Case Name:

Lavell v. Canada (Attorney General)

The Attorney General of Canada (Respondent), Appellant; and Jeannette Vivian Corbiere Lavell (Applicant), Respondent. Richard Isaac, Leonard Staats, Clarence Jamieson, Rena Hill, Norman Lickers, William White, Nina Burnham, John Capton, Howard Lickers, Clifford Lickers, Mitchell Sandy, Ronald Monture, Gordon Hill, Sydney Henhawk, Ross Powless, Victor Porter, Frank Monture, Renson Jamieson and Vincent Sandy, Appellants; and Yvonne Bédard, Respondent.

[1973] S.C.J. No. 128

[1973] A.C.S. no 128

[1974] S.C.R. 1349

[1974] R.C.S. 1349

38 D.L.R. (3d) 481

7 C.N.L.C. 236

23 C.R.N.S. 197

11 R.F.L. 333

Supreme Court of Canada

1973: February 22, 23, 26, 27 / 1973: August 27.

Present: Fauteux C.J. and Abbott, Martland, Judson, Ritchie, Hall, Spence, Pigeon and Laskin JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL ON APPEAL FROM THE SUPREME COURT OF ONTARIO

Civil rights -- Indians -- Indian woman marrying non-Indian -- Loss of rights -- No analogous provision applicable male Indian -- Discrimination by reason of sex -- Canadian Bill of Rights, 1960 (Can.), c. 44 -- Indian Act, R.S.C. 1970, c. I-6, s. 12(1)(b).

The respondents are both female persons of North American Indian ancestry. Mrs. Lavell was born Jeannette Vivian Corbiere, a member of the Wikwemikong Band and registered in the Indian Register. She subsequently married a non-Indian and thereafter her name was deleted from the Indian Register.

Mrs. Bédard was born of Indian parents on the Six Nations Indian Reserve, married a non-Indian and thereafter having separated from her husband returned to the Reserve to live on a property held by her mother by Certificate of Possession and bequeathed to Mrs. Bédard by will approved by the Council of the Six Nations and by the Minister in terms of the Indian Act. The Council required Mrs. Bédard to dispose of the property and to leave the Reserve.

Mrs. Lavell failed in an appeal from the decision of the Registrar deleting her name from the Register. However a motion to review that decision was granted by the Federal Court of Appeal which held that s. 12(1)(b) of the Indian Act was inoperative by reason of s. 1(b) of the Canadian Bill of Rights. An appeal was filed in this Court.

Mrs. Bédard obtained in the Supreme Court of Ontario a decision in her favour based on the judgment of the Federal Court of Appeal in the Lavell case. Leave to appeal was granted to appeal to this Court.

Held (Abbott, Hall, Spence and Laskin JJ. dissenting): The appeals should be allowed.

Per Fauteux C.J. and Martland, Judson and Ritchie JJ.: These appeals are from judgments holding that the provisions of s. 12(1)(b) of the Indian Act, R.S.C. 1970, c. I-6, are rendered inoperative by s. 1(b) of the Canadian Bill of Rights, 1960 (Can.), c. 44, as denying equality before the law to the two respondents. In issue is whether the Bill of Rights is to be construed as rendering inoperative one of the conditions imposed by Parliament for the use and occupation of Crown lands reserved for Indians. The question is confined to deciding whether Parliament, in defining Indian status so as to exclude women of Indian birth who have married non-Indians, enacted a law which cannot be sensibly construed without abrogating, abridging or infringing the rights of such women to equality before the law. The Queen v. Drybones, [1970] S.C.R. 282 case can have no application to render inoperative legislation such as s. 12(1)(b) of the Indian Act passed by Parliament in discharge of its constitutional function under s. 91(24) of the B.N.A. Act. Equality before the law under the Bill of Rights means equality of treatment in the enforcement and application of the laws of Canada and no such inequality is necessarily entailed in the construction and application of s. 12(1)(b).

Per Pigeon J: This result is in accordance with the view that the enactment of the Canadian Bill of Rights was not intended to effect a virtual suppression of federal legislation over Indians.

Per Abbott J. dissenting: The decision in the Drybones case cannot be distinguished from the two cases under appeal. Effect must be given to the words "without discrimination by reason of race, national origin, colour, religion or sex" as used in s. 1 of the Canadian Bill of Rights and s. 1(b) must be read as if those words were recited therein.

Per Hall, Spence and Laskin JJ., dissenting: It is not possible to leap over the telling words of s. 1 of the Canadian Bill of Rights, "without discrimination by reason of race, national origin, colour, religion or sex" by invoking the words "equality before the law" in clause (b). That was not done in the Drybones case. There was an intimation during the argument of these appeals that the Canadian Bill of Rights is properly invoked only to resolve a clash under its terms between two federal statutes. It is a spurious contention. The Canadian Bill of Rights is the indicator to which any Canadian statute or provision thereof must yield unless Parliament has declared that the statute or the particular provision is to operate notwithstanding the Canadian Bill of Rights.

Cases Cited

[St. Ann's Island Shooting and Fishing Club Limited v. The King [1950] S.C.R. 211; Baker v. Edger [1898] A.C. 748; The Queen v. Drybones [1970] S.C.R. 282; Curr v. The Queen [1972] S.C.R. 889; Smythe v. The Queen [1971] S.C.R. 680; Roncarelli v. Duplessis [1959] S.C.R. 121; Lowny and Lepper v. The Queen (1972), 26 D.L.R. (3d) 224; Brownridge v. The Queen [1972] S.C.R. 926; Duke v. The Queen [1972] S.C.R. 917 referred to].

APPEALS from judgments of the Federal Court of Appeal [[1971] F.C. 347; 22 D.L.R. (3d) 188] and the Supreme Court of Ontario [[1972] 2 O.R. 391] affirming that the provisions of the Indian Act are inoperative to deprive the respondents of their right to registration in terms of the said Act. Appeals allowed, Abbott, Hall, Spence and Laskin JJ. dissenting.

C.R.O. Munro, Q.C., M.A. Chalmers, Q.C., J.E. Smith and C.J. Pepper for the Attorney General of Canada.
Clayton Ruby, for the respondent, J.V.C. Lavell.
B.H. Kellock and V. Libis, for the appellants R. Isaac et al. and for the Six Nations Band of Indians of the County of Brant, Intervenant.
M. Montgomery, Q.C., for the respondent, Yvonne Bédard.
Douglas Sanders, B.A. Crane, James O'Reilly, Ken Regier, Bob Young and Bruce Fotheringham, for The Indian Association of Alberta, The Union of British Columbia Indian Chiefs, The Manitoba Indian Brotherhood Inc., The Union of New Brunswick Indians, The Indian Brotherhood of the Northwest Territories, The Union of Nova Scotia Indians, The Union of Ontario Indians, The Federation of Saskatchewan Indians, The Indian Association of Quebec, The Yukon Native Brotherhood and The National Indian Brotherhood. Intervenants.
B.J. MacKinnon, Q.C., for the Native Council of Canada. Intervenant.
M.P. Hyndman, Q.C., and Frances Smookler, for Rose Wilhelm, Alberta Committee on Indian

Rights for Indian Women Inc., Viola Shannacappo, University Women's Club of Toronto, University Women Graduates Limited, The North Toronto Business and Professional Women's Club Inc., and Monica Agnes Turner. Intervenants.
Arnold F. Moir, Q.C., for the Treaty Voice of Alberta. Intervenant.
E. Greenspan, for Anishnawbekwek of Ontario Inc. Intervenant.

Solicitor for the Attorney general of Canada, appellant: D.S. Maxwell, Ottawa.
Solicitors for the respondent, J.V.C. Lavell: Copeland & Ruby, Toronto.
Solicitors for the appellants, R. Isaac et al: Waterous, Holden, Kellock & Kent, Brantford.
Solicitors for the respondent, J.V.C. Lavell: Copeland & Ruby, Toronto.
Solicitor for the intervenants, The Indian Association of Alberta, The Union of British Columbia Indian Chiefs, The Manitoba Indian Brotherhood Inc., The Union of New Brunswick Indians, The Indian Brotherhood of the Northwest Territories, The Union of Nova Scotia Indians, The Union of Ontario Indians, The Federation of Saskatchewan Indians, The Indian Association of Quebec, The Yukon Native Brotherhood and The National Indian Brotherhood: Douglas Sanders, Ottawa.
Solicitors for the intervenants, The Six Nations Band of Indians of the County of Brant: Waterous, Holden, Kellock & Kent, Brantford.
Solicitors for the intervenants, The Native Council of Canada: MacKinnon, McTaggart, Toronto.
Solicitors for the intervenants, Alberta Committee on Indian Rights for Indian Women Incorporated, University Women's Club of Toronto, University Women Graduates Limited, Viola Shannacappo, Rose Wilhelm, The North Toronto Business and Professional Women's Club Inc., Monica Agnes Turner: Blackwell, Law, Threadgold & Armstrong, Toronto.
Solicitors for the intervenants, The Treaty Voice of Alberta: Wood, Moir, Hyde & Ross, Edmonton.
Solicitors for the intervenants, Anishnawbekwek of Ontario Inc.: Pomerant, Pomerant & Greenspan, Toronto.

The judgment of Fauteux C.J., and Martland, Judson and Ritchie was delivered by

RITCHIE J.:-- I have had the advantage of reading the reasons for judgment prepared for delivery by my brother Laskin.

These appeals, which were heard together, are from two judgments holding that the provisions of s. 12(1)(b) of the Indian Act, R.S.C. 1970, c. I-6, are rendered inoperative by s. 1(b) of the Canadian Bill of Rights, 1960 (Can.), c. 44, as denying equality before the law to the two respondents.

Both respondents were registered Indians and "Band" members within the meaning of s. 11(b) of the Indian Act when they elected to marry non-Indians and thereby relinquished their status as Indians in conformity with the said s. 12(1)(b) which reads 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.

It is contended on behalf of both respondents that s. 12(1)(b) of the Act should be held to be inoperative as discriminating between Indian men and women and as being in conflict with the provisions of the Canadian Bill of Rights and particularly s. 1 thereof which provides:

> 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; ...

I think it desirable at the outset to outline the facts concerning the two respondents separately.

1. Mrs. Lavell--This woman was a member of the Wikwemikong Band of Indians who married a non-Indian and whose name was deleted from the Indian Register by the Registrar in charge thereof pursuant to the provisions of section 12(1)(b) of the Act. An appeal was taken from the Registrar's decision and was heard before His Honour Judge Grossberg, acting as persona designata under the Indian Act before whom evidence was taken which disclosed that at the time of the hearing and for some nine years before her marriage Mrs. Lavell had not lived on any Reserve except for sporadic visits to her family, and the learned judge declined to accept the suggestion that she could not visit her family on the Reserve whenever she wished. Mrs. Lavell did not claim to have been deprived of any property rights on the Reserve except those incidental to the right as a Band member.

Judge Grossberg having found that in his opinion section 12(1)(b) of the Indian Act was not rendered inoperative by the Bill of Rights an appeal was taken from his judgment to the Federal Court of Appeal where a judgment was rendered by Mr. Justice Thurlow who concluded his opinion by saying of section 12(1)(b) of the Indian Act:

> These provisions are thus laws which abrogate, abridge and infringe the right of an individual Indian woman to equality with other Indians before the law. Though this is not a situation in which an act is made punishable at law on account of race or sex, it is one in which under the provisions here in question the consequences of the marriage of an Indian woman to a person who is not an

> Indian are worse for her than for other Indians who marry non-Indians and than for other Indians of her band who marry persons who are not Indians. In my opinion this offends the right of such an Indian woman as an individual to equality before the law and the Canadian Bill of Rights therefore applied to render the provisions in question inoperative.

(The italics are my own.)

It is from this judgment that the Crown now appeals.

2. Mrs. Bédard--In this case the respondent sought an injunction restraining the members of the Six Nations Council from expelling her and her two infant children from the home she occupied on the Six Nations Indian Reserve in the County of Brant, and an order setting aside a resolution passed by the Council ordering her to dispose of such property. By agreement an additional claim was added for a declaratory judgment concerning the respective rights of the parties.

Mrs. Bédard was born on the Six Nations Indian Reserve of Indian parents and she married a non-Indian in May, 1964, by whom she had two children and with whom she resided off the Reserve until June 23, 1970 when, having separated from her husband, she returned to the Reserve to live in a house on a property to which her mother had held a Certificate of Possession under s. 20 of the Indian Act and which had been bequeathed to her under her mother's will which had been approved by the Council of the Six Nations and on behalf of the Minister of Indian Affairs as required by the Indian Act, (section 45(3)) on August 7, 1969.

When Mrs. Bédard returned to the Reserve with her children in 1970 to occupy her mother's house, the Council passed a series of resolutions giving her permission to reside on the Reserve for a period of six months during which she was to dispose of the property, and extending this permission for a further eight months, after which any further requests for her continued residence would be denied. In accordance with these resolutions this respondent conveyed her interest in the property in question to her brother who was a registered member of the Six Nations Band, and to whom a Certificate of Possession of the property was granted on March 15, 1971 by the Minister. Her brother, however, permitted Mrs. Bédard and her infant children to continue occupying the premises without rent, but the Band Council passed a further resolution on September 15, 1971 by which it was resolved that the Brant District Supervisor should be requested to serve a notice to quit the Reserve upon this respondent. It should be noted that the writ instituting this action was issued on September 14, 1971, more than a year after the brother had obtained his Certificate of Possession and that no notice to quit has been served on Mrs. Bédard pursuant to the resolution which was passed after the writ was issued.

Mrs. Bédard's case was heard by Mr. Justice Osler in the Supreme Court of Ontario where it was contended that the Council's request to the District Supervisor and any action taken by the Supervisor pursuant to such request, and the removal of her name from the Band list simply because of her marriage to a non-Indian, are actions that discriminate against her by reason of her race and

sex and deny her "equality before the law". Mr. Justice Osler, basing his decision on the judgment of the Federal Court of Appeal in the Lavell case, concluded that:

> Section 12(1)(b) of the Act is ... inoperative and all acts of the Council Band and of the District Supervisor purporting to be based on the provisions of that section can be of no effect.

Leave to appeal from this judgment was granted by order of this Court on January 25, 1972.

The contention which formed the basis of the argument submitted by both respondents was that they had been denied equality before the law by reason of sex, and I propose to deal with the matter on this basis.

In considering the impact of the Bill of Rights on the provisions of the Indian Act, I think it desirable to reproduce the portions of the Bill which I consider to be relevant and which are:

Preamble

> The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;
>
> Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;
>
> And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada:
>
> THEREFORE Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:
>
> BILL OF RIGHTS
>
> Recognition and Declaration of Rights and Freedoms
>
> 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,

(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.

Construction of Law

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 Rights, 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, and in particular, 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 crimination 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.

5. (2) The expression 'law of Canada' in Part 1 means 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.

(3) The provisions of Part 1 shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada.

(The italics are my own.)

There cannot, in my view, be any doubt that whatever may have been achieved by the Bill of Rights, it is not effective to amend or in any way alter the terms of the British North America Act and it is clear from the third recital in the preamble that the Bill was intended to "reflect the respect of Parliament for its constitutional authority ...," so that wherever any question arises as to the effect of any of the provisions of the Bill, it is to be resolved within the framework of the B.N.A. Act.

It follows, in my view, that the effect of the Bill of Rights on the Indian Act can only be considered in light of the provisions of s. 91(24) of the B.N.A. Act whereby the subject of "Indians and lands reserved for Indians" is assigned exclusively to the legislative authority of the Parliament of Canada.

It is true that under s. 88 of the Indian Act laws of general application in any Province are made applicable to and in respect of Indians in the Province except to the extent that such laws make provision for any matter for which provision is made by or under the Indian Act. But the incorporation of these laws as a part of the Act in no way signifies a relinquishment of Parliament's exclusive legislative authority over Indians, and in any event, the property and civil rights of

members of Indian Bands living on Reserves, which is what we are here concerned with, are matters for which express provision is made by the Indian Act and which can only apply to Indians as distinct from other Canadians.

In my opinion the exclusive legislative authority vested in Parliament under s. 91(24) could not have been effectively exercised without enacting laws establishing the qualifications required to entitle persons to status as Indians and to the use and benefit of Crown "lands reserved for Indians". The legislation enacted to this end was, in my view, necessary for the implementation of the authority so vested in Parliament under the constitution.

To suggest that the provisions of the Bill of Rights have the effect of making the whole Indian Act inoperative as discriminatory is to assert that the Bill has rendered Parliament powerless to exercise the authority entrusted to it under the constitution of enacting legislation which treats Indians living on Reserves differently from other Canadians in relation to their property and civil rights. The proposition that such a wide effect is to be given to the Bill of Rights was expressly reserved by the majority of this Court in the case of The Queen v. Drybones [[1970] S.C.R. 282], at 298, to which reference will hereafter be made, and I do not think that it can be sustained.

What is at issue here is whether the Bill of Rights is to be construed as rendering inoperative one of the conditions imposed by Parliament for the use and occupation of Crown lands reserved for Indians. These conditions were imposed as a necessary part of the structure created by Parliament for the internal administration of the life of Indians on Reserves and their entitlement to the use and benefit of Crown lands situate thereon, they were thus imposed, in discharge of Parliament's constitutional function under s. 91(24) and in my view can only be changed by plain statutory language expressly enacted for the purpose. It does not appear to me that Parliament can be taken to have made or intended to make such a change by the use of broad general language directed at the statutory proclamation of the fundamental rights and freedoms enjoyed by all Canadians, and I am therefore of opinion that the Bill of Rights had no such effect.

The responsibility of the Parliament of Canada in relation to the internal administration of the life of Indians on Reserves is succinctly stated by Rand J. in St. Ann's Island Shooting and Fishing Club Limited, v. The King [[1950] S.C.R. 211], at 219, where he was dealing with the effect of s. 51 of the Indian Act, R.S.C. 1906 c. 81, in relation to the "surrender" of lands on Indian Reserves and said:

> The language of the statute embodies the accepted view that these aborigenes are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation.

In the case of Barker v. Edger [[1898] A.C. 748], the Privy Council was considering the effect of a New Zealand statute which established a Validation Court and contained a provision to the effect that the commencement of proceedings in that Court should operate as a stay of proceedings in any other court in respect of the same matter. The question arose in relation to

special legislation concerning the title to lands of the Poututu native tribe which had been governed by the Native Land Courts Act whereunder proceedings had been taken when a new action was commenced in the Validation Court and it was claimed that the Native Land Court had thereby lost jurisdiction.

In the course of his reasons for judgment, Lord Hobhouse had occasion to say, at p. 754:

> When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms.

And he concluded this part of his judgment by saying:

> The Legislature could not have intended to displace the complete and precise jurisdiction adapted to the special case of Poututu, or to put it in the power of a defeated litigant to so displace it, without substituting something equally complete and precise in its place.

The contention that the Bill of Rights is to be construed as overriding all of the special legislation imposed by Parliament under the Indian Act is, in my view, fully answered by Pigeon J. in his dissenting opinion in the Drybones [[1970] S.C.R. 282] case where he said, at p. 304:

> If one of the effects of the Canadian Bill of Rights is to render inoperative all legal provisions whereby Indians as such are not dealt with in the same way as the general public, the conclusion is inescapable that Parliament, by the enactment of the Bill, has not only fundamentally altered the status of the Indians in that indirect fashion but has also made any future use of federal legislative authority over them subject to the requirement of expressly declaring every time 'that the law shall operate notwithstanding the Canadian Bill of Rights'. I find it very difficult to believe that Parliament so intended when enacting the Bill. If a virtual suppression of federal legislation over Indians as such was meant, one would have expected this important change to be made explicitly not surreptitiously so to speak.

That it is membership in the Band which entitles an Indian to the use and benefit of lands on the Reserve is made plain by the provisions of SS. 2 and 18 of the Indian Act.; Section 2(1)(a) reads as follows:

> 2. (1) In this Act 'band' means a body of Indians

> (a) for whose use and benefit in common, lands the legal title to which is vested in Her Majesty, have been set apart before, on or after the 4th day of September 1951, ...

Section 18 reads as follows:

> 18. (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

In considering the meaning to be given to section 1(b) of the Bill of Rights, regard must of course be had to what was said by Mr. Justice Laskin, speaking in this regard for the whole of the Court in Curr v. The Queen [[1972] S.C.R. 889], at pp. 896 and 897, where he interpreted sections 1(a) and 1(b) of the Bill in the following passage:

> In considering the reach of s. 1(a) and s. 1(b), and, indeed, of s. 1 as a whole, I would observe, first, that the section is given its controlling force over federal law by its referential incorporation into s. 2; and, second, that I do not read it as making the existence of any of the forms of prohibited discrimination, a sine qua non of its operation. Rather, the prohibited discrimination is an additional lever to which federal legislation must respond. Putting the matter another way, federal legislation which does not offend s. 1 in respect of any of the prohibited kinds of discrimination may nonetheless be offensive to s. 1 if it is violative of what is specified in any of the clauses (a) to (f) of s. 1. It is, a fortiori, offensive if there is discrimination by reason of race so as to deny equality before the law. That is what this Court decided in Regina v. Drybones and I need say no more on this point.
>
> It is, therefore, not an answer to reliance by the appellant on s. 1(a) and s. 1(b) of the Canadian Bill of Rights that s. 223 does not discriminate against any person by reason of race, national origin, colour, religion or sex. The absence of such discrimination still leaves open the question whether s. 223 can be construed and applied without abrogating, abridging or infringing the rights of the individual listed in s. 1(a) and s. 1(b).

My understanding of this passage is that the effect of s. 1 of the Bill of Rights is to guarantee to all Canadians the rights specified in paragraphs (a) to (f) of that section, irrespective of race, national origin, colour or sex. This interpretation appears to me to be borne out by the French version which reads:

> 1. Il est par les présentes reconnu et déclaré que les droits de l'homme et les libertés fondamentales ci-après énoncés ont existé et continueront à exister pour tout individu au Canada quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe: ...

It was stressed on behalf of the respondents that the provisions of s. 12(1)(b) of the Indian Act constituted "discrimination by reason of sex" and that the section could be declared inoperative on this ground alone even if such discrimination did not result in the infringement of any of the rights and freedoms specifically guaranteed by s. 1 of the Bill.

I can find no support for such a contention in the Curr case in which, in any event, no question of any kind of discrimination was either directly or indirectly involved. My own understanding of the passage which I have quoted from that case was that it recognized the fact that the primary concern evidenced by the first two sections of the Bill of Rights is to ensure that the rights and freedoms thereby recognized and declared shall continue to exist for all Canadians, and it follows, in my view, that those sections cannot be invoked unless one of the enumerated rights and freedoms has been denied to an individual Canadian or group of Canadians. Section 2 of the Bill of Rights provides for the manner in which the rights and freedoms which are recognized and declared by s. 1 are to be enforced and the effect of this section is that every law of Canada shall "be so construed and applied as not to abrogate, abridge or infringe or authorize the abrogation, abridgment or infringement of any of the rights and freedoms herein recognized and declared ...," (i.e. by s. 1). There is no language anywhere in the Bill of Rights stipulating that the laws of Canada are to be construed without discrimination unless that discrimination involves the denial of one of the guaranteed rights and freedoms, but when, as in the case of The Queen v. Drybones, supra, 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 opening words of s. 2 of the Bill of Rights are, in my view, determinative of the test to be applied in deciding whether the section here impugned is to be declared inoperative. The words to which I refer are:

> 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 Rights, be so construed and applied as not to abrogate, abridge or infringe or authorize the abrogation, abridgement of infringement of the freedoms herein recognized and declared ...

In the course of the reasons for judgment rendered on behalf of the majority of this Court in The Queen v. Drybones, supra, this language was interpreted in the following passage at p. 294:

> 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'.

Accordingly, in my opinion, the question to be determined in these appeals is confined to deciding whether the Parliament of Canada in defining the prerequisites of Indian status so as not to include women of Indian birth who have chosen to marry non-Indians, enacted a law which cannot be sensibly construed and applied without abrogating, abridging or infringing the rights of such women to equality before the law.

In my view the meaning to be given to the language employed in the Bill of Rights is the meaning which it bore in Canada at the time when the Bill was enacted, and it follows that the phrase "equality before the law" is to be construed in light of the law existing in Canada at that time.

In considering the meaning to be attached to "equality before the law" as those words occur in section 1(b) of the Bill, I think it important to point out that in my opinion this phrase is not effective to invoke the egalitarian concept exemplified by the 14th Amendment of the U.S. Constitution as interpreted by the courts of that country. (See Smythe v. The Queen [[1971] S.C.R. 680] per Fauteux C.J. at pp. 683 and 686). I think rather that, having regard to the language employed in the second paragraph of the preamble to the Bill of Rights, the phrase "equality before the law" as used in s. 1 is to be read in its context as a part of "the rule of law" to which overriding authority is accorded by the terms of that paragraph.

In this connection I refer to Stephens Commentaries on the Laws of England, 21st Ed. 1950, where it is said in Vol. III at p. 337:

> Now the great constitutional lawyer Dicey writing in 1885 was so deeply impressed by the absence of arbitrary governments present and past, that he coined the phrase 'the rule of law' to express the regime under which Englishmen lived; and he tried to give precision to it in the following words which have exercised a profound influence on all subsequent thought and conduct.
>
> > 'That the "rule of law" which forms a fundamental principle of the constitution has three meanings or may be regarded from three different points of view ....'

The second meaning proposed by Dicey is the one with which we are here concerned and it was stated in the following terms:

> It means again equality before the law or the equal subjection of all classes to the

> ordinary law of the land administered by the ordinary courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary courts.

"Equality before the law" in this sense is frequently invoked to demonstrate that the same law applies to the highest official of government as to any other ordinary citizen, and in this regard Professor F.R. Scott, in delivering the Plaunt Memorial Lectures on Civil Liberties and Canadian Federalism in 1959, speaking of the case of Roncarelli v. Duplessis [[1959] S.C.R. 121], had occasion to say:

> It is always a triumph for the law to show that it is applied equally to all without fear or favour. This is what we mean when we say that all are equal before the law.

The relevance of these quotations to the present circumstances is that "equality before the law" as recognized by Dicey as a segment of the rule of law, carries the meaning of equal subjection of all classes to the ordinary law of the land as administered by the ordinary courts, and in my opinion the phrase "equally before the law" as employed in section 1(b) of the Bill of Rights is to be treated as meaning equality in the administration or application of the law by the law enforcement authorities and the ordinary courts of the land. This construction is, in my view, supported by the provisions of subsections (a) to (g) of s. 2 of the Bill which clearly indicate to me that it was equality in the administration and enforcement of the law with which Parliament was concerned when it guaranteed the continued existence of "equality before the law".

Turning to the Indian Act itself, it should first be observed that by far the greater part of that Act is concerned with the internal regulation of the lives of Indians on Reserves and that the exceptional provisions dealing with the conduct of Indians off Reserves and their contacts with other Canadian citizens fall into an entirely different category.

It was, of course necessary for Parliament, in the exercise of section 91(24) authority, to first define what Indian meant, and in this regard s. 2(1) of the Act provides that:

> 'Indian' means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.

It is therefore clear that registration is a necessary prerequisite to Indian status and in order to fully appreciate the nature of the issue raised by the respondents, I think it desirable to consider s. 12(1)(b) in the context of ss. 11 and 12 of the Act which provide:

> 11. (1) Subject to section 12, a person is entitled to be registered if that person

(a) on the 26th day of May 1874 was, for the purposes of An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands, being chapter 42 of the Statutes of Canada, 1868, as amended by section 6 of chapter 6 of the Statutes of Canada, 1869, and section 8 of chapter 21 of the Statutes of Canada, 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada;

(b) is a member of a band

(i) for whose use and benefit, in common, lands have been set apart or since the 26th day of May 1874, have been agreed by treaty to be set apart, or

(ii) that has been declared by the Governor in Council to be a band for the purposes of this Act;

(c) is a male person who is a direct descendant in the male line of a male person described in paragraph (a) or (b);

(d) is the legitimate child of

(i) a male person described in paragraph (a) or (b),or

(ii) a person described in paragraph (c);

(e) is the illegitimate child of a female person described in paragraph (a), (b) or (d); or

(f) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (a), (b), (c), (d) or (e).

(2) Paragraph (1)(e) applies only to persons born after the 13th day of August 1956. R.S., c. 149, s. 11; 1956, c. 40, s. 3.

12. (1) The following persons are not entitled to be registered, namely,

(a) a person who

(i) has received or has been alotted halfbreed lands or money scrip,
(ii) is a descendant of a person described in subparagraph (i),
(iii) is enfranchised, or
(iv) is a person born of a marriage entered into after the 4th day of September 1951 and has attained the age of twenty-one years, whose mother and whose fathers's mother are not persons described in paragraph 11(1)(a), (b) or (d) or entitled to be registered by virtue of paragraph 11(1)(e),

unless, being a woman, that person is the wife or widow of a person described in section 11, and

(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.

Provision for the loss of status by women who marry non-Indians was first introduced in 1869 by section 6 of chapter 6 of the Statutes of Canada of that year which reads as follows:

> Provided always that any Indian woman marrying any other than an Indian, shall cease to be an Indian within the meaning of this Act, nor shall the children issue of such marriage be considered as Indians within the meaning of this Act; Provided also, that any Indian woman marrying an Indian of another tribe, band or body shall cease to be a member of the tribe, band or body to which she formerly belonged and become a member of the tribe, band or body of which her husband is a member, and the children, issue of this marriage, shall belong to their father's tribe only.

It is thus apparent that the marital status of Indian women who marry non-Indians has been the same for at least one hundred years and that their loss of Band status on marriage to a member of another Band and acquisition of status in that Band, for which provision is made under s. 14 of the Indian Act, has been in effect for the same period.

The first 41 sections of the Indian Act are concerned with the status of Indians and the administration of Indian Reserves, including the detailed provisions to which I have referred with respect to the status of those entitled to the use and benefit of the lands of which they are composed.

The Act then proceeds to the enactment of laws governing the use and disposition of all property of Indians whether real or personal (see sections 42 to 86), and s. 87 deals with conditions under which property of Indians on Reserves is exempt from taxation.

Relations between Indians and non-Indians are first considered under the following headings:

> Legal Rights of Indians (s. 88 to 90);
> Trading with Indians (s. 91 to 92);
> Removal of materials from Reserves (s. 93);
> Sale of intoxicants to and possession thereof by Indians
> (s. 94 to 97);

and forfeitures and penalties for breach of these sections are dealt with in ss. 103 and 104. The remainder of the statute is concerned almost exclusively with the topic of enfranchisement, s. 109 to 113 and schools, s. 114 to 123.

A careful reading of the Act discloses that section 95 (formerly 94) is the only provision therein made which creates an offence for any behaviour of an Indian off a Reserve and it will be plain that there is a wide difference between legislation such as s. 12(1)(b) governing the civil rights of designated persons living on Indian Reserves to the use and benefit of Crown lands, and criminal legislation such as s. 95 which creates an offence punishable at law for Indians to act in a certain fashion when off a Reserve. The former legislation is enacted as a part of the plan devised by Parliament, under s. 91(24) for the regulation of the internal domestic life of Indians on Reserves. The latter is criminal legislation exclusively concerned with behaviour of Indians off a Reserve.

Section 95 (formerly s. 94) reads, in part, as follows:

> 95. An Indian who ...
>
> (b) is intoxicated ...
>
> 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.

These were the provisions that were at issue in the case of The Queen v. Drybones, supra, where this Court held that they could not be construed and applied without exposing Indians as a racial group to a penalty in respect of conduct as to which the Parliament of Canada had imposed no sanctions on other Canadians who were subject to Canadian laws regulating their conduct, which were of general application in the Northwest Territories where the offence was allegedly committed and in which there are no Indian Reserves.

In that case the decision of the majority of this Court was that the provisions of s. 94(b), as it then was, could not be enforced without bringing about inequality between one group of citizens and another and that this inequality was occasioned by reason of the race of the accused. It was there said, at page 297:

> ... I am ... of 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 only necessary for the purpose of deciding this case for me to say that in my opinion s. 94(b) of the Indian Act is a law of Canada which creates such an offence and that it can only be construed in such manner that its application would operate so as to abrogate, abridge or infringe one of the rights declared and recognized by the Bill of Rights. For the reasons which I have indicated, I am therefore of opinion that s. 94(b) is inoperative.
>
> For the purpose of determining the issue raised by this appeal it is unnecessary to express any opinion respecting the operation of any other section of the Indian Act.

And it was later said:

> The present case discloses laws of Canada which abrogate, abridge and infringe the right of an individual Indian to equality before the law and in my opinion if those laws are to be applied in accordance with the express language used by Parliament in s. 2 of the Bill of Rights, then s. 94(b) of the Indian Act must be declared to be inoperative.
>
> It appears to me to be desirable to make it plain that these reasons for judgment are 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; in my opinion the same considerations do not by any means apply to all the provisions of the Indian Act.

Having regard to the express reservations contained in these passages, I have difficulty in understanding how that case can be construed as having decided that any sections of the Indian Act, except s. 94(b) are rendered inoperative by the Bill of Rights.

The Drybones case can, in my opinion, have no application to the present appeals as it was in no way concerned with the internal regulation of the lives of Indians on Reserves or their right to the use and benefit of Crown lands thereon, but rather deals exclusively with the effect of the Bill of Rights on a section of the Indian Act creating a crime with attendant penalties for the conduct by Indians off a Reserve in an area where non-Indians, who were also governed by federal law, were

not subject to any such restriction.

The fundamental distinction between the present case and that of Drybones, however, appears to me to be that the impugned section in the latter case could not be enforced without denying equality of treatment in the administration and enforcement of the law before the ordinary courts of the land to a racial group, whereas no such inequality of treatment between Indian men and women flows as a necessary result of the application of s. 12(1)(b) of the Indian Act.

To summarize the above, I am of opinion:

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

2. that the Bill of Rights does not require federal legislation to be declared inoperative unless it offends against one of the rights specifically guaranteed by section 1, but where legislation is found to be discriminatory, this affords an added reason for rendering it ineffective;

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

I would allow the appeal of the Attorney General of Canada against J.V. Corbiere Lavell, reverse the judgment of the Federal Court of Appeal and restore the decision of Judge B.W. Grossberg. In accordance with the terms of the order of the Federal Court of Appeal granting leave to appeal to this Court, the appellant will pay to the respondent her solicitor and client costs of the appeal and the application for leave. There should be no further order as to costs.

On the appeal of Richard Isaac and others v. Yvonne Bédard, a question was raised in this Court as to the jurisdiction of the trial court. In view of the conclusion reached on the merits, no decision is now necessary on that question. The appeal to this Court should be allowed, the judgment at trial should be reversed and the action dismissed. Under the circumstances, there should be no order as to costs in that case in any court.

ABBOTT J. (dissenting):-- The facts which are not in dispute are set out in the reasons of Ritchie and Laskin JJ. which I have had the advantage of reading. I am in agreement with the reasons of Laskin J. and wish to add only a few observations.

I share his view that the decision of this Court in The Queen v. Drybones [[1970] S.C.R. 282] cannot be distinguished from the two cases under appeal although in these two appeals the consequences of the discrimination by reason of sex under s. 12(1)(b) of the Indian Act are more

serious than the relatively minor penalty for the drinking offence under s. 94 of the Act which was in issue in Drybones.

In that case, this Court rejected the contention that s. 1 of the Canadian Bill of Rights provided merely a canon of construction for the interpretation of legislation existing when the Bill was passed. With respect I cannot interpret "equality before the law" as used in s. 1(b) of the Bill as meaning simply "the equal subjection of all classes to the ordinary law of the land as administered by the ordinary courts" to use the language of Dicey which is quoted in the reasons of Ritchie J.

Unless the words "without discrimination by reason of race, national origin, colour, religion or sex" used in s. 1 are to be treated as mere rhetorical window dressing, effect must be given to them in interpreting the section. I agree with Laskin J. that s. 1(b) must be read as if those words were recited therein.

In my view the Canadian Bill of Rights has substantially affected the doctrine of the supremacy of Parliament. Like any other statute it can of course be repealed or amended, or a particular law declared to be applicable notwithstanding the provisions of the Bill. In form the supremacy of Parliament is maintained but in practice I think that it has been substantially curtailed. In my opinion that result is undesirable, but that is a matter for consideration by Parliament not the courts.

Ritchie J. said in his reasons for judgment in Drybones that the implementation of the Bill of Rights by the courts can give rise to great difficulties and that statement has been borne out in subsequent litigation. Of one thing I am certain the Bill will continue to supply ample grist to the judicial mills for some time to come.

I would dismiss both appeals with costs.

The Judgment of Hall, Spence and Laskin JJ. was delivered by

LASKIN J. (dissenting):-- These two appeals, which are here by leave respectively of the Federal Court of Appeal (as to Attorney General of Canada v. Lavell, under s. 31(2) of the Federal Court Act, 1970 (Can.), c. 1) and of this Court (as to Isaac et al v. Bédard, under s. 39 of the Supreme Court Act, R.S.C. 1970, c. S-19, as enacted by R.S.C. 1970, 1st Supp., c. 44, S. 2) involve consideration again of the principles governing the application of the Canadian Bill of Rights, 1960 (Can.), c. 44, as laid down by this Court in The Queen v. Drybones [[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.

The issues in both appeals are, in the main, as simple as that. They focus on s. 12(1)(b) of the Indian Act, R.S.C. 1970, c. I-6 which is 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 the woman is subsequently the wife or widow of a person described in section 11.

There are other provisions of the Act to which I will refer later in these reasons but for the moment it is enough to say that no similar disqualification is visited upon an Indian man who marries a non-Indian woman.

In the Lavell case, the Federal Court of Appeal held that s. 12(1)(b) was inoperative in purporting to disentitle the respondent, born an Indian, to continued registration as a member of the Wikwemikong Band of Indians because she had married a man who was not an Indian. The marriage took place on April 11, 1970 and on December 7, 1970, the respondent's name was removed from the Band membership list by the Registrar under the Indian Act. After protest by the respondent and denial thereof by the Registrar, the matter was referred for review to Judge B.W. Grossberg, of the York County Court pursuant to s. 9(3) of the Indian Act. Judge Grossberg in his reasons concluded that there was no violation of s. 12(1)(b) of the Canadian Bill of Rights because the respondent on her marriage had equality in that status with all other Canadian married females, both as to rights and obligations. He rejected the contention that discrimination by reason of sex within the class of Indians brought the Canadian Bill of Rights into play. There was, in his opinion, no inequality before the law when the respondent was in no different position than other fellow Canadians who were married females. This decision was reversed by the Federal Court of Appeal which held that because the Indian Act prescribed a different result in the case of an Indian woman who married a non-Indian man from that which followed when an Indian man married a non-Indian woman, there was discrimination by reason of sex in violation of the Canadian Bill of Rights; and, further, that this discrimination infringed the respondent's right to equality with other Indians before the law.

In Isaac et al v. Bédard, Osler J. of the Ontario Supreme Court also held that s. 12(1)(b) of the Indian Act was inoperative, agreeing with the decision of the Federal Court of Appeal in the Lavell case which he considered to be in accordance with the Drybones case. In the Bédard case, as in the Lavell case, the respondent, born a full blooded Indian, had married a non-Indian man in 1964 but she separated from him in 1970 and returned with the two children of the marriage to the Six

Nations Reserve where she had been born and took possession of a house which had been left to her under her mother's will, the terms of which had been approved, as required by the Indian Act, by the Council of the Six Nations and by an official on behalf of the Minister of Indian Affairs. The defendants, members of the Council, passed a number of resolutions purporting to give the respondent permission for successive limited periods to reside on the Reserve, but she was to dispose of the property during that time. On September 7, 1971, after having previously informed the respondent that there would be no further permission, the Council passed a resolution requesting the District Supervisor to serve a notice to quit on the respondent. Thereupon the respondent sued to enjoin her expulsion and also sought declaratory relief. The application for an injunction was later withdrawn and counsel agreed that a declaration only would be sought as against the members of the Band Council, the appellants in this Court. The respondent's name was removed from the membership list of her Band after she brought action but before delivery of her statement of claim.

Osler J. determined that "there is plainly discrimination by reason of sex with respect to the rights of an individual to the enjoyment of property"; and further 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" and is in contravention of the Canadian Bill of Rights. He declared that all acts of the Council of the Band and of the District Supervisor purportedly based on s. 12(1)(b) were without effect.

In both cases, which were argued together, leave was given to various bodies and organizations and to a number of individuals to intervene by representation and by submissions to this Court. The position of the Attorney General of Canada in the Lavell case was supported by counsel appearing on behalf of The Indian Association of Alberta, The Union of British Columbia Indian Chiefs, The Manitoba Indian Brotherhood Inc., The Union of New Brunswick Indians, The Indian Brotherhood of the Northwest Territories, The Union of Nova Scotia Indians, The Union of Ontario Indians, The Federation of Saskatchewan Indians, The Indian Association of Quebec, The Yukon Native Brotherhood and The National Indian Brotherhood, by counsel appearing on behalf of the Six Nations Band and by counsel appearing on behalf of the Treaty Voice of Alberta Association. The position of the respondent was supported by counsel appearing for the Native Council of Canada, by counsel appearing for Rose Wilhelm, Alberta Committee on Indian Rights for Indian Women Inc., Viola Shannacappo, University Women's Club of Toronto and University Women Graduates Limited, The North Toronto Business and Professional Women's Club Inc. and Monica Agnes Turner, and by counsel for Anishnawbekwek of Ontario Incorporated. There was the same division of support for the appellants and the respondent in the Bédard case, in which the Attorney General of Canada also intervened to support the position of the appellants.

An issue of jurisdiction was raised in the Bédard case with which it will be convenient to deal at this point. That issue is whether it was open to Osler J., as a member of a provincial superior Court, to entertain an action for declaratory relief in this case, or whether exclusive jurisdiction resided in the Federal Court by virtue of s. 18 of the Federal Court Act, 1970 (Can.), c. 1. Osler J. was of the opinion that his jurisdiction as a Superior Court judge was not clearly taken away by s.

18 of the Federal Court Act, and he doubted also whether the Band Council was a "federal board, commission or other tribunal" within s. 2(g) of that Act.

I share the doubt of Osler J. whether a Band Council, even an elected one under s. 74 of the Indian Act (the Act also envisages that a Band Council may exist by custom of the Band), is the type of tribunal contemplated by the definition in s. 2(g) of the Federal Court Act which embraces "any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada". A Band Council has some resemblance to the board of directors of a corporation, and if the words of s. 2(g) are taken literally, they are broad enough to embrace boards of directors in respect of powers given to them under such federal statutes as the Bank Act, R.S.C. 1970, c. B-1, as amended, the Canada Corporations Act, R.S.C. 1970, c. C-32, as amended, and the Canadian and British Insurance Companies Act, R.S.C. 1970, c. I-15, as amended. It is to me an open question whether private authorities (if I may so categorize boards of directors of banks and other companies) are contemplated by the Federal Court Act under s. 18 thereof. However, I do not find it necessary to come to a definite conclusion here on whether jurisdiction should have been ceded to the Federal Court to entertain the declaratory action brought by Mrs. Bédard against the members of the Band Council. There is another ground upon which, in this case, I would not interfere with the exercise of jurisdiction by Osler J.

Although the Indian Act by s. 81, confers authority upon the Council of a Band to make by-laws for specified purposes, and it may also be given authority under s. 83 to make by-laws for additional specified purposes, there is nothing in the record here that indicates that the members of the Band Council proceeded under any by-law. The by-law powers include in clause (p) of s. 81 the removal and punishment of persons trespassing upon the Reserve, but in the cross-examination of the appellant Isaac on his affidavit he stated that the Band Council did not purport to remove Mrs. Bédard from the Reserve. Nor was any charge laid against her by any member of the Band Council under s. 30 of the Indian Act which makes it an offence to trespass on a Reserve. The Band Council was content to request the District Supervisor to give her a notice to quit and to leave any legal proceedings to the administrative authorities under the Indian Act. Such proceedings might have consisted of a charge of trespass or might also have been taken under s. 31 of the Indian Act which empowers the Attorney General to exhibit an information in respect of any alleged trespass upon a Reserve.

What the Band Council did do was to assume to exercise permit power in respect of Mrs. Bédard's residence on the Reserve. I use the word "assume" because in his affidavit the defendant Isaac stated that the Band Council "has at all times assumed jurisdiction to grant, refuse and revoke permission for persons who are not members of the Six Nations Band to reside upon or occupy property upon the Six Nations Reserve". The record does not disclose any statutory basis for this assumption of authority which was exercised against Mrs. Bédard by the various resolutions already referred to. Section 25 of the Indian Act, relating to the required disposition of land by an Indian who ceases to be entitled to reside thereon on a Reserve, itself specifies the period within which the disposition must be made and confers upon the responsible Minister and not upon the Band Council

the power to extend the period.

I am not satisfied that the Band Council was purporting to exercise powers conferred by the Indian Act rather than powers which it felt it had apart from the Act. It was open to the appellants to establish their authority if it was drawn from the Act, but they did not do so. This leaves the question whether in such circumstances the respondent should have been allowed to proceed by way of a declaration in the light of the fact that the Band Council's resolutions were in themselves, on the record in the case, of no legal force. They did threaten Mrs. Bédard and could have been followed up by invocation of s. 31 or by the laying of a charge under s. 30. In these circumstances, I am disposed to support the broad view taken by Osler J. in exercising his discretion to entertain Mrs. Bédard's claim for declaratory relief so that her rights could be ascertained: see Vine v. National Dock Labour Board [[1957] A.C. 488].

The contentions of the appellants in both cases in appeal, stripped of their detail, amount to a submission that the Canadian Bill of Rights does not apply to Indians on a Reserve, nor to Indians in their relations to one another whether or not on a Reserve. This submission does not deny that the effect of s. 12(1)(b) of the Indian Act is to prescribe substantive discrimination by reason of sex, a differentiation in the treatment of Indian men and Indian women when they marry non-Indians, this differentiation being exhibited in the loss by the women of their status as Indians under the Act. It does, however, involve the assertion that the particular discrimination upon which the two appeals are focused is not offensive to the relevant provisions of the Canadian Bill of Rights; and it also involves the assertion that the Drybones case is distinguishable or, if not, that it has been overcome by the re-enactment of the Indian Act in the Revised Statutes of Canada, 1970, including the then s. 94 (now s. 95) which was in issue in that case. I regard this last-mentioned assertion, which is posited on the fact that the Canadian Bill of Rights was not so re-enacted, as simply an oblique appeal for the overruling of the Drybones case.

The Drybones case decided two things. It decided first-- and this decision was a necessary basis for the second point in it--that the Canadian Bill of Rights was more than a mere interpretation statute whose terms would yield to a contrary intention; it had paramount force when a federal enactment conflicted with its terms, and it was the incompatible federal enactment which had to give way. This was the issue upon which the then Chief Justice of this Court, Chief Justice Cartwright, and Justices Abbott and Pigeon, dissented. Pigeon J. fortified his view on this main point by additional observations, bringing into consideration, inter alia, s. 91(24) of the British North America Act. The second thing decided by Drybones was that the accused in that case, an Indian under the Indian Act, was denied equality before the law, under s. 1(b) of the Canadian Bill of Rights, when it was made a punishable offence for him, on account of his race, to do something which his fellow Canadians were free to do without being liable to punishment for an offence. Ritchie J., who delivered the majority opinion of the Court, reiterated this basis of decision by concluding his reasons as follows:

> It appears to me to be desirable to make it plain that these reasons for

> judgment are 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.

It would be unsupportable in principle to view the Drybones case as turning on the fact that the challenged s. 94 of the Indian Act created an offence visited by punishment. The gist of the judgment lay in the legal disability imposed upon a person by reason of his race when other persons were under no similar restraint. If for the words "on account of race" there are substituted the words "on account of sex" the result must surely be the same where a federal enactment imposes disabilities or prescribes disqualifications for members of the female sex which are not imposed upon members of the male sex in the same circumstances.

It is said, however, that although this may be so as between males and females in general, it does not follow where the distinction on the basis of sex is limited as here to members of the Indian race. This, it is said further, does not offend the guarantee of "equality before the law" upon which the Drybones case proceeded. I wish to deal with these two points in turn and to review, in connection with the first point, the legal consequences for an Indian woman under the Indian Act when she marries a non-Indian.

It appears to me that the contention that a differentiation on the basis of sex is not offensive to the Canadian Bill of Rights where that differentiation operates only among Indians under the Indian Act is one that compounds racial inequality even beyond the point that the Drybones case found unacceptable. In any event, taking the Indian Act as it stands, as a law of Canada whose various provisions fall to be assessed under the Canadian Bill of Rights, I am unable to appreciate upon what basis the command of the Canadian Bill of Rights, that laws of Canada shall operate without discrimination by reason of sex, can be ignored in the operation of the Indian Act.

The Indian Act defines an Indian as a person who is registered as an Indian pursuant to the Act or is entitled to be so registered. It is registration or registrability upon a Band list or upon a general list that is the key to the scheme and application of the Act. The Registrar, charged with keeping the membership records, is the person to whom protests may be made by a Band Council or by an affected person respecting the inclusion or deletion of a name from the Indian Register. By s. 9(2) his decision on a protest is final subject to a reference to a judge under s. 9(3). The Lavell case arose in this way. Section 11 of the Act enumerates the persons entitled to be registered, and it is common ground that both Mrs. Lavell and Mrs. Bédard were so entitled prior to their respective marriages. Section 12 lists the classes of persons not entitled to be registered, and the only clause thereof relevant here is subsection 1(b) which I have already quoted. Section 14 has a peripheral relevance to the present case in its provision that a woman member of a Band who marries a person outside that Band ceases to be a member thereof but becomes a member of the Band of which her husband is a member. There is no absolute disqualification of an Indian woman from registrability on the Indian Register (that is, as a member on the general list) by marrying outside a Band unless the marriage is to a non-Indian.

Registration or registrability entitles an Indian as a member of a Band (and that was the status of both Mrs. Lavell and Mrs. Bédard prior to their respective marriages) to the use and benefit of the Reserve set aside for the Band. This may take the form of possession or occupation of particular land in the Reserve under an allotment by the Council of the Band with the approval of the responsible Minister, and it may be evidenced by a certificate of possession or a certificate of occupation, the latter representing possession for a limited period only. Indians may make wills disposing of their property, and it may also pass on intestacy, in either case subject to approval or control of the Minister or of a competent court; and in the case of a devise or descent of land in a Reserve the claimant's possession must be approved by the Minister under s. 49. Section 50 has only a remote bearing on the Bédard case in providing that a person who is not entitled to reside on a Reserve does not by devise or descent acquire a right to possession or occupation of land in that Reserve. It begs the question in that the issue here is whether or not Mrs. Bédard became disentitled to reside on the land in the Reserve which was left to her by her mother upon the latter's death in 1969. The fact that the respondent's brother now holds a certificate of possession of all the land formerly possessed by the mother, that certificate having been issued after the respondent transferred her interest to her brother in February, 1971, does not affect the overriding question of the respondent's right to reside on the land, having her brother's consent to residence thereon.

Indians entitled to be registered and to live on a Reserve are members of a society in which, through Band Councils, they share in the administration of the Reserve subject to overriding governmental authority. There is provision for election of councillors by Band members residing on a Reserve, and I note that there is no statutory discrimination between Indian men and women either as qualified electors or as qualified candidates for election as councillors. Other advantages that come from membership in the social unit relate to farm operations and to eligibility for governmental loans for various enumerated purposes.

Section 12(1)(b) effects a statutory excommunication of Indian women from this society but not of Indian men. Indeed, as was pointed out by counsel for the Native Council of Canada, the effect of ss. 11 and 12(1)(b) is to excommunicate the children of a union of an Indian woman with a non-Indian. There is also the invidious distinction, invidious at least in the light of the Canadian Bill of Rights, that the Indian Act creates between brothers and sisters who are Indians and who respectively marry non-Indians. The statutory banishment directed by s. 12(1)(b) is not qualified by the provision in s. 109(2) for a governmental order declaring an Indian woman who has married a non-Indian to be enfranchised. Such an order is not automatic and no such order was made in relation to Mrs. Bédard; but when made the woman affected is, by s. 110, deemed not to be an Indian within the Indian Act or any other statute or law. It is, if anything, an additional legal instrument of separation of an Indian woman from her native society and from her kin, a separation to which no Indian man who marries a non-Indian is exposed.

It was urged, in reliance in part on history, that the discrimination embodied in the Indian Act under s. 12(1)(b) is based upon a reasonable classification of Indians as a race, that the Indian Act reflects this classification and that the paramount purpose of the Act to preserve and protect the

members of the race is promoted by the statutory preference for Indian men. Reference was made in this connection to various judgments of the Supreme Court of the United States to illustrate the adoption by that Court of reasonable classifications to square with the due process clause of the Fifth Amendment and with due process and equal protection under the Fourteenth Amendment. Those cases have at best a marginal relevance because the Canadian Bill of Rights itself enumerates prohibited classifications which the judiciary is bound to respect; 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.

I do not think it is possible to leap over the telling words of s. 1, "without discrimination by reason of race, national origin, colour, religion or sex", in order to explain away any such discrimination by invoking the words "equality before the law" in clause (b) and attempting to make them alone the touchstone of reasonable classification. That was not done in the Drybones case; and this Court made it clear in Curr v. The Queen [[1972] S.C.R. 889], that federal legislation, which might be compatible with the command of "equality before the law" taken alone, may nonetheless be inoperative if it manifests any of the prohibited froms of discrimination. In short, the proscribed discriminations in s. 1 have a force either independent of the subsequently enumerated clauses (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.

This seems to me an obvious construction of s. 1 of the Canadian Bill of Rights. When that provision states that the enumerated human rights and fundamental freedoms shall continue to exist "without discrimination by reason of race, national origin, colour, religion or sex", it is expressly adding these words to clauses (a) to (f). Section 1(b) must read therefore as "the right of the individual to equality before the law and the protection of the law without discrimination by reason of race, national origin, colour, religion or sex". It is worth repeating that this is what emerges from the Drybones case and what is found in the Curr case.

There is no clear historical basis for the position taken by the appellants, certainly not in relation to Indians in Canada as a whole, and this was in effect conceded during the hearing in this Court. In any event, history cannot avail against the clear words of ss. 1 and 2 of the Canadian Bill of Rights. It is s. 2 that gives this enactment its effective voice, because without it s. 1 would remain a purely declaratory provision. Section 2 brings the terms of s. 1 into its orbit, and its reference to "every law of Canada" is a reference, as set out in s. 5(2), to any Act of the Parliament of Canada enacted before or after the effective date of the Canadian Bill of Rights. Pre-existing Canadian legislation as well as subsequent Canadian legislation is expressly made subject to the commands of the Canadian Bill of Rights, and those commands, where they are as clear as the one which is relevant here, cannot be diluted by appeals to history. Ritchie J. in his reasons in the Drybones case touched on this very point when he rejected the contention that the terms of s. 1 of the Canadian Bill of Rights must be circumscribed by the provisions of Canadian statutes in force at the date of the enactment of the Canadian Bill of Rights: see [1970] S.C.R. 282, at pp. 295-296. I subscribe fully to

the rejection of that contention. Clarity here is emphasized by looking at the French version of the Canadian Bill of Rights which speaks in s. 1 of the enumerated human rights and fundamental freedoms ((pour tout individu au Canada quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe)).

In my opinion, the appellants' contentions gain no additional force because the Indian Act, including the challenged s. 12(1)(b) thereof, is a fruit of the exercise of Parliament's exclusive legislative power in relation to "Indians, and Lands reserved for the Indians" under s. 91(24) of the British North America Act. Discriminatory treatment on the basis of race or colour or sex does not inhere in that grant of legislative power. The fact that its exercise may be attended by forms of discrimination prohibited by the Canadian Bill of Rights is no more a justification for a breach of the Canadian Bill of Rights than there would be in the case of the exercise of any other head of federal legislative power involving provisions offensive to the Canadian Bill of Rights. The majority opinion in the Drybones case dispels any attempt to rely on the grant of legislative power as a ground for escaping from the force of the Canadian Bill of Rights. The latter does not differentiate among the various heads of legislative power; it embraces all exercises under whatever head or heads they arise. Section 3 which directs the Minister of Justice to scrutinize every Bill to ascertain whether any of its provisions are inconsistent with ss. 1 and 2 is simply an affirmation of this fact which is evident enough from ss. 1 and 2.

There was an intimation during the argument of these appeals that the Canadian Bill of Rights is properly invoked only to resolve a clash under its terms between two federal statutes, and the Drybones case was relied on in that connection. It is a spurious contention, if seriously advanced, because the Canadian Bill of Rights is itself the indicator to which any Canadian statute or any provision thereof must yield unless Parliament has declared that the statute or the particular provision is to operate notwithstanding the Canadian Bill of Rights. A statute may in itself be offensive to the Canadian Bill of Rights, or it may be by relation to another statute that it is so offensive.

I would dismiss both appeals with costs.

PIGEON J.:-- I agree in the result with Ritchie J. I certainly cannot disagree with the view I did express in The Queen v. Drybones [[1970] S.C.R. 282] (at p. 304) 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 in 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, now adopt it for the main body of this important statute.

I would observe that this result does not conflict with any of our decisions subsequent to Drybones. In no case was the Canadian Bill of Rights given an invalidating effect over prior legislation.

In Lowry and Lepper v. The Queen [(1972) 26 D.L.R. (3d) 224] and in Brownridge v. The Queen [[1972] S.C.R. 926], the application of criminal legislation, past and subsequent, was held to be subject to provisions respecting a "fair hearing" and "the right to retain and instruct counsel". These decisions are important illustrations of the effectiveness of the Bill without any invalidating effect.

In Smythe v. The Queen [[1971] S.C.R. 680] it was held that provisions for stiffer penalties depending on the method of prosecution were not rendered inoperative by the Canadian Bill of Rights as infringing equality before the law, although the choice of the method of prosecution always depends on executive discretion.

In Curr v. The Queen [[1972] S.C.R. 889] recent Criminal Code provisions for compulsory breath analysis were held not to infringe the right to the "protection of the law" any more than the right to the "protection against self-crimination".

Finally, in Duke v. The Queen [[1972] S.C.R. 917] these same provisions were said not to deprive the accused of a "fair trial" although proclaimed without some paragraphs contemplating a specimen being offered and given on request to the suspect.

Appeals allowed, ABBOTT, HALL, SPENCE and LASKIN JJ. dissenting.