with the drafting of the Canadian Bill of Rights. Referring specifically to the opening clause of section 2, he said:

This provision is clearly a rule of interpretation. Granted that Parliament cannot bind itself and cannot bind future parliaments, it may nevertheless lay down the rules that are to govern the interpretation and application of its own statutes. The Interpretation Act is a long-standing example of this technique. The Bill of Rights applies to “every law of Canada”, which is defined in subsection 2 of s. 5. The rule of interpretation prescribed by s. 2 is to apply to all laws of Canada, unless it is expressly declared by an act of the Parliament of Canada that any of those laws shall operate notwithstanding the Canadian Bill of Rights. The effect of this provision therefore would appear to be to abrogate the two rules of inconsistency, namely, that a particular statute overrides a general statute and that a later statute overrides an earlier one. Is such a provision effective? Parliament has not said that its own powers are any the less, nor that a future parliament must not enact a conflicting law. Parliament has said only that certain intentions shall not be imputed to it unless a special form of words is used. This does not differ from s. 16 of the Interpretation Act, which says that no provision or enactment in any act affects, in any manner whatsoever, the rights of Her Majesty, unless it is expressly stated therein that Her Majesty is bound thereby, and that Act also states that it applies to every act “now or hereafter passed”.

The virtue of this position is that it gives paramount effect to the Bill of Rights without running afool of the principle of parliamentary sovereignty that no parliament can bind a future parliament.

I cannot agree, however, that s. 2 does no more than establish a rule for the interpretation and application of federal statutes. For it is directed not only to the courts, but also to Parliament itself, and prescribes, if not the manner, then the form in which legislation must be expressed if it is to override the Bill. Granted, as Mr. Driedger points out, a future parliament is not precluded from enacting a conflicting law. But if the conflicting law is to

10 The Canadian Bill of Rights, in Contemporary Problems of Public Law in Canada, ed. by O. E. Lang (1968) 37
prevail over the Bill of Rights, it must contain the express declaration of s. 2. No longer can a future parliament modify or repeal, by implication, any of the provisions of the Bill of Rights even though such legislation is expressed in clear, unequivocal terms. To this extent, the powers of a future parliament are less. I agree that s. 16 of the Interpretation Act\(^\text{11}\) is similar in terms to s. 2 of the Bill in that both can be characterized as "manner and form legislation", but the fact that Parliament enacted s. 16 is no argument that this section or s. 2 is effective. To offer s. 16 in support of this interpretation of s. 2, begs the question of whether either of these two instances of "manner and form" legislation is effective in Canada. If it is, the Canadian Bill of Rights, though an ordinary statute, could be considered practically entrenched.\(^\text{12}\)

The proscription against "manner and form" legislation derives from Dicey's principle of parliamentary sovereignty which most Canadian lawyers accept as being equally part of Canadian constitutional law. According to Dicey,

\[\text{The principle of parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmak}\]

\[\text{e any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.}^\text{13}\]

The characteristics of parliamentary sovereignty as it existed in England were defined by Dicey as follows:

\[\text{First, the power of the legislature to alter any law, fundamental or otherwise, as freely and in the same manner as other laws; secondly, the absence of any legal distinction between constitutional and other laws; thirdly, the non-existence of any judicial or other authority having the right to nullify an Act of Parliament, or to treat it as void and unconstitutional.}\]

It is clear that the Canadian Parliament has never possessed that degree of sovereignty which Dicey would attribute to the United Kingdom Parliament. The Parliament of Canada is subject to a fundamental law, the British North America Act,\(^\text{15}\) which is beyond its power to repeal. Even with respect to ordinary laws, its substantive legislative jurisdiction is limited by the distribution of powers in s. 91 and s. 92, of that Act. Finally, the courts in Canada always have considered it to be their proper function to review the exercise of legislative power by Parliament and declare ultra vires any laws which fall outside its competence.

Nor is Parliament supreme in the sense that it is free from "manner and form" requirements. There are various requirements imposed under the British North America Act which must be followed if legislation passed by

\(^{11}\) S.C. 1967, c. 7.

\(^{12}\) I use the word "practically" as opposed to "legally" because Parliament could expressly amend or repeal the Bill by simple majority. As a political matter, however, this would be a very difficult step to take.


\(^{14}\) Ibid, p. 91.

\(^{15}\) 30 & 31 Victoria, c. 3, as am.
Parliament is to be valid. The clearest example is to be found in s. 91 (1) which, among other things, empowers Parliament, in time of real or apprehended war, invasion or insurrection, to legislate for the continuance of a House of Commons beyond the stipulated five year period, provided that "such continuation is not opposed by the votes of more than one-third of the members of such house".

That Parliament has only a limited sovereignty should not be a difficult proposition to accept. For the preamble to the British North America Act, as well as stating a desire to have "a constitution similar in principle to that of the United Kingdom", also states the desire to be "federally united". Federalism necessarily implies the supremacy of the constitution not the supremacy of Parliament. Although the phrase, limited sovereignty, appears to be a contradiction, what is meant is that the Parliament of Canada is supreme within its own sphere. So long as it conforms to the fundamental law, it has the power to make any law whatever, including a law which imposes limitations upon its own powers. Such a law would in no way offend Dicey's principle of legislative supremacy which assumes a Parliament possessed of unlimited powers.

Thus, there is no reason why, until expressly repealed or amended, the Canadian Bill of Rights should not prevail over any inconsistent, federal legislation which does not contain the notwithstanding clause.

II

Turning now to a consideration of the leading cases on the Bill of Rights, it may be said that the courts have shown little appreciation of the constitutional and interpretative problems posed by the wording of s. 2. In R. v. Gonzales, the accused, an Indian, was charged and convicted for unlawful possession of intoxicants, off a reserve, contrary to s. 94 (a) of the Indian Act. On appeal to the British Columbia Court of Appeal, the main submission of the appellant was that s. 94 (a) was inoperative because it denied the right of Indians to equality before the law contrary to the Canadian Bill of Rights. Two members of the court, Tysoe J.A. (Bird J.A. concurring), found no conflict between the two pieces of legislation, and dismissed the appeal on that basis. The third judge, Davey J.A., assumed, for the purpose of his judgment, that s. 94 (a) infringed the Bill of Rights and addressed himself solely to the question of the consequences of such a conflict. In his opinion, it was necessary, first of all, to distinguish between subordinate legislation and enactments of Parliament. He suggested that the effect of the Bill may well be to nullify subordinate legislation which infringed its provisions. He further suggested that the Bill may have the same effect on legislation of Parliament which infringed any of the enumerated rights in s. 2.

16 See for example, sections 20, 35, 48, 50, 53 and 54.

17 Dicey's theory of parliamentary sovereignty has been challenged both by eminent constitutional lawyers and high judicial authority. For a discussion of these authorities, see Tarnopolsky, The Canadian Bill of Rights (1966) 66-89.

Insofar as the specific matters that follow this part of s. 2 [i.e. the opening clause of section 2] are concerned, it may be that the effect is to nullify existing legislation to the extent that it purports to authorize any of the specifically prohibited things. But since none of those things are involved in this appeal, it is unnecessary to express any final opinion on that point and I refrain from doing so.\(^{19}\)

With respect to the s. 1 rights and freedoms, s. 2 was nothing more than a rule of construction.

Insofar as existing legislation does not offend any of the matters specifically mentioned in clauses (a) to (g) of s. 2, but is said to otherwise infringe upon some of the human rights and fundamental freedoms declared in s. 1, in my opinion the section does not repeal such legislation either expressly or by implication. On the contrary, it expressly recognizes the continued existence of such legislation, but provides that it shall be construed and applied so as not to derogate from those rights and freedoms. By that, it seems merely to provide a canon or rule of interpretation for such legislation. The very language of s. 2, “be so construed and applied as not to abrogate” assumes that the prior Act may be sensibly construed and applied in a way that will avoid derogating from the rights and freedoms declared in s. 1. If the prior legislation cannot be so construed and applied sensibly, then the effect of s. 2 is exhausted, and the prior legislation must prevail according to its plain meaning.\(^{20}\)

Presumably, the distinction drawn by Davey J.A. is based on the words in which the formula in s. 2 is expressed. The phrase “construed and applied” is used with reference to the rights and freedoms declared in s. 1; whereas, a disjunctive form “construed or applied” is used in relation to the rights enumerated in s. 2. It is interesting that Davey J.A. reached his decision through a close analysis of the specific wording of s. 2, yet ignored completely the notwithstanding clause. One can only speculate as to the reasons for this. Perhaps he considered it made no difference to the result of his reasoning; or it may be that he was not prepared to accept the responsibility of overriding Parliament by declaring invalid legislation which was otherwise within its legislative competence.

In contrast, is the dissenting judgment of Cartwright J. in \textit{Robertson and Rosetanni v. The Queen}.\(^{21}\) The issue in the \textit{Robertson} case was whether the \textit{Lord's Day Act}\(^{22}\) infringed freedom of religion as guaranteed by section 1 (c) of the Canadian Bill of Rights. Section 4 of the Lord's Day Act provides as follows:

\begin{quote}
It shall not be lawful for any person on the Lord's Day, except as provided herein, or in any provincial Act or law now or hereafter in force, to sell or offer for sale or purchase any goods, chattels or other personal property, or any real estate, or to carry on or transact any business of his ordinary calling, or in connection with such calling, or for gain to do, or employ any other person to do, on that day, any work, business or labour.
\end{quote}

A majority of the Supreme Court of Canada avoided the interpretative problem of s. 2 by finding no inconsistency between the Act and the Bill of Rights.\(^{23}\) Mr. Justice Cartwright dissented from this conclusion. In his opinion, the purpose and effect of the Act was to compel the observance of Sunday as a religious holy day, and “any law which compels a course of conduct, whether

\(^{19}\) \textit{Ibid.}, pp. 291-2.
\(^{20}\) \textit{Ibid.}, p. 292.
\(^{22}\) R.S.C. 1952, c. 171.
\(^{23}\) This judgment is discussed later in this article.
positive or negative, for a purely religious purpose infringes the freedom of religion.” Dealing next with the consequences of this conclusion, he referred to the reasoning of Davey J.A. in the Gonzales case and stated:

With the greatest respect I find myself unable to agree with this view. The imperative words of s. 2 of the Canadian Bill of Rights, ... , appear to me to require the courts to refuse to apply any law coming within the legislative authority of Parliament, which infringes freedom of religion unless it is expressly declared by an Act of Parliament that the law which does so infringe shall operate notwithstanding the Canadian Bill of Rights. ... In my opinion, where there is an irreconcilable conflict between another Act of Parliament and the Canadian Bill of Rights the latter must prevail.

There can be no argument that Cartwright, J. provided a very clear statement as to the effect to be given to s. 2 of the Bill. What is lacking are any substantial reasons in support of his conclusion. However, his judgment did serve to isolate the alternatives that were available to the Supreme Court in the Drybones case, and it is within the context of these two earlier decisions that the reasoning of Ritchie J., on behalf of the majority, must be considered. Referring expressly to the statement of Davey, J.A. in the Gonzales case, Ritchie J. rejected it because “this proposition appears to me to strike at the very foundations of the Bill of Rights and to convert it from its apparent character as a statutory declaration of the fundamental human rights and freedoms which it recognizes, into being little more than a rule for the construction of federal statutes. ...” Rather, he agreed that the proper characterization of the effect of the Bill was as stated by Cartwright J. in his dissent in the Robertson case.

If Mr. Justice Davey’s reasoning was correct and the Bill of Rights was to be construed as meaning that all laws of Canada which clearly offend the Bill were to operate notwithstanding its provisions, then the words which I have italicized in s. 2 [the notwithstanding clause] would be superfluous unless it be suggested that Parliament intended to reserve unto itself the right to exclude from the effect of the Bill of Rights only such statutes as are unclear in their meaning. It seems to me that a more realistic meaning must be given to the words in question and they afford, in my view, the clearest indication that s. 2 is intended to mean and does mean that if a law of Canada cannot be “sensibly construed and applied” so that it does not abrogate, abridge or infringe one of the rights and freedoms recognized and declared by the Bill, then such law is inoperative “unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights.

According to the majority, it can no longer be contended that s. 2 provides only a rule of construction. But, by focusing on the notwithstanding clause of s. 2, is Ritchie J. to be taken as suggesting that it is a special rule of priority for resolving conflicts between the Bill and other federal legislation? If so, has Ritchie J. impliedly rejected the proposition that the Bill of Rights enacts a “manner and form” requirement for all federal laws? Or has he decided that this kind of legislation is effective in Canada? It must be remembered that s. 94 (b) of the Indian Act is legislation which was in existence at the time of the enactment of the Bill of Rights. Therefore, it is

26 Supra, footnote 20.
possible to regard the majority reasoning as the straight application of the ordinary rule that, in the case of a conflict between two statutes, the later law prevails over the earlier one. If this is all that was decided, the question still remains as to the effect of the Bill on subsequent, inconsistent legislation. Such a conclusion, however, would run counter to the wording of s. 5 (2), which makes it plain that the Bill is to have the same effect on all laws, whether passed prior or subsequent to it. Thus, I would suggest that the majority judgment must be read as either characterizing the s. 2 as a special rule of priority or as “manner and form” legislation. The problem with the former, as I contended earlier, is that it does not accord with the wording of s. 2. More to the point, suppose Parliament enacted a subsequent, substantive law which was clearly inconsistent with the Bill, but did not contain the *non obstante* clause. Would our courts hold this law ineffective because of a provision in an earlier law laying down a rule of priority? It would seem that the court could better justify its refusal to apply the law if s. 2 was interpreted as a “manner and form” requirement, for it could declare the attempt by Parliament to amend the Bill of Rights as invalid for failure to follow the prescribed manner and form.

III

So far, my discussion has been limited to a consideration of the logical and analytical problems raised by the Canadian Bill of Rights. These are the terms in which the debate is usually conducted within the Canadian legal environment. I now want to focus on the equally important problem of the implications of the *Drybones* decision with respect to the vital question of institutional policy. This case has achieved an effective transfer of power from the legislature to the courts. While the courts of Canada have always exercised supervision over Parliament, there is an important distinction between their traditional function of judicial review and their new role under the Bill of Rights. Previously, lack of legislative jurisdiction in a federal sense was the only basis for invalidating legislation. Now the courts are to declare inoperative legislation which is otherwise valid if they disagree with the values or policy implemented by specific legislation. In other words, it is the judiciary, not Parliament who, to a very great extent, will be responsible for determining the content and scope of fundamental liberties in Canada.

This certainly was a concern of Mr. Justice Cartwright, who in dissenting in the *Drybones* case, completely reversed the position he had taken earlier in *Robertson*:

The question is whether or not it is the intention of Parliament to confer the power and impose the responsibility upon the courts of declaring inoperative any provision in a Statute of Canada although expressed in clear and unequivocal terms, the meaning of which after calling in aid every rule of construction including

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that prescribed by s. 2 of the Bill is perfectly plain, if in the view of the court it infringes any of the rights or freedoms declared by s. 1 of the Bill.

In approaching this question, it must not be forgotten that the responsibility mentioned above, if imposed at all, is imposed upon every justice of the peace, magistrate and judge of any court in the country who is called upon to apply a Statute of Canada or any order, rule or regulation made thereunder.31

In my opinion, the apprehension expressed by Cartwright J. is well founded. The courts in Canada have had little experience in interpreting and applying constitutional guarantees of the traditional freedoms. This, in itself, is not an overriding consideration because the courts, in their ordinary activities, are constantly involved in the interpretation of statutes and the common law. More important is the judicial philosophy of a court and the way in which it conceives of its role and its relationship to the legislature. The predominant philosophy of the Canadian courts is that of positivism. The courts, our judges would argue, are not properly a law making body. Indeed, they perceive of themselves as insulated from those social, political and economic considerations which are the raw materials of the law maker. The validity of this self-perception is problematic, yet our courts strive to maintain this positivist posture. But the Bill of Rights implicitly demands that the courts be prepared to abandon mechanical jurisprudence. Although expressed in unqualified terms, it cannot be that the guaranteed rights and freedoms are to be interpreted as absolutes. Adjudication in this area necessarily involves a judicial balancing of claims to exercise any of the guarantees against considerations of public order and the expectations of the community. Contemporary social facts as well as the facts which give rise to the controversy thus become all important to intelligent decision-making. I wonder, however, whether it is realistic, or fair, to expect the judiciary to abandon their positivist attitude and accept the consequential role of community policy makers. Certainly their legal training, founded as it is in the traditions of positivism, and their professional experience militates against this. Further, the superior courts of Canada exercise a mixed private and public law jurisdiction which tends to inhibit the development of the kind of expertise and perspective which is so necessary to statesman-like decisions.

A further consideration is the method by which constitutional issues are argued. Material facts for decision are presented to the court on the basis of the record and through submissions of counsel on behalf of the litigants. Apart from the doctrine of judicial notice, and the personal knowledge of the judges there is little opportunity to apprise the court of the relevant social facts. It has been suggested by some commentators32 that the use of the Brandeis Brief would be a useful method for accomplishing this. As a technical matter, there is some difficulty in implementing this suggestion, at least in the Supreme Court of Canada. Under the Rules of that

31[1970] S.C.R. 282, 287-8. It should be noted that this was not the sole basis of Cartwright J.'s dissent. He considered his opinion in the Robertson case to be erroneous because it required the courts to refuse to apply any inconsistent law whereas the wording of s. 2 of the Bill of Rights required the courts to apply such laws.

Court, the parties to an appeal are required to submit factums containing a concise statement of the facts of the case and "a brief of the argument setting out the points of law or fact to be discussed. While the word "fact" seems broad enough to accommodate something in the nature of a Brandeis Brief, the little judicial authority on the point supports the opposite conclusion. Even if the Brandeis Brief was an accepted part of Canadian constitutional adjudication, the task of the courts would not be any easier. This technical device may be regarded as providing, at the appeal level, the kind of expert evidence that is available to the lower courts. The appeal court must still decide whether or not to accept such evidence and how much weight it is to be given. In short, the Brandeis Brief must be seen for what it is, as an aid for the resolution of facts which are in dispute and not as a substitute for decision making. The court still must determine whether or not to give judicial protection, in a particular case, to the purported exercise of any of the constitutionally recognized rights and freedoms.

While the technical attitudes of the judiciary, and the sophistication of fact-finding techniques are vital considerations with respect to the question of institutional policy, equally important is the willingness of the judges to engage in an in-depth analysis of the issues confronting the court. The record of our courts, particularly the Supreme Court of Canada, is not one which inspires a great deal of confidence in their ability to deal with the admittedly difficult definitional problems raised by s. 1 of the Bill of Rights. No better illustration of this statement can be found than in the two cases which have reached the Supreme Court of Canada on a Bill of Rights issue, Robertson and Rosetanni v. The Queen, and The Queen v. Drybones. The issue in Robertson was whether the Lord's Day Act infringed the guarantee of freedom

33 Rules of the Supreme Court of Canada, 1945, as am., Rules 29 and 30. It should be noted that these two Rules have been amended by General Order of the Supreme Court of Canada, October 28, 1970. Quaere, whether these amendments which are to take effect on February 1, 1971, will be interpreted so as to permit the use of a device such as the Brandeis Brief.

34 See Saumur v. The City of Quebec, [1953] 2 S.C.R. 299, 325. On the question of costs to be awarded to the successful appellant, Kerwin J. said: "The appeal should be allowed and a declaration and injunction granted in the terms set out above. Although he does not secure all that he claims, the appellant is entitled to his costs of the action and of the appeal to the Court of Queen's Bench (Appeal Side). He is also entitled to his cost of the present appeal except that nothing should be allowed for the preparation of a factum. Rule 30 of the Rules of this Court provides for the contents of the factum or points of argument of each party, Part 3 whereof is to consist of "a brief of the argument setting out the points of law or fact to be discussed". This Rule was not complied with by the appellant filing two volumes containing 912 mimeographed pages together with an appendix thereto of 86 mimeographed pages".

35 A good example of what I mean is the case of Brown v. Board of Education, (1954), 347 U.S. 438. The question for the court was whether racial segregation in the schools deprived black children of "the equal protection" of the law as guaranteed by the Fourteenth Amendment to the United States Constitution. In deciding this issue, the court had to reassess the validity of the "separate but equal doctrine" which was a question of fact. It was with respect to this question that evidence as to the social and psychological impact of racial segregation was offered.


of religion as found in s. 1 (c) of the Bill of Rights. The Lord's Day Act was first passed by the Parliament of Canada in 1906. As is evident from its title, its purpose was to preserve the sanctity of Sunday, the sabbath for the majority of the Canadian population. At the time the Robertson case arose, the practice of the Attorney General of Ontario was to enforce the Act by way of selective prosecution, reasoning that the Act was a social measure to control the level of Sunday commercialism. If the Supreme Court of Canada were to hold the Lord's Day Act inoperative as denying freedom of religion, the consequences would extend far beyond the interests of the particular litigants. It would cause significant dislocation in the established economic and social practices that had developed within the community. On the other hand, a refusal on the part of the Court to find a conflict would be tantamount to a judicial sanctioning of the imposition of one aspect of Christianity on a significant minority in Canada who do not accept the sanctity of Sunday as one of the tenets of their religion. Perhaps, the best solution would have been for the Supreme Court to refuse to hear the appeal and thereby implicitly recognize the issue as a non-justiciable one.

Turning now to the actual reasoning, the majority judgment was delivered by Mr. Justice Ritchie. In his opinion, it was first of all necessary to attempt a definition of the phrase “freedom of religion”. One starting point is suggested by the Bill of Rights itself. By s. 1, it is recognized and declared that in Canada “there have existed and shall continue to exist... the following human rights and freedoms, namely... (c) freedom of religion”. On the basis of this section, it is possible to contend that laws in existence at the time of the enactment of the Bill supply the definition of the enumerated freedoms. Therefore, there could never be a conflict between an existing law and the Bill of Rights. This was the interpretation given to s. 1 by Pigeon J., dissenting, in the Drybones case.

In considering the provisions just quoted, s. 1 of the Bill, one must observe that the Bill itself begins by a solemn declaration by Parliament in the form of an enactment that, in Canada, the enumerated rights and freedoms “have existed and shall continue to exist...”. This statement is the essential element of the very first provision of the Bill and it is absolutely unqualified. It is the starting point of that legislation and I have great difficulty in reconciling it with the contention that in fact those rights and freedoms were not wholly and completely existing but were restricted by any number of statutory and other provisions infringing thereon.

There can be no doubt that in enacting legislation Parliament is presumed to be aware of the state of the law. A fortiori must it be so when the enactment itself has reference thereto. Where is the extent of existing human rights and fundamental freedoms to be ascertained if not by reference to the statute books and other legislative instruments as well as to the decisions of the courts?

It must also be considered that the rights and freedoms enumerated in s. 1 are not legal concepts of precise and invariable content. If those words were to be

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38 It should be noted that the Lord's Day Act does not impose an absolute prohibition on commercial activities on Sunday. Under s. 4, any province may legislate so as to exempt certain activities from the application of the Act. Many provinces have enacted their own Lord's Day legislation. See for example, The Lord's Day Act (Ontario), S.O. 1960-1, c. 50 as am.

taken by themselves, a great deal would be left undefined. However, by declaring those rights and freedoms as they existed a large measure of precision was supplied. Is this not an important purpose of s. 1 and a very effective way of defining some key words of the enactment? . . .

. . . . If in s. 1 the act means what it says and recognizes and declares existing rights and freedoms only, nothing more than proper construction of existing laws in accordance with the Bill is required to accomplish the intended result. There can never be any necessity for declaring any of them inoperative as coming in conflict with the rights and freedoms defined in the Bill seeing that these are declared as existing in them. . . .

It is not clear from his reasoning exactly what position Ritchie J. took. First of all, he stated that

. . . The Canadian Bill of Rights is not concerned with "human rights and fundamental freedoms" in any abstract sense, but rather with such "rights and freedoms" as they existed in Canada immediately before the statute was enacted. It is therefore the "religious freedom" then existing in this country that is safeguarded by the provisions of s. 2. . . .

It is accordingly of first importance to understand the concept of religious freedom which was recognized in this country before the enactment of the Canadian Bill of Rights and after the enactment of the Lord's Day Act in its present form. . . .

Ritchie J. also said that freedom of religion was "recognized by this Court as existing in Canada before the Canadian Bill of Rights and notwithstanding the provisions of the Lord's Day Act".

It could be contended that Ritchie J. meant that freedom of religion was to be defined by laws which were in existence at the time of the enactment of the Bill. That would have been sufficient to dispose of the appeal since freedom of religion must be regarded as subject to aid circumscribed by the Lord's Day Act. But Ritchie J. did not end his judgment at this point. He went on to consider whether or not the Lord's Day Act, in fact, conflicted with the Bill. In so doing, again it is unclear whether he intended merely to provide an alternative basis for his conclusion, or he considered that existing laws may not always be compatible with the guarantees of the Bill. In any event, the above contention was expressly rejected by Ritchie J. in Drybones:

If it had been accepted that the right to "freedom of religion" as declared in the Bill of Rights was circumscribed by the provisions of the Canadian statutes in force at the date of its enactment, there would have been no need, in determining the validity of the Lord's Day Act to consider the authorities in order to examine the situation in light of the concept of religious freedom which was recognized in Canada at the time of the enactment of the Bill of Rights. It would have been enough to say that "freedom of religion" as used in the Bill must mean freedom of religion subject to the provisions of the Lord's Day Act. This construction would, however, have run contrary to the provision of s. 5 (2) of the Bill which makes it applicable to every "Act of the Parliament of Canada enacted before or after the coming into force of this Act. . . .

It is with respect to the question of the conflict between the Lord's Day Act and the Bill that the inadequacy of analysis of the majority in the Robertson case really becomes apparent. First of all, Ritchie J. adopted as his operational definition of freedom of religion, the statement of Mr. Justice

Frankfurter, dissenting, in *Board of Education v. Barnett* that “its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma”. He then proceeded to enquire as to whether or not the Lord's Day Act fell within or outside of this definition:

My own view is that the effect of the Lord's Day Act rather than its purpose must be looked to in order to determine whether its application involves the abrogation, abridgement or infringement of religious freedom, and I can see nothing in that statute which in any way affects the liberty of religious thought and practice of any citizen of this country. Nor is the “untramelled affirmations of religious belief and its propagation” in any way curtailed.

The practical result of this law on those whose religion requires them to observe a day of rest other than Sunday, is a purely secular and financial one in that they are required to refrain from carrying on or conducting their business on Sunday as well as on their own day of rest. In some cases this is no doubt a business inconvenience, but it is neither an abrogation nor an abridgement nor an infringement of religious freedom, and the fact that it has been brought about by reason of the existence of a statute enacted for the purpose of preserving the sanctity of Sunday cannot, in my view, be construed as attaching some religious significance to an effect which is purely secular in so far as non-Christians are concerned.

The finding of the majority of no conflict between the Lord’s Day Act and the Bill has considerable implications both for religious freedom in Canada and the whole process of constitutional interpretation. As Ritchie J. himself recognized, the power to legislate for purely secular purposes, such as the regulation of hours of labour or business closing times, is within the exclusive legislative jurisdiction of the provinces. On the other hand, Lord’s Day legislation has been consistently upheld as having a religious character, and as such, comes within the criminal law power of Parliament. If the Lord’s Day Act is now to be considered as having a non-religious character, its constitutional support falls. This result can be avoided only if one is prepared to accept the rather novel argument advanced by Ritchie J., completely without reasons, that the constitutional test of “purpose and effect” is to be applied in determining legislative jurisdiction, but, only the “effect” of legislation is to be considered for Bill of Rights purposes.

In terms of religious freedom in Canada, by upholding the Lord’s Day Act, the Supreme Court of Canada has implicitly recognized that s. 1 (c) of the Bill of Rights protects only the free exercise of religion and does not include a ban on state action which prefers one religion over another. Admittedly, the question of whether or not the Bill of Rights should be interpreted as including a guarantee against the establishment of religion is a very difficult one to answer. But, it is a rather telling fact that the majority of the Supreme Court, once having raised the question of the content and scope of religious freedom, were not prepared to go any further than adopt a brief statement culled from a dissenting judgment which involved a constitutional guarantee expressed in very different language than s. 1 (c)

44 (1943), 319 U.S. 624, 653.
48 For an elaboration of this point, see Laskin, *op.cit.*, p. 155; and Godfrey, *op.cit.*, pp. 72-3.
of the Canadian Bill of Rights. Indeed, this statement by Frankfurter J. barely expressed his judicial philosophy with respect to religious freedom.

In fairness, it is not reasonable to expect a highly sophisticated Bill of Rights jurisprudence to emerge on the basis of one decision. This is especially true when one considers that Robertson was the first occasion upon which the Supreme Court had to interpret a substantive provision of the Bill of Rights. But if the Court derived any benefit from its experience in deciding the Robertson case, it certainly was not apparent in the judgment of the majority in Drybones. In interpreting “equality before the law”, the Court engaged in the same narrow, unreflective analysis that was so characteristic of its approach in the earlier case. It seemed unable to move beyond considerations of the particular interests of the parties involved and construct an intellectual framework within which alternative definitions of equality before the law and the implications thereof could be tested.

A convenient starting point is the interpretation given to these words by Tysoe J.A. in the Gonzales case. For him, the phrase “equality before the law” as found in s. 1 (c) of the Bill of Rights meant:

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 a particular law relates or extends and the right to the protection of the law.

Mr. Justice Ritchie, who delivered the majority judgment in Drybones, made short shrift of this definition and rightfully so:

... 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.

... Without attempting any exhaustive definition of "equality before the law" I think that s. 1 (b) means at least that no individual or group of individuals is to be treated more harshly than another under that law, and I am therefore of the opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty.

It is precisely his failure to attempt any exhaustive definition that makes Ritchie J.'s interpretation so unsatisfactory. It ignores the quite valid objection raised by Pigeon J., that the conclusion of the majority amounts to a virtual repeal of federal legislative jurisdiction over Indians. Under s. 91 (24) of the British North America Act, the Parliament of Canada is given exclusive jurisdiction to pass laws in relation to "Indians and lands reserved

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49 The First Amendment to the United States Constitution includes both a guarantee of free exercise as well as a prohibition against the establishment of a religion. It should also be noted, that later in his opinion, Frankfurter J. said: "the essence of the religious freedom guaranteed by our Constitution is, therefore, this: no religion shall either receive the state's support or incur its hostility". Board of Education v. Barnette, (1943), 319 U.S. 624, 654.

50 See Howe, The Garden and the Wilderness (1965) 112-118.

51 (1962), 32 D.L.R. (2d) 290.

52 Ibid, p. 296.

for Indians". As Pigeon J. pointed out, the very object of this section "is to enable the Parliament of Canada to make legislation applicable only to Indians as such and therefore not applicable to Canadian citizens generally". But, carried to its logical conclusion, Ritchie J.'s definition of equality before the law would preclude Parliament, not only from enacting laws which treated Indians more harshly than other Canadians, but also from enacting laws which conferred special benefits on Indians. Legislation of the latter kind would deny the right of non-Indians to equality before the law. For a law which grants benefits to Indians not given to non-Indians, "treats those latter individuals or group of individuals more harshly than another under that law". Notwithstanding Ritchie J.'s statements to the contrary, the result of the majority reasoning, if carried to its logical conclusion, would be that the whole of the Indian Act must now be declared inoperative. It is most unfortunate that the Supreme Court of Canada, almost inadvertently, has introduced additional complications with respect to the legislative jurisdiction of Parliament to implement new Indian policies, especially at a time when the whole question of the status and rights of the aboriginal people in Canada is being widely debated.

The implications of the majority decision extend far beyond the rights of Indians and the provisions of the Indian Act. Did the majority mean to imply that any law of Canada which classifies on the basis of race is *per se* inoperative? Is the same true of all federal laws which classify on the basis of any of the other criteria contained within the *non-discrimination clause* of s. 1 of the Bill? In other words, can it be argued, on the Drybones case, that Parliament, in enacting the non-discrimination clause, has declared that any law of Canada that depends for its legislative classification on race, national origin, colour, religion or sex, cannot stand in the face of the Bill of Rights? If so, at least three areas of exclusive federal jurisdiction are bound to be affected, the federal franchise, immigration and the criminal law. Many examples can be found of existing legislation which offend s. 1 (b) of the Bill as presently defined. To name a few, exclusion of persons other than native-born or naturalized Canadian citizens of the right to vote in federal elections denies equality before the law on account of national origin; similarly, any disabilities or obligations imposed under the Immigration Act must be declared inoperative for the same reason. Certain provisions of the Criminal Code relating to sexual offences, such as rape and indecent assault male, obviously discriminate against men on the basis of sex. Another example of discrimination on the basis of sex is s. 164 (1) (c) of the Code which makes it an offence to be a common prostitute or nightwalker.

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56 This seems to be the opinion of Hall J., *ibid*, p. 300.
58 Immigration Act, R.S.C. 1952, c. 325 as am.
59 S.C. 1953-4, c. 51 as am., s. 135 & s. 148.
60 In fact, one recent lower court decision reached this conclusion. See *R. v. Viens* (so far unreported) where Ontario Provincial Court Judge Morrison held, inter alia, s. 164 (1) (c) inoperative as infringing equality before the law.
While on the subject of sex, I should mention the recent *Royal Commission Report on the Status of Women in Canada*.\(^6\) I would suggest that federal legislation which seeks to implement any of the provisions of the Report recommending special benefits for women, must be declared inoperative as discriminating against men on the basis of sex.

Closely related to the above discussion is the question of whether the non-discrimination clause exhausts the range of criteria by which it may be said that any of the rights and freedoms in s. 1 are infringed. That is, are the categories contained within the non-discrimination clause to be read as qualifying the enumerated guarantees? When the Bill of Rights was first introduced in the House of Commons\(^6\)\(^2\) these words were contained in what is now s. 1 (b). Surely Parliament by moving these words up into the opening clause of s. 1 so that they now qualify the word "exist", did not intend to limit the application of the Bill to laws which infringed its guarantees solely by reason of race, national origin, colour, religion or sex. In the first place, equality before the law, must itself include a ban on certain laws which discriminate on the basis of the above categories. Secondly, it would make little sense to assert without more, that freedom of the press, for example, was not infringed by a federal law which imposed an absolute prohibition on the publication of a daily newspaper anywhere in Canada even if the admitted purpose of such a law was for reasons other than race, national origin, etc.

The most logical interpretation of the effect of the non-discrimination clause, and the one which best suits the context of s. 1, would be to regard these words as ensuring that the enumerated rights and freedoms are to extend to all persons in Canada regardless of their race, national origin, colour, religion or sex.\(^6\)\(^3\) Accepting this conclusion as the proper one (or assuming that the majority in the *Drybones* case did not mean to enunciate a *per se* constitutional rule) it becomes crucial to develop some judicial standards or approach by which any federal law can be assessed in terms of its compatibility with the requirements of "equality before the law". This is not to be found in the reasoning of the Supreme Court of Canada in *Drybones*. It is strange that the same court, and indeed, the same judge, Ritchie J., was quite prepared to adopt American authorities in aid of the decision in *Robert-

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61 Queen's Printer, Ottawa, 1970.
63 None of the judges in the *Drybones* case including those in dissent, dealt explicitly with this question. The only judicial opinion that I have found is that of Tysoe J.A. in *R. v. Gonzalez*, (1962), 32 D.L.R. (2d) 290, 294. In considering the effect of the non-discrimination clause he said: "As I read the *Canadian Bill of Rights*, the human rights and fundamental freedoms enumerated in s. 1 belong to all persons irrespective of their race, national origin, colour, religion or sex. The words "without discrimination by reason of race, national origin, colour, religion or sex" are not qualifying words. I am doubtful if this phrase is to be interpreted as extending further than to emphasize that the rights and freedoms exist for all persons no matter who they may be." See also, the statement of Justice Minister Fulton given before the House of Commons Special Committee on Human Rights and Fundamental Freedoms to the effect that this clause was designed to ensure that everyone in Canada would possess these rights without discrimination. 1960 Committee Proceedings, 380.
son. Yet, when deciding the Drybones case, the wealth of decisions and legal scholarship concerning the Equal Protection clause of the United States Constitution was virtually ignored.

One doctrine suggested by the American experience is that of “reasonable classification”\(^6\)\(^4\) This theory can be summarized as follows. The ideal of equality before the law would demand the same laws for all persons and the application of the law equally to everyone. But to expect the attainment of this ideal would be wholly unrealistic. For it would require that things different in fact be treated constitutionally as if they were the same. Therefore, laws must classify,\(^5\)\(^6\) and in so doing, must discriminate as against individuals or groups of individuals. It is at this point that the idea of reasonableness becomes relevant. Such discrimination is acceptable, as a matter of law, if the classification upon which it is based, is itself reasonable. At the very minimum, a reasonable classification is one which treats all persons who are similarly situated, the same. This was the definition suggested by Tysoe J.A. in the Gonzales case, and its inadequacy has already been commented upon earlier in this paper.\(^6\)\(^5\).

There is a much better test of the reasonableness of a classification contained within a law; one which seeks to accommodate the ideal of equality with the need for legislative particularization. By this test, a reasonable classification is one which has a reasonable relationship to the purpose of the law. That is, the classification includes all persons who are similarly situated with respect to the purpose of the law.\(^6\)\(^7\) But the guarantee of equality before the law may not necessarily be satisfied by this requirement of reasonable classification. There may be many situations where the classification in the law coincides completely with the class of those persons similarly situated in terms of the purpose of the law. Section 94 of the Indian Act is an example of such a case. Its purpose is directed towards the protection of Indians by controlling their use of intoxicants. This purpose is based on the legislative determination that such use is peculiarly harmful to their individual well-being, and more broadly, to their social and cultural practises. Since only Indians are subject to prosecution under s. 94, the classification is perfectly reasonable. Similarly, a law which prohibited black children from attending white schools, could not be challenged on the basis of its classification, if its purpose was to maintain the “purity” of the white race. If these two instances of discrimination are to be prevented, the doctrine of reasonable classification must be further refined.

\(^6\)\(^4\) For an excellent article which discusses this concept, see Tussman and Tenbroek, The Equal Protection of the Laws, (1949), 37 Calif. L. Rev. 341.

\(^6\)\(^2\) The word “classify” is used here in the sense of defining, by the designation of certain characteristics or traits, the class of persons to which a particular law applies rather than determining whether or not an individual is a member of that class.

\(^6\)\(^7\) A good illustration of how this test could be applied is the Japanese Canadians Case [1947] A.C. 87, in which the Privy Council upheld three Orders-in-Council made in December 1945, authorizing the deportation of persons of “Japanese ancestry” who had “requested” repatriation. On the above test, the reasonableness of this classification could be challenged on the grounds that it was both under-inclusive and over-inclusive, having regard to the purpose of the law.
One way of accomplishing this is to say that laws which classify on the basis of race, religion, colour, etc. offend equality before the law. In other words, certain traits, no matter how reasonably related to the purpose of the law, can never be made the basis of a constitutional classification. As mentioned earlier in this paper, this seems to be the basis of the majority reasoning in the *Drybones* case. But, as was also pointed out, there are difficulties in adopting this approach. Although it provides a rationale for invalidating the most flagrant discriminatory laws, it also precludes laws which grant special benefits to individuals, or groups of individuals, by reason of their race, religion, colour, etc. Further, laws which classified in an equally invidious fashion, but on a basis other than the constitutionally irrelevant categories, would not be caught by this definition. Therefore, it is necessary to go beyond the mere identification of the purpose of the law, and the promulgation of constitutional rules.

What I now suggest is that the doctrine of reasonable classification be viewed as a requirement that the singling out of an individual or a group of individuals for special treatment must be *justified*. This can only be justified in terms of the *legitimacy* of the legislative purpose. The judicial task with respect to the problem of legitimacy involves the following inquiry. First, the court must discover the law's purpose, which may or may not be expressly stated. Secondly, the court must decide whether or not to accept the legislative judgment of fact underlying the purpose of the law. In this regard, it has two choices. It may defer to the legislative judgment, reasoning that the determination of fact is a peculiarly legislative function, or it may reject the legitimacy of purpose on the grounds that the facts upon which it is based are not true. In so doing, the court itself must engage in the process of fact-finding.

Even if the court accepts the legislative determination as to the truth of the facts, that does not necessarily end the matter. It may decide that the purpose of the law is not legitimate in terms of the value to society in achieving the object of the regulation measured against the costs to those who are subject to special burdens or who are denied special benefits. In other words, while accepting the validity of the social facts, the court may disagree with the legislative response to those facts. In both cases where the court rejects the purpose of the law, it is substituting its judgment for that of the legislature.

In conclusion, the guarantee of equality before the law is met if the requirement of reasonable classification is satisfied. And a classification within a law, which imposes special burdens or grants special benefits, is reasonable if it is necessarily related to the achievement of a legitimate legislative purpose.

Viewed in this way, the nature of the issue presented by the *Drybones* case is sharply focused. The issue may be stated as follows. In legislating with respect to the question of intoxication, was Parliament justified in singling out

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68 By this is meant that the court must look beyond the facts which gave rise to the dispute and inquire into the relevant social facts that bear on the issue. Thus, it can be seen why the use of a technical device such as the Brandeis Brief is so important.
the conduct of one class of Canadians, Indians, for different treatment? Ignoring the prohibited category rule, the Supreme Court of Canada could have approached the question in one of two ways. First, it could have inquired into the reasons as to why Indians were made the subject of a special law. In so doing, it might have ascertained that the legislative purpose of s. 94 of the Indian Act was to protect the Indians, which purpose was based on the fact that the dangers to the individual well-being of Indians and Indians as a whole, from the consumption of alcohol, were much greater than for non-Indians. If the court accepted these facts without more, then the classification was reasonable and s. 94 did not infringe the equality before the law provision of the Bill of Rights. On the other hand, the court might have decided, on the basis of contemporary evidence, that the facts did not support the legislative inference that Indians are different from the rest of Canadians at least in terms of the effects of alcohol consumption; and therefore, must not be treated any differently under the law.

Alternatively, the Supreme Court of Canada, once having determined the purpose of the law, might have decided that the validity of the facts upon which it was based was a matter beyond its competence to determine. But, in deferring to the legislative diagnosis of the social problem, the court was not necessarily bound to accept the validity of the legislative remedy. It may have concluded that the more stringent burden imposed upon Indians was not reasonably likely to achieve the valid legislative objective of ameliorating the problems of Indian intoxication. Of course, this approach raises anew all of the difficult problems of judicial review of factual determinations by a representative legislature.

But, by making the kind of qualitative decision suggested above, the Supreme Court of Canada could have disposed of the issue in the Drybones case, while at the same time, reserving its right to review the other provisions of the Indian Act and the right of Parliament to implement new Indian policies under s. 91 (24) of the British North America Act.

IV

At the beginning of this article, I raised the question of whether the Canadian Bill of Rights should be applied by the courts as a law capable of imposing restraints on legislative and administrative action which infringes any of its guarantees. There are a number of reasons which would justify the exercise of this supervisory role by the court. It is an institution which operates in a non-partisan atmosphere and is not influenced by majority desires to override the rights of the minority. Its decisions are based on who has the best arguments not who has the most votes. The court is an arena in which one individual can effectively seek redress of his grievances. And because the court considers the issues within the context of a factual situation rather than in the abstract, it is better able to assess the meaning of the fundamental rights and freedoms. Finally, the primary concern of the legislature is the determination and implementation of policy. In the performance of this function,
it may only consider peripherally the effect of its legislation on basic rights and freedoms. By judicially reviewing legislative and administrative action for Bill of Rights purposes, the courts provide a more detailed, non-legislative second look.

If the above discussion makes the case for the *judicial* protection of civil liberties in general, when one considers the performance of our courts to date, can the same case be made for judicial protection of civil liberties in Canada?