CASE COMMENTS

ATTORNEY-GENERAL of CANADA v. LAVELL ISAAC et al. v. BEDARD

Challenging that which the murky waters of the future have in store by claiming the existence of a judicial trend is never a safe pursuit, and when the proof for such an assertion is based only upon two cases, the endeavour is more likely to be nothing short of foolhardiness. However, it is submitted that a good argument can be made for holding that whenever a clash between the *Canadian Bill of Rights*[1] and the *Indian Act*[2] reaches the Supreme Court of Canada, the resultant majority decision will be, to say the least, unpredictably unique in character.

The first case called upon to verify this assertion is *R.* v. *Drybones*[3] where the Court held that s. 94(b) of the *Indian Act*[4] is rendered inoperative because that section of the Act denies to an Indian "equality before the law" as guaranteed by s. 1(b) of the *Canadian Bill of Rights.*[5] The unique aspect of this decision is not its finding *per se*, but rather the combination of the following two factors within the case: (1) the majority judgement, delivered by Ritchie J., was based upon the strong dissent of Cartwright J., as he then was, in *Robertson and Rosetanni* v. *The Queen*;[6] and

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1 R.S.C. 1970, App. III.

2 R.S.C. 1970, c. I-6.

3 (1969), 3 D.L.R. (3d) 473. The respondent, an Indian, was charged for being intoxicated off a reserve pursuant to s. 94(b) of the *Indian Act* (infra, note 4.). The Supreme Court of Canada dismissed the Crown's appeal for conviction and affirmed the decision of the lower court by holding that s.94(b) of the *Indian Act* was rendered inoperative by s. 1(b) of the *Canadian Bill of Rights* (infra, note 5.) on the ground that s. 94(b) of the *Indian Act* created for Indians an offence which was not imposed upon the members of any other race.

4 R.S.C. 1952, c. 149 (now R.S.C. 1970, c. I-6).
s. 94. (now s. 95.) 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.

5 R.S.C. 1960, c. 44 (now R.S.C. 1970, App. III).
s. 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
(b) the right of the individual to equality before the law and the protection of the law.

6 (1964), 41 D.L.R. (2d) 485.

(2) Cartwright C.J., as he then was, in an equally strong dissent, repudiated his dissent in the *Robertson and Rosetanni* case. It is submitted that there are few other, if any, cases from the Supreme Court of Canada wherein we find the Chief Justice declaring as erroneous in law one of his previous dissenting judgments whilst the majority of his brothers on the bench are embracing that same dissenting judgment and using it as the basis of their decision.

The second and more recent case dealing with this same clash of federal legislation is *Attorney-General of Canada* v. *Lavell Isaac et al.* v. *Bedard*[7], a case involving two appeals, where the Court held that s 12(1)(b) of the *Indian Act*[8] is *not* rendered inoperative by s. 1(b) of the Canadian Bill of Rights.[9] This decision contains aspects that are even more unique than those of its predecessor, the *Drybones* case.[10] Note, for example, the following elements of the *Lavell-Bedard*[11] decision: (1) the case, though dealing with a problem that was similar in principle to the *Drybones* situation, yielded a contrary decision, yet the judgment in *Drybones* was not criticized; (2) Ritchie J. delivered the majority judgment, and instead of basing it upon his majority judgment in the *Drybones* case, he distinguished that judgment and chose to rely upon the dissent of Pigeon J. in the *Drybones* case as the basis of his decision; and (3) the majority judgment hinged upon the argument that a relevant distinction of fact rendered the *Drybones* decision inapplicable to the *Lavell-Bedard* situation, but the majority of the Court refused to hold that such a distinction existed.

One could fabricate a rational explanation regarding these

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7 (1973), 38 D.L.R. (3d) 481. The respondents, Indian women, married non-Indians. As a result, their names were deleted from the Indian Register pursuant to s. 12(1)(b) of the *Indian Act* (infra, footnote 8) and they lost their status as Indians. The women appealed to the Federal Court of Appeal which held that s. 12(1)(b) of the *Indian Act* was rendered inoperative by s. 1(b) of the *Canadian Bill of Rights* (supra, footnote 5) on the ground that s. 12(1)(b) of the *Indian Act* imposed upon members of the female sex disqualifications which were not imposed upon members of the male sex. The Supreme Court of Canada, on appeal by the Crown, reversed this decision.

8 R.S.C. 1970, c. I-6, s. 12(1)(b) which provides as follows:
12(1) The following persons are not entitled to be registered, namely,
(b) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11.

9 *Supra*, footnote 5.

10 *Supra*, footnote 3.

11 *Supra*, footnote 8.

aspects of the *Lavell-Bedard* case if one were able to state that the case overruled, reversed, or in any way held the *Drybones* decision to be bad law, but such an assertion would be incorrect. In fact, quite the opposite is true, for the Court, paradoxically, appears to have unanimously affirmed the *Drybones* decision in the *Lavell-Bedard* cases. Abbott J., as he then was, held, in his dissent, that the *Drybones* case should be applied to the *Lavell-Bedard* cases. Laskin J., as he then was, (with Hall and Spence JJ. concurring) argued, in his dissent, that the *Lavell-Bedard* appeals:[12]

> . . . . . involve consideration again of the principles governing the application of the *Canadian Bill of Rights*, R.S.C. 1970, App. III, as laid down by this Court in *R. v. Drybones* (1969), 9 D.L.R. (3d) 473, [1970] 3 C.C.C. 355, [1970] S.C.R. 282. In my opinion, unless we are to depart from what was said in *Drybones*, both appeals now before us must be dismissed. I have no disposition to reject what was decided in *Drybones;* and on the central issue of prohibited discrimination as catalogued in s. 1 of the *Canadian Bill of Rights*, it is, in my opinion impossible to distinguish *Drybones* from the two cases in appeal. If, as in *Drybones*, discrimination by reason of race makes certain statutory provisions inoperative, the same result must follow as to statutory provisions which exhibit discrimination by reason of sex.

Ritchie J. (with Fauteux C.J., as he then was, and Martland and Judson JJ. concurring), in the majority judgment, denied that the *Drybones* decision was being questioned and, instead, avoided his decision in that case by attempting to distinguish *Drybones* from the *Lavell-Bedard* situation. Even Pigeon J., who dissented in *Drybones*, was unwilling to criticize the outcome of that case. He merely ignored the decision in *Drybones* and agreed with the decision of Ritchie J. on the ground that since that judge (and three other concurring judges) accepted his dissent in *Drybones* as the law in the *Lavell-Bedard* cases, it would not be improper for him to adhere to what he had said in that dissent.

Thus, one is not able to find, in the *Lavell-Bedard* cases, any criticism of the judgment in the *Drybones* case. However, what one does see (and this certainly does not add any weight to its decision) is the peculiar situation in which the majority of the Court in *Lavell-Bedard* are in disagreement with the reason for supporting the majority judgment in that case. Ritchie J. based the majority judgment on the ground that *Drybones* could be distinguished from the *Lavell-Bedard* cases on the following grounds: (1) *Drybones* was not concerned with the internal regulations of Indians *on* reserves, but (2) dealt exclusively with the creation of an offence (visited by punishment) *off* a reserve which applied

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12 (1973), 38 D.L.R. (3d) 481, at pp. 501-502.

only to Indians and not to others; and (3) that:[13]

> the impunged section in the [*Drybones*] case could not be enforced without denying equality of treatment in the administration and enforcement of the law before the ordinary Courts of the land to a racial group, whereas no such inequality of treatment between Indian men and women flows as a necessary result of the application of s. 12(1) (b) of the *Indian Act*.

However, Abbott J., in his dissent, expressed his agreement with the dissent of Laskin J. (Hall and Spence JJ. concurring), who held that the *Drybones* case could *not* be distinguished on those or any other grounds. Also, Pigeon J., although he agreed with the judgment of Ritchie J., appears to have accepted Laskin J.'s argument that the two cases are not distinguishable from one another. In fact, the judgment of Pigeon J. indicates that he considered repudiating his *Drybones* dissent in the *Lavell-Bedard* cases, as did Cartwright C.J. repudiate his *Robertson and Rosetanni* dissent in the *Drybones* case. Read the first paragraph of Pigeon J.'s judgment carefully. The only thing of which he appears to be certain is that the *Canadian Bill of Rights* was not meant to suppress the right of the federal government to legislate with respect to Indians:[14]

> I agree in the result with Ritchie, J. I certainly cannot disagree with the view I did express in *R. v. Drybones* (1969), 9 D.L.R. (3d) 473 at pp. 489-90, [1970] 3 C.C.C. 355, [1970] C.S.R. 282, that the enactment of the *Canadian Bill of Rights* was not intended to effect a virtual suppression of federal legislation over Indians. My difficulty is Laskin, J.'s strongly reasoned opinion that, unless we are to depart from what was said by the majority in *Drybones*, these appeals should be dismissed because, if discrimination by reason of race makes certain statutory provisions inoperative, the same result must follow as to statutory provisions which exhibit discrimination by reason of sex. In the end, it appears to me that, in the circumstances, I need not reach a firm conclusion on that point. Assuming the situation is such as Laskin, J., says, it cannot be improper for me to adhere to what was my dissenting view, when a majority of those who did not agree with it in respect of a particular section of the *Indian Act*, R.S.C. 1970, c. I-6, now adopt it for the main body of this important statute.

What, then does the *Lavell-Bedard* decision offer? It presents, for those who have examined the case in search of decisive law, a judicial smorgasbord composed of the following delicacies: (1) a majority judgment in *Drybones* based upon an earlier dissenting judgment which was repudiated by its author in the *Drybones* case, (2) a majority in *Lavell-Bedard* based upon a dissenting judgment in *Drybones* which was *almost* repudiated by its author in the *Lavell-Bedard* cases; (3) a majority judgment in *Drybones*

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13 *Ibid.*, at p. 499.

14 *Ibid.*, at pp. 500-501.

which was unanimously affirmed in *Lavell-Bedard*; (4) a majority judgment delivered by Ritchie J. in *Lavell-Bedard* which contradicts the majority judgment delivered by that same judge in the earlier *Drybones* case; (5) a majority of the Court in the *Lavell-Bedard* cases in disagreement with the rationale for the majority judgment in those cases; and (6) strong dissenting judgments in both situations.

Note, however, that no solutions to the problems created by the conflict between the *Canadian Bill of Rights* and the *Indian Act* have been offered to compliment the brandy, the cigars and retirement to the library at the end of the repast. One is still no closer to a firm decision as to whether the *Bill of Rights* is merely a canon of construction or can be applied to legislation resulting from the power over "Indians and lands reserved for Indians" vested in the federal authority by s. 91 (24) of *The British North America Act, 1867.* Even the more general questions relating to the interpretation of the phrase "equality before the law" as it appears in s. 1(b) of the *Bill of Rights*[15] and the interpretation of the word "discrimination" as it appears in s. 1 of the *Bill of Rights*[16] have yet to be answered.

Such answers await future decisions, but, unfortunately, these decisions will have to grapple with the confused state of the law resulting from the judgments in the *Drybones* and the *Lavell-Bedard* cases. Having read these judgments, one cannot help but agree with Abbott J. who, at the conclusion of his short judgment in the *Lavell-Bedard* cases, stated that:[17]

> of one thing I am certain the Bill will continue to supply ample grist to the judicial mills for some time to come.

Also, one cannot help but add to his prediction by stating that future decisions in this area of the law will bear a uniqueness of character which will have been created by the necessity of having to dodge and cope with those opinions on the subject which have come before.

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15 *Supra*, footnote 5.

16 *Supra*, footnote 5.

17 *Supra*, footnote 12, at p. 484.

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