Supreme Court of Canada  Cour suprême du Canada

START OF FILE

DÉBUT DU DOSSIER

Supreme Court of Canada | Cour suprême du Canada

INVENTORY OF FILE CONTENTS

Casefile No.: 11026

Date Initiated: 1967

Short Style of Cause: The Queen v. DRYBONES

INVENTAIRE DES DOCUMENTS

N° de Dossier: _____

Date du dossier: _____

Intitulé: _____

_____

MOST COMMONLY OCCURRING COURT DOCUMENTS:

A) Application for Leave

- Notice of Motion on Application for leave
- ✓ Application for leave to Appeal
- Respondent's memorandum of Argument
- Discontinuance
- ✓ Minute Sheet
- ✓ Order Granting Leave to Appeal/Formal Judgment
- Bill of Costs taxed

B) Appeal

- ✓ Notice of Appeal
- ✓ Case Book
- Discontinuance
- ✓ Appellant's Factum
- ✓ Inscription
- ✓ Respondent's Factum
- ✓ Intervener's Factum
- ✓ Minute Sheet
- ✓ Formal Judgment/Oral Judgment
- ✓ Reasons for Judgment
- Taxation Documents

DOCUMENTS COURANTS:

A) Requête en autorisation

- Avis de requête en autorisation de pourvoi
- Requête en autorisation de pourvoi
- Mémoire de l'intimé
- Désistement
- Feuille des minutes
- Ordonnance/jugement
- Taxation des dépens

B) Pourvoi

- Avis de pourvoi
- Dossier imprimé sur appel
- Désistement
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- Mémoire de l'intimé
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- Feuille des minutes
- Jugement/jugement oral
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- Taxation des dépens

11026

IN THE SUPREME COURT OF CANADA

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant,

- and -

MR. JOSEPH DRYBONES

Respondent.

I, ~~Sgt. J. R.~~ Joseph Raymond Johnson ..... of the Town of Yellowknife in the Northwest Territories, a Member of the Royal Canadian Mounted Police (Peace Officer),

MAKE OATH AND SAY:

THAT I did on Friday the 17th day of November, A.D. 1967 personally serve ~~MR. JOSEPH DRYBONES~~ Mr. Brian Purdy Solicitor for the Respondent of Yellowknife in the Northwest Territories, with a true copy of the paper writings entitled NOTICE OF MOTION FOR LEAVE TO APPEAL now shown to me and marked respectively as Exhibit "A" attached to this my Affidavit, by handling the aforesaid paper writings and leaving the same with the said ~~MR. JOSEPH DRYBONES~~ Mr. Brian Purdy of Yellowknife, Northwest Territories.

THAT in the said copy of the said Exhibit "A" so served by me there were at the time of such service endorsed all the endorsements now appearing upon the original Exhibit "A" with the exception of the endorsement of same being an Exhibit as aforesaid.

SWORN BEFORE ME at the Town of Yellowknife in the Northwest Territories this 20th day of November A.D. 1967

J. R. Johnson

Notary Public for the N.W.T.

A Notary Public and Commissioner for Oaths in and for the Northwest Territories

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL
FOR THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

JOSEPH DRYBONES

Respondent

AFFIDAVIT OF SERVICE

D.S. Maxwell, Q.C.,
Deputy Attorney General of Canada,
Department of Justice,
OTTAWA 4, Ontario.

Solicitor for the Appellant.

IN THE SUPREME COURT OF CANADA

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant,

- and -

MR. JOSEPH DRYBONES

Respondent.

I, ~~Sgt. J. R.~~ Joseph Raymond Johnson ..... of the Town of Yellowknife in the Northwest Territories, a Member of the Royal Canadian Mounted Police (Peace Officer),

MAKE OATH AND SAY:

THAT I did on Friday the 17th day of November, A.D. 1967 personally serve ~~MR. JOSEPH DRYBONES~~ Mr. Brian Purdy Solicitor for the Respondent of Yellowknife in the Northwest Territories, with a true copy of the paper writings entitled NOTICE OF MOTION FOR LEAVE TO APPEAL now shown to me and marked respectively as Exhibit "A" attached to this my Affidavit, by handling the aforesaid paper writings and leaving the same with the said ~~MR. JOSEPH DRYBONES~~ Mr. Brian Purdy of Yellowknife, Northwest Territories.

THAT in the said copy of the said Exhibit "A" so served by me there were at the time of such service endorsed all the endorsements now appearing upon the original Exhibit "A" with the exception of the endorsement of same being an Exhibit as aforesaid.

SWORN BEFORE ME at the Town of Yellowknife in the Northwest Territories this 20th day of November A.D. 1967

J. R. Johnson

Notary Public for the N.W.T.

A Notary Public and Commissioner for Oaths in and for the Northwest Territories

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL
FOR THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

JOSEPH DRYBONES

Respondent

AFFIDAVIT OF SERVICE

D.S. Maxwell, Q.C.,
Deputy Attorney General of Canada,
Department of Justice,
OTTAWA 4, Ontario.

Solicitor for the Appellant.

BRIAN PURDY
BARRISTER
SOLICITOR
NOTARY PUBLIC
(MEMBER N.W.T. AND ALBERTA BAR) P.O. BOX 818 YELLOWKNIFE, N.W.T. PHONE 873-4749

OUR FILE: 67-132

YOUR FILE:

November 15, 1967

Department of Justice
Criminal Law Section
OTTAWA 4, Ontario

RECEIVED
NOV 22 1967
DEPARTMENT OF JUSTICE

Att: Mr. D. H. Christie, Esq.

Re: The Queen vs. Joseph Drybones

Dear Sir:

Thank you for your letter of November 8th. We have written today to Mr. R. H. Barrigar of the firm of Smart & Biggar, 70 Gloucester Street, in Ottawa, asking him to act as our agent in this matter on your application on Monday NOvember 27th.

We have discussed the matter with Mr. Drybones, and he has instructed us not oppose your application.

Yours very truly,

Brian Purdy

BRIAN PURDY

BP:jv

22/11

11026

M.B. p._____

Cause: Queen v Dr Gloves.

Amount involved:

Nature of Case:

No. of pages: No. of folios:

Case

App. Factum

Resp. Factum

Coram: C.J., J., S.

Counsel: for Appellant (or Applicant) - D. Christie Q. C.,

for Respondent - F Harrigor

Record of Hearing

Date	Counsel	Representing	Time From	Time To

Result: leave granted - Applt to pay costs of resp. in any event of the appeal on undertaking that writ fix arrangements or may be spoken to.

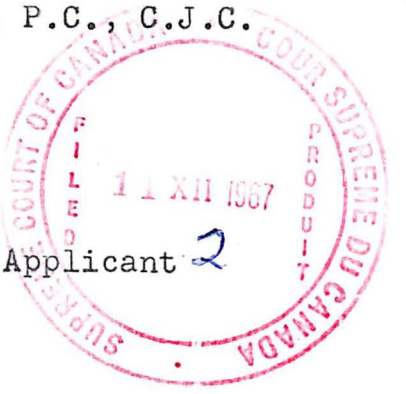
11026

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

Tuesday, the 28th day of November, 1967

BEFORE: THE HONOURABLE JOHN ROBERT CARTWRIGHT, P.C., C.J.C.
THE HONOURABLE MR. JUSTICE JUDSON
THE HONOURABLE MR. JUSTICE SPENCE



BETWEEN:

HER MAJESTY THE QUEEN

Applicant 2

and

JOSEPH DRYBONES

Respondent

O R D E R

THE MOTION of the Applicant herein for an Order Granting Leave to Appeal to this Honourable Court from the judgment of the Court of Appeal for the Northwest Territories dated the 25th day of August 1967 and supplemented by judgment dated the 21st day of September 1967, on the ground that there is an important question of law involved, namely:-

> whether the Court of Appeal for the Northwest Territories erred in finding that Section 94 of the Indian Act R.S.C. 1952 cap. 149 as amended is rendered inoperative by reason of the Canadian Bill of Rights, Stat. Can. 1960 cap. 44,

having come on for hearing before this Honourable Court on this day in the presence of Counsel for the Applicant and Counsel for the Respondent, and upon hearing what was alleged by Counsel aforesaid:

Approved as to form
R.S. Saunders of Smart & Biggar
Agents for Solicitor for Respondent

THIS COURT DOTH ORDER AND ADJUDGE that the Applicant herein be, and hereby is, granted leave to appeal to this Court from the said judgment of the Court of Appeal for the Northwest Territories on the undertaking of Counsel that suitable arrangements be made for the cost of representation of the Respondent and if such cannot be made, this Court may then be spoken to.

~~DATED this~~ day of ~~1967.~~

REGISTRAR

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL
FOR THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Applicant,

and

JOSEPH DRYBONES

Respondent.

O R D E R

D.S. Maxwell, Q.C.,
Deputy Attorney General of Canada,
Department of Justice,
OTTAWA, Ontario.

11026

Her Majesty The Queen

v. N.W.T.

Joseph Drybones

Dept of Justice

Only app. Factum missing. Should be on October term

11026

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

B E T W E E N:



HER MAJESTY THE QUEEN

Appellant,

-and-

JOSEPH DRYBONES

Respondent.

I, Clarence Donald MacKinnon, Barrister and Solicitor, of the City of Ottawa in the County of Carleton and Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. THAT I am a legal officer of the Department of Justice and as such have knowledge of the matters hereinafter deposed to.

2. THAT I did on Monday, the 11th day of December, A.D. 1967 personally serve Mr. R.H. Barrigar of the law firm of Smart & Biggar of the City of Ottawa in the Province of Ontario, the booked agent for the solicitor for the respondent, with a true copy of the paper writings entitled NOTICE OF APPEAL now shown to me and marked respectively as Exhibit "A" attached to this my Affidavit and with a true copy of the ORDER of the Supreme Court of Canada granting Leave to Appeal now shown to me and

marked respectively as Exhibit "B" attached to this my Affidavit, by handing the aforesaid paper writings and leaving the same with the said Mr. R.H. Barrigar of the City of Ottawa, in the Province of Ontario.

3. THAT in the said copies of the said Exhibits "A" and "B" so served by me there were at the time of such service endorsed all the endorsements now appearing upon the original Exhibits "A" and "B" with the exception of the endorsement of same being Exhibits as aforesaid.

SWORN BEFORE ME at the City of Ottawa in the County of Carleton, Province of Ontario, this 12 day of December, 1967.

A Commissioner for taking Affidavits within the Province of Ontario.

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL
FOR THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Appellant,

-and-

JOSEPH DRYBONES

Respondent.

AFFIDAVIT OF SERVICE

D.S. Maxwell, Q.C.,
Deputy Attorney General of Canada,
Department of Justice,
OTTAWA 4, Ontario.

EXHIBIT A copy

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Appellant,

-and-

JOSEPH DRYBONES

Respondent.

NOTICE OF APPEAL

TAKE NOTICE that the above noted Appellant hereby appeals to the Supreme Court of Canada from the Judgment of the Court of Appeal of the Northwest Territories dated the 25th day of August, 1967, and supplemented by Judgment dated the 21st day of September, 1967, dismissing the appeal of the above noted Appellant upon the following ground:-

THAT the Court of Appeal for the Northwest Territories erred in upholding the decision of the Territorial Court of the Northwest Territories acquitting the Respondent of an offence contrary to Section 94(b) of the Indian Act, R.S.C. 1952, ch. 149, on the ground that Section 94 of

the Indian Act is rendered inoperative by reason of the Canadian Bill of Rights, Stat. Can. 1960, ch. 44.

DATED at Ottawa, in the Province of Ontario, this 12th day of December, 1967.

D.S. Maxwell,
Deputy Attorney General of Canada.

TO: The Respondent and his Solicitor

AND TO: The Registrar of this Honourable Court.

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL
FOR THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Appellant,

-and-

JOSEPH DRYBONES

Respondent.

NOTICE OF APPEAL

D.S. Maxwell, Q.C.,
Deputy Attorney General of Canada,
Department of Justice,
OTTAWA, Ontario.

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES.

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant,

and

JOSEPH DRYBONES

Respondent.

AGREEMENT AS TO CONTENTS OF CASE

IT IS AGREED between the parties hereto that the case on appeal shall comprise the following:

PART I

1) Information and complaint of Constable M. A. Mohr against the respondent herein dated the 10th day of April 1967.

2) Notice of Appeal on behalf of the Respondent to the Territorial Court of the Northwest Territories dated the 26th day of April 1967.

3) Notice of Appeal on behalf of the Appellant to the Court of Appeal for the Northwest Territories dated the 27th day of June 1967.

4) Notice of Intention to Cross Appeal on behalf of the Respondent to the Court of Appeal for the Northwest Territories dated the 30th day of June 1967.

5) Notice of Motion for Leave to Appeal to the Supreme Court of Canada on behalf of the Appellant dated the 14th day of November 1967

6) Affidavit of Clarence Donald MacKinnon dated the 9th day of November 1967 in support of the Notice of Motion dated the 14th day of November 1967.

7) Order of the Supreme Court of Canada granting leave to appeal herein dated the 28th day of November 1967.

8) Notice of Appeal to the Supreme Court of Canada dated the 11th day of December 1967.

9) Agreement as to Contents of Case on Appeal.

PART II - EVIDENCE - Nil

PART III - EXHIBITS - Nil

PART IV - JUDGMENTS, REASON FOR JUDGMENTS

1) Judgment of John Anderson Thompson, a Justice of the Peace convicting the accused (Respondent) dated the 10th day of April 1967.

2) Judgment of the Territorial Court of the Northwest Territories acquitting the accused respondent dated the 5th day of June 1967.

3) Reasons for Judgment of the Honourable Mr. Justice W.G. Morrow of the Territorial Court of the Northwest Territories dated the 5th day of June 1967.

4) Judgment of the Court of Appeal for the Northwest Territories dated the 14th day of September 1967.

5) Reasons for Judgment of the Court of Appeal for the Northwest Territories dated the 25th day of August 1967.

6) Supplementary Reasons for Judgment of the Territorial Court of the Northwest Territories dated the 21st day of September 1967.

7) Certificate of the Registrar of the Court of Appeal for the Northwest Territories.

8) Certificate of the Solicitor.

DATED this 18th day of December 1967.

D.H. Christie
Solicitor for the Appellant

Brian Purdy
per R.H. Bauman
Solicitor for the Respondent

Solicitor's Certificate.

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant,

and

JOSEPH DRYBONES

Respondent,

SOLICITOR'S CERTIFICATE

I, D. H. CHRISTIE, hereby certify that I have closely examined the annexed print of the case in appeal to the Supreme Court of Canada and verily believe that the same is a true and correct reproduction of the originals of which they purport to be copies and that all reasonable methods have been taken to attain that end and that the same has been proofread.

D. H. Christie

Solicitor for the Appellant

11026

Reg. No. 20318

GOVERNMENT OF THE PROVINCE OF ALBERTA

JUDICIAL OFFICES

OUR FILE N.W.T. App. 80

YOUR FILE _____

THE COURT HOUSE,
EDMONTON, Alberta,
January 2nd, 1968,

Registrar,
Supreme Court of Canada,
OTTAWA 4, Ontario.

Dear Sir:

RE: REGINA -vs- JOSEPH DRYBONES
N. W. T. App. 80

I am returning the case on Appeal with the Certificate to Registrar duly signed.

Also enclosed are the files from the Magistrate's Court, the Territorial Court with exhibits one and two and the Court of Appeal for the Northwest Territories.

Kindly return same when they have served their purpose.

Yours very truly,

Owen D. Lowe,
for Registrar.

ODL:ceh

Encl.

11026

OFFICES: TORONTO-DOMINION BANK CHAMBERS

AGENT OF THE ATTORNEY GENERAL

D. L. TENNENT, B.A., LL.B.
Barrister and Solicitor

YORKTON, SASKATCHEWAN

PHONE 783-3651

FILE REFERENCE:

January 17, 1969

The Registrar,
The Supreme Court of Canada,
OTTAWA, Ontario.

Dear Sir:-

Re: Your Drybones vs Regina
N.W. Territories
1967 60 WWR 321
Indians- Intoxication "Off Reserve"
Re: My Raymond RAZOR vs The Queen
Sec. 96(a) Unlawful Possession of
Intoxicants D.C. Appeal Dept. of Justice
Reference No. 213738
Det Ref: 67K 400-17
S/D Ref: 67Y 400-1/231
"F" Div. Ref: 67F 400.

****

Under date of June 3rd last I had inquired as to anticipated hearing date and disposition of your above Drybones file.

You were kind enough to reply under date of June 5th last advising that the Appeal had not yet come on for hearing, however, was anticipated to be on the list commencing Oct. lrst last presuming the A.G. of C. factum was filed.

Since as indicated the writer has interest in view of the above Razor case being adjourned sine die pending delivery of the Drybones decision I would be pleased if you could advise if the Drybones matter was disposed of at the Oct. sittings and if so I would be pleased to receive a copy of the Judgment or advice if it was set over to a later sittings.

Yours truly

D.L. TENNENT

Per: D. L. Tennent

Acting Agent of the Minister of Justice.

DLT/cb

Heard Oct 28/68

SUPREME COURT
JAN 20 1968
OF CANADA

RT KJM
RT.
AT.

11026

IN THE SUPREME COURT OF CANADA

On Appeal from the Court of Appeal for the Northwest Territories

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

- and -

JOSEPH DRYBONES

Respondent

This is Exhibit "A" referred to in my Affidavit dated 20 day of November, 1967 which is attached.

(sgd) J. R. Johnson

APPLICATION FOR LEAVE TO APPEAL

This is Exhibit " A " to the affidavit of Joseph Raymond Johnson sworn before me at the Town of Yellowknife in the Northwest Territories this 20th day of November, 1967

G. Brian Purdy, Esq.
A NOTARY PUBLIC IN AND FOR THE NORTHWEST TERRITORIES.
MY COMMISSION EXPIRES
Yellowknife, Barrister & Solicitor
Northwest Territories.

D. S. Maxwell, Q.C.,
Deputy Attorney General of Canada,
Department of Justice,
OTTAWA, Ontario.

Solicitor for the Appellant.

Solicitor for the Respondent.

IN THE SUPREME COURT OF CANADA

On Appeal from the Court of Appeal for the Northwest Territories

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

- and -

JOSEPH DRYBONES

Respondent

APPLICATION FOR LEAVE TO APPEAL

D. S. Maxwell, Q.C.,
Deputy Attorney General of Canada,
Department of Justice,
OTTAWA, Ontario.

Solicitor for the Appellant.

G. Brian Purdy, Esq.,
Yellowknife,
Northwest Territories.

Solicitor for the Respondent.

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IN THE SUPREME COURT OF CANADA
ON APPEAL FROM THE COURT OF APPEAL
FOR THE NORTHWEST TERRITORIES

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant,

and

JOSEPH DRYBONES

Respondent.

NOTICE OF MOTION FOR LEAVE TO APPEAL

TAKE NOTICE that application will be made to this Honourable Court by Counsel on behalf of the Attorney General of Canada on Monday, the 27th day of November, 1967 at the hour of 10:30 o'clock in the forenoon, or so soon thereafter as Counsel may be heard, for an order granting leave to appeal to this Honourable Court from the decision of the Court of Appeal for the Northwest Territories pronounced on the 25th day of August, 1967 and supplemented by judgment dated the 21st day of September, 1967 dismissing the appellant's appeal from a judgment of His Lordship Mr. Justice W. G. Morrow of the Territorial Court of the Northwest Territories pronounced at Yellowknife, in the Northwest Territories on the 5th day of June, 1967 reversing an order made at Yellowknife by Mr. John Anderson Thompson, a Justice of the Peace in and for the Northwest Territories,

on April 10, 1967 convicting the Respondent, an Indian, on a charge that he was on or about the 8th day of April, 1967 at Yellowknife unlawfully intoxicated off a reserve, contrary to subsection (b) of section 94 of the Indian Act, R.S.C. 1952, c. 149.

AND FURTHER TAKE NOTICE that the question of law upon which the Application for Leave to Appeal is based is that the Court of Appeal for the Northwest Territories erred in finding that section 94 of the Indian Act is rendered inoperative by reason of the Canadian Bill of Rights.

AND FURTHER TAKE NOTICE that in support of this Application will be read the Reasons for Judgment of the Court of Appeal for the Northwest Territories, the Affidavit of Clarence Donald MacKinnon, sworn the 9th day of November, 1967, and such further and other material as Counsel may advise and this Honourable Court may permit.

DATED at Ottawa in the Province of Ontario, this 14th day of November, 1967.

D.S. Maxwell,
Deputy Attorney General
of Canada

TO: The Registrar of the
Supreme Court of Canada;

AND TO: Joseph Drybones, Esq.,
the Respondent;

AND TO: Brian Purdy, Esq.,
Counsel for the Respondent.

IN THE SUPREME COURT OF CANADA
ON APPEAL FROM THE COURT OF APPEAL
FOR THE NORTHWEST TERRITORIES

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant,

and

JOSEPH DRYBONES

Respondent.

AFFIDAVIT

I, Clarence Donald MacKinnon, Barrister and Solicitor, of the City of Ottawa in the County of Carleton and Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. THAT I am a legal officer of the Department of Justice and as such have knowledge of the matters hereinafter deposed to.

2. THAT on the 10th day of April 1967 an Information was sworn charging "... that Joseph DRYBONES of Yellowknife, Northwest Territories, on or about the 8th day of April, A.D. 1967, at Yellowknife, in the Northwest Territories, being an Indian, was unlawfully intoxicated off a reserve, contrary to Section 94(b) of the Indian Act".

3. THAT on the 10th day of April 1967 the Respondent entered a plea of guilty to said charge before His Worship John Anderson Thompson, a Justice of the Peace in and for the Northwest Territories, and was sentenced to pay a fine

of ten dollars and costs and, in default of payment, three days' imprisonment.

4. THAT the Respondent appealed by way of trial de novo and the appeal was allowed on the 5th day of June, 1967, by Mr. Justice W.G. Morrow of the Territorial Court of the Northwest Territories.

5. THAT counsel on behalf of the Attorney General of Canada made application for leave to appeal to the Court of Appeal for the Northwest Territories which was granted, but the appeal was dismissed by said Court on the 25th day of August, 1967.

6. THAT in dismissing the appeal the Northwest Territories Court of Appeal held that Section 94 of the Indian Act, R.S.C. 1952, c. 149, has been rendered inoperative by the Canadian Bill of Rights, Statutes of Canada 1960, c. 44.

SWORN BEFORE ME at the City of Ottawa in the County of Carleton, Province of Ontario, this 9th day of November, 1967.

sgd: Pauline Sprague

A Commissioner for taking Affidavits within the Province of Ontario.

sgd: Clarence Donald MacKinnon

Criminal Code
Form 2

(Sections 439 and 69

INFORMATION

CANADA)
) (ON BEHALF OF HER MAJESTY THE QUEEN)
NORTHWEST TERRITORIES)

This the information of Cst. M.A. MOHR, a member of the Royal Canadian Mounted Police, Yellowknife, Northwest Territories, (Peace Officer), hereinafter called the informant.

The informant says that he has reasonable and probable grounds to believe and does believe that Joseph DRYBONES of Yellowknife, Northwest Territories on or about the 8th day of April A.D. 1967 at Yellowknife in the Northwest Territories, being an Indian, was unlawfully intoxicated off a reserve, contrary to Section 94(b) of the Indian Act.

SWORN BEFORE ME this 10th day
of April A.D. 1967 at
Yellowknife, Northwest
Territories

sgd: John Anderson Thompson, MS, JP.
A Justice of the Peace in and for
the Northwest Territories.

sgd: M.A. Mohr
(Signature of Informant)

I hereby certify that the foregoing is a true copy of the original of which it purports to be a copy.

sgd: J. Stewart
CLERK OF THE COURT

(S E A L)

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

JUDICIAL DISTRICT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN on the information and complaint of Const. M.A. Mohr, a member of the Royal Canadian Mounted Police,

Respondent,

- and -

JOSEPH DRYBONES

Appellant.

NOTICE OF APPEAL

TAKE NOTICE THAT the appellant be aggrieved by a conviction on the 10th day of April, 1967, by John Anderson-Thompson, a Justice of the Peace in and for the Northwest Territories, on a certain information and complaint whereby the appellant was charged that he was, on or about the 8th day of April, 1967, at Yellowknife in the Northwest Territories, being an Indian, was unlawfully intoxicated off a reserve, contrary to Section 94 (b) of the Indian Act, whereupon the appellant pleaded guilty and was sentenced by the said Justice of the Peace to pay a fine of $10.00 and costs, and in default of payment to spend three days in custody;

THE APPELLANT intends to appeal anddoes hereby appeal to the Territorial Court of the Northwest Territories, Judicial District of the Northwest Territories, at the next sittings thereof to be held at Yellowknife, in the Northwest Territories, or at such sittings thereof as this appeal may be lawfully entered and heard, against the said conviction only.

AND FURTHER TAKE NOTICE that the appellant appeals his conviction on the following grounds;

1. That the said conviction was contrary to law;
2. That the said conviction, had there been no plea of guilty, was against the evidence and the weight of the evidence;
3. That the learned Justice of the Peace failed to give the appellant the benefit of the reasonable doubt of his guilt which became apparent in the Crown's speach to sentence, and failed to direct that the plea of guilty be changed.

AND FURTHER TAKE NOTICE that the appellant will ask for leave of this Honourable Court to make an application to substitute a plea of not guilty for the plea of guilty entered before the said Justice of the Peace on the following grounds:

1. That the appellant does not speak English, or adequate English, and was not given an adequate interpretation of the proceedings.
2. That the interpretation of the charge to the appellant was incorrect, and accordingly the appellant did not understand the true nature or consequences of the charge against him.
3. That the appellant was not advised of his right to counsel and was given no reasonable opportunity to obtain counsel, contrary to the Bill of Rights.

DATED at the Town of Yellowknife, in the Northwest Territories this 26th day of April, 1967.

BRIAN PURDY

(sgd: Brian Purdy)

Solicitor for the Appellant

TO: The Clerk of the Court,
Court House,
Yellowknife, N.W.T.

AND TO: Mr. John Anderson-Thompson,
Justice of the Peace,
Yellowknife, N.W.T.

AND TO: Const. M. A. Mohr,
R. C. M. P.,
Yellowknife, N.W.T.

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

JUDICIAL DISTRICT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN on the information and complaint of Const. M.A. Mohr, a member of the Royal Canadian Mounted Police — Plaintiff

- and -

JOSEPH DRYBONES — Defendant

AFFIDAVIT OF SERVICE

I, GORDON BRIAN PURDY, Barrister and Solicitor, of the Town of Yellowknife in the Northwest Territories, MAKE OATH AND SAY:

THAT I did, on Wednesday, the 26th day of April A.D. 1967 personally serve CONST. M.A. MOHR, with true copies of the paper writing NOTICE OF APPEAL now shown to me and marked respectively as Exhibit "A" to this my affidavit, by delivering such copies to and leaving the same with the said CONST. M.A. MOHR at Yellowknife, Northwest Territories.

THAT in the said copy of the said Exhibit "A" so served by me there were at the time of such service endorsed all the endorsements now appearing upon the original Exhibit "A" with the exception of the endorsement of same being an Exhibit as aforesaid.

SWORN BEFORE ME at the Town of Yellowknife in the Northwest Territories, this 27th day of April A.D. 1967

sgd: J. M. Bellis

A Notary Public in and for the Northwest Territories.

sgd: Brian Purdy

(S E A L)

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

JUDICIAL DISTRICT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN on the information and complaint of Const. M.A. Mohr, a member of the Royal Canadian Mounted Police

Plaintiff

- and -

JOSEPH DRYBONES

Defendant

AFFIDAVIT OF SERVICE

I, GORDON BRIAN PURDY, Barrister and Solicitor, of the Town of Yellowknife in the Northwest Territories, MAKE OATH AND SAY:

THAT I did, on Thursday, the 27th day of April A.D. 1967 personally serve MR. JOHN ANDERSON-THOMPSON, Justice of the Peace, with true copies of the paper writings NOTICE OF APPEAL now shown to me and marked respectively as Exhibit "A" to this my affidavit, by delivering such copies to and leaving the same with the said JOHN ANDERSON-THOMPSON at Yellowknife, Northwest Territories.

THAT in the said copy of the said Exhibit "A" so served by me there were at the time of such service endorsed all the endorsements now appearing upon the original Exhibit "A" with the exception of the endorsement of same being an Exhibit as aforesaid.

SWORN BEFORE ME at the Town of Yellowknife in the Northwest Territories, this 27th day of April A.D. 1967

sgd: J. M. Bellis

A Commissioner of Oaths in the Northwest Territories

(S E A L)

sgd: Brian Purdy

IN THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Applicant

- and -

JOSEPH DRYBONES

Respondent

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE that Orval J.T. Troy, being Crown Counsel and agent of the Attorney-General of Canada will apply for leave to appeal and does hereby appeal to this Honourable Court from the decision of the Honourable Mr. Justice W. G. Morrow, Judge of the Territorial Court of the Northwest Territories, made the 5th day of June, A.D. 1967, at Yellowknife in the Northwest Territories, allowing the Appeal of the Respondent from his conviction by His Worship, John Anderson-Thompson, a Justice of the Peace in and for the Northwest Territories, made the10th day of April, A.D. 1967 at Yellowknife in the Northwest Territories, upon the following offence, namely;

1. That the said Respondent, Joseph Drybones of Yellowknife, Northwest Territories, on or about the 8th day of April A.D. 1967 at Yellowknife in the Northwest Territories, being an Indian, was unlawfully intoxicated off a reserve, contrary to Section 94(b) of the Indian Act, whereupon the Respondent aforesaid was fined ten dollars ($10.00) and costs of three dollars and fifty cents ($3.50) and in default to spend three (3) days in custody (and was given one month to pay the fine and costs aforesaid).

AND TAKE NOTICE that the grounds of the said appeal are as follows:

(a) That the learned Judge of the Territorial Court erred in law in allowing the Appeal of the Respondent on the grounds that Section 94(b) of the Indian Act is inoperative and offends the basic rights and freedoms guaranteed by the Canadian Bill of Rights and in particular Section 1(b) of the said Canadian Bill of Rights.

(b) That the learned Judge of the Territorial Court erred in law in allowing the Appeal of the Respondent on the grounds that the "intoxication sections" of the Indian Act, "abrogate, abridge, and infringe" the Canadian Bill of Rights.

AND FURTHER TAKE NOTICE that this appeal is to this Honourable Court at the next sitting thereof to be holden at Yellowknife, Northwest Territories or at such other time and place as this Honourable Court may designate, in pursuance of the provisions of the Criminal Code of Canada in that behalf and the rules respecting appeals to the Court of Appeal of the Northwest Territories.

DATED AT the Town of Yellowknife in the Northwest Territories, this 27th day of June, A.D. 1967.

sgd: Orval J.T. Troy
.....
Crown Counsel and Agent for the
Attorney General of Canada

TO: Mr. Joseph Drybones,
Yellowknife,N.W.T.

Mr. Justice W.G. Morrow,
Judge of the Territorial Court,
Yellowknife, N.W.T.

Mr. A. Stewart (4)
Deputy Registrar of the Court of Appeal
Yellowknife, N.W.T.

I hereby certify that the foregoing is a true copy of the original of which it purports to be a copy.

sgd: A. Stewart
Clerk of the Court
(S E A L)

Mr. C.G. Cioni,
Registrar of the Court of Appeal
Edmonton, Alberta

Mr. J. C. Cavanagh, Q.C.,
Agent of the Attorney General of Canada,
c/o Cavanagh, Henning, Buchanan, Kerr & Witten,
Barristers and Solicitors,
900 Bank of Montreal Building,
Edmonton, Alberta.

Mr. Brian Purdy,
Barrister and Solicitor,
Box 818,
Yellowknife, N.W.T.

IN THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

BETWEEN:

JOSEPH DRYBONES — Applicant

-and-

HER MAJESTY THE QUEEN — Respondent

NOTICE OF INTENTION TO CROSS-APPEAL

WHEREAS a Notice of Application for Leave to Appeal has been filed by the Agent for the Attorney-General of Canada from the judgment of the Honourable Mr. Justice W.G. Morrow pronounced the 5th day of June, 1967 at Yellowknife, in the Northwest Territories allowing the appeal of the applicant from his conviction by His Worship, John Anderson-Thompson, a Justice of the Peace in and for the Northwest Territories, made the 10th day of April, A.D. 1967 at Yellowknife in the Northwest Territories, upon the following offence, namely:

1. That the said Applicant, Joseph Drybones, of Yellowknife, in the Northwest Territories, on or about the 8th day of April, A.D. 1967 at Yellowknife in the Northwest Territories, being an Indian, was unlawfully intoxicated off a reserve, contrary to Section 94 (b) of the Indian Act, whereupon the Applicant aforesaid was fined ten dollars ($10.00) and costs of three dollars and fifty cents ($3.50) and in default to spend three (3) days in custody (and was given one month to pay the fine and costs aforesaid).

AND WHEREAS the learned Mr. Justice W.G. Morrow rejected the argument of the Applicant upon appeal that an Indian may not be convicted under Section 94 (b) of the Indian Act in the Northwest Territories and disallowed the said appeal of the Applicant on that ground;

TAKE NOTICE that the applicant intends to apply for leave to cross-appeal and does hereby cross-appeal pursuant to the provisions of Rules 607 and 608 of the Consolidated Rules and Rule 13 of the Rules respecting Criminal Appeals promulgated October 24th, 1962, on the following grounds:

1. That the learned Mr. Justice W. G. Morrow erred in law in disallowing the appeal of the Applicant on the ground that an Indian may not be convicted in the Northwest Territories under Section 94(b) of the Indian Act.

AND FURTHER TAKE NOTICE that this cross-appeal is to this Honourable Court at the same sittings thereof as may be held to determine the appeal of the Agent for the Attorney General of Canada herein.

DATED at the Town of Yellowknife, in the Northwest Territories, this 30th day of June, A.D. 1967.

sgd: Brian Purdy

BRIAN PURDY
Counsel for the Applicant herein.

TO: Mr. Justice W.G. Morrow,
Judge of the Territorial Court,
Court House,
Yellowknife, N.W.T.

Mr. A. Stewart (4),
Deputy Registrar of the Court of Appeal,
Court House,
Yellowknife, N.W.T.

JUDGMENT

PLACE: ..... Yellowknife, N.W.T.

DATE: ..... April 10, 1967

FOR CROWN: ..... R.C.M.P.

FOR DEFENCE: ..... Mr. George Smith (sworn)

INTERPRETER: ..... None

PLEA: ..... Guilty

Crown Witness: .... -

Defence Witnesses:.. -

JUDGMENT: ..... Found guilty as charged.

SENTENCE: ..... Fined $10.00 and costs $3.50 and in default to spend 3 days in custody, and given one month to pay fine.

EXHIBITS: -

sgd: John Anderson Thompson, MS., JP.
Magistrate or Justice of the Peace.

(S E A L)

Criminal Code
Form 33.
(Section 482)

ORDER ACQUITTING ACCUSED

CANADA
NORTHWEST TERRITORIES }

BE IT REMEMBERED that on the 5th day of June A.D. 1967 at Yellowknife, Northwest Territories, Joseph DRYBONES of Yellowknife, Northwest Territories, was tried upon the charge that

JOSEPH DRYBONES of Yellowknife, Northwest Territories, on or about the 8th day of April A.D. 1967 at Yellowknife in the Northwest Territories, being an Indian, was unlawfully intoxicated off a reserve, contrary to Section 94(b) of the Indian Act, and was found not guilty of the said offence.

DATED this 5th day of June A.D. 1967
at Yellowknife, Northwest Territories

sgd: J. Stewart
Clerk of the Territorial Court

I hereby certify that the foregoing is a true copy of the original of which it purports to be a copy.

sgd: J. Stewart
Clerk of the Court

(S E A L)

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

JOSEPH DRYBONES

Appellant

REASONS FOR JUDGMENT

of The Honourable Mr. Justice W. G. Morrow

The appellant was found guilty at Yellowknife, in the Northwest Territories, on April 10, 1967, and sentenced by John Anderson Thompson, a Justice of the Peace. The plea was guilty and the sentence was a fine of $10.00 and costs or three days on default. The appellant was not represented by counsel at the trial.

The charge to which the appellant plead guilty was that the appellant:

> "on or about the 8th day of April, A.D. 1967 at Yellowknife in the Northwest Territories, being an Indian, was unlawfully intoxicated off a reserve, contrary to Section 94 (b) of the Indian Act."

Notice of appeal was filed April 27, 1967, and raised legal as well as factual grounds for interfering with the verdict of the Justice of the Peace.

At the opening of the appeal before me an application was made by counsel for the appellant to include the Canadian Bill of Rights as a further ground of appeal and to permit the plea of "Guilty" to be withdrawn.

When it became clear that the appellant did not understand English and that therefore there was some serious doubt as to whether he fully appreciated his plea in the lower court, he was allowed to withdraw his original plea and the appeal proceeded as a trial de novo with a plea of "Not Guilty". The Canadian Bill of Rights was allowed to become a ground of appeal.

Six witnesses in all were called by the Crown and none by the defence.

It would appear from Section 94 (b) of The Indian Act, R.S.C. 1952, c. 149, set out below that there are three elements of the offence charged, and it was common ground that failure to establish one or more could be fatal to the Crown's case (Regina v. Modeste (1959) 31 W.W.R. 84).

Section 94 states:

"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."

The suggested three elements of the offence are: (1) he is an Indian, (2) he is intoxicated, and (3) he is off a reserve.

The events leading up to the laying of the charge took place shortly after 11:00 p.m. o'clock in the evening of April 8, 1967, on the premises of Old Stope Hotel in Yellowknife.

The evidence of R.C.M.Police Constables P. W. Pertson and J. Woll and of Hilda Rasche, wife of the hotel manager, satisfies me that when the appellant was found by them on the floor of the hotel lobby he was intoxicated and I so find.

Brian Purdy, counsel for the appellant, asked me to hold that his client was not proven to be an Indian. His argument was based on the definition of an Indian contained in The Indian Act, namely Section 2 (g). This section defines an Indian as "a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian". He proceeded to argue that the Crown had failed to establish that the appellant was in a band (Section 2 (1)(a)), that no Indian Register (Section 5) was produced, and that the entitlement to be registered as

an Indian (Section 6) was not proven with failure to produce a band list, and that there was no evidence before me of a declaration by the Governor in Council (Section 2 (1)(a)(iii)).

The Crown produced as a witness one Joe Sangris, who has held the position of Chief and leader of the Indian Village at Yellowknife for some sixteen years. He described how he had known the appellant from the time he was born, he knew his wife Madeline, and the father of the appellant. This witness described how the appellant moved from the previous Indian Settlement to the present village, how he had been raised there from infancy, and was in receipt of Treaty money once a year.

David George Greyeyes, a second Crown witness, was Regional Director of Indian Affairs, and the officer responsible to look after Indian records, contractual obligations, and otherwise represent his Department in its carrying out the various Treaties affecting the Indians. This witness produced the official record sheet showing that an Indian by the name of Drybones was carried on the Department records as an Indian, that he was shown as having no children, and was married to a Madeline Crapeau. A photostat of this record was marked Exhibit 1. The record was used for payment of Treaty money. Under cross-examination by defence counsel this witness described how records such

as Exhibit 1 are maintained for each Treaty and are made up from a master list.

I am satisfied from the above that the appellant is an Indian within the meaning of The Indian Act. R. v. Myers (1925) 2 W.W.R. 471 and R. v. Howson (1894) 1 Terr. L.R. 492, have been helpful to me under this heading.

This brings me to the third suggested element of the offence. Both Chief Joe Sangris and David George Greyeyes testified that there are no Indian reserves in the Northwest Territories and I so find. There remains the problem of whether the Crown has proven its case by establishing that the appellant cannot in fact be on a reserve if there are none to be on, and therefore he is off a reserve, or whether it is possible for a person to be off a reserve in the language of The Indian Act if there is no reserve to be off of.

To me the question at this point resolves itself into a question of law and I must refer to what cases, if any, have already discussed this question.

It would appear that this question is peculiar to the Northwest Territories and the Yukon, where, unlike the rest of Canada, no reservations have been set aside or designated.

The problem appears to have been considered by Mr. Justice Sissons of this court in two cases, one of which is reported.

The reported decision, R. v. Modeste (supra), deals with the very same problem as is before me. At page 88 of the report the learned justice remarks on the fact that the lands granted to the Indians under their treaties had not yet been designated and reserves never established. He does state, however, "The accused must be intoxicated off a reserve. It seems implied that there is a reserve to which and on which the Indian belongs."

While at first blush it would seem that Sissons J. has decided the question now before me, as I read the judgment he has treated the question as one of fact rather than law and although I must, and would in any event out of my respect for Justice Sissons, pay great deference to his ruling, nevertheless, if I am correct here, then he has not settled the legal point.

Again in his second decision, R. v. Gully (unreported), he treats it as a question of fact saying, "I am still firmly of the view that the prosecution has not established that he was intoxicated off a reserve."

In so far as these two decisions go, therefore, they suggest that "off a reserve" is an element of the offence charged and that possibly had the learned Justice been required to settle the legal point he was inclined to the view that it was implicit in a charge of being "intoxicated off a reserve" that there be a reserve in existence to be off of.

The above two cases appear to be the only cases in which the Territorial Court of the Northwest Territories has been concerned with this problem.

The circumstance of there being "no reserve" appears to be found in the Yukon Territory as well, Regina v. Peters (1967) 50 C.R. 68; 57 W.W.R. 727.

In Regina v. Peters (supra) the Yukon Territory Court of Appeal was faced with the problem of whether an Indian within the meaning of The Indian Act could be prosecuted for a liquor offence under The Liquor Ordinance, R.O.Y.T. 1958, c. 67. The court held that the Ordinance was not applicable to Indians because The Indian Act made provision for the use and possession of intoxicants by Indians. Although the judgment makes reference to the lack of reserves in the Yukon Territory there does not appear to be any direction by the court in that connection. An examination of the actual appeal book giving rise to the appeal indicates this point was not before the court.

In a second case, Regina v. Corbek (1966) 3 C.C.C. 323, Magistrate W. J. Trainor of the Yukon had occasion to discuss a charge involving an Indian found in "an intoxicated condition in a public place" also under The Liquor Ordinance (supra). Although, again, the decision is based on the inapplicability of The Liquor Ordinance because of The Indian Act applying, the learned magistrate's reasons

for judgment do contain the phrase: "There are no reserves in the Yukon Territory so anywhere in the Yukon Territory is off a reserve within the meaning of the Indian Act."

It would appear, therefore, that although there is a divergence of opinion to be found in the abovementioned decisions, nonetheless, the field is open and must be settled in the present case.

A review of the legislation relating to Indians and leading up to the present Section 94 therefore becomes desirable.

As early as 1886 references are found to "reserves" in the legislation, The Indian Act 1886, R.S.C. c. 43. In this statute prohibitions with respect to intoxicants and the supplying of same are found. "Every one who sells . . . supplies . . . any Indian or non-treaty Indian, any intoxicant, . . ." (Sec. 94); "any constable may . . . arrest any Indian or non-treaty Indian whom he finds in a state of intoxication," (Sec. 104). The only reference to reserve (on or off) in these sections relates to a person who "opens on any reserve . . . a tavern house . . ." (Sec. 94).

Section 94 above was amended by Chapter 22, 1888, but retained the same essential language and meaning.

In 1894, Chapter 32, a change takes place and Section 99 contains "may arrest . . . any person or Indian found gambling, or drunk . . . on any part of a reserve."

When the 1886 statute is carried forward in the 1906 Revised Statutes of Canada as Chapter 81, we find a greater area covered in respect of intoxicants, but little material change. Again it is an offence to: "sell . . . supply . . . to any Indian . . . any intoxicant" (Sec. 135 (a)), "found in possession in wigwam . . ." (Sec. 135 (c)); "Indian . . . has in his possession intoxicant" (Sec. 137). In this statute Section 135 (b) refers to "opens . . . on any reserve", Section 135 (c) refers to the wigwam "on reserve", and Section 139 again states: ". . . may arrest Indian found drunk . . . on any part of a reserve".

In 1914, Chapter 35, a new section 149 (2) is introduced. It has nothing to do with intoxication as such but is interesting in its reference to inciting Indians to partake in ceremonial dances and such. Part of the language is: "any Indian, in the province of Manitoba, Saskatchewan, Alberta, British Columbia, or the Territories who participates in any Indian dance outside the bounds of his own reserve".

It is to be noted that at this time the Government of Canada is referring to "outside the bounds of his own reserve" in respect to the Territories at a time when not only were there no reserves in the Territories but where there had not yet been a treaty with the Indians in the Territories (Treaty No. 11, Sikyea v. The Queen (1964) S.C.R. 642).

Chapter 26, 1918, introduces a new Section 122A in reference to enfranchisement of Indians and part of the wording is perhaps of some interest: ss. (1) "If an Indian who holds no land in a reserve, does not reside on a reserve and does not follow the Indian mode of life, makes application to be enfranchised . . .", and ss. (3) "This section shall apply to the Indians in any part of Canada."

In respect to acquirement of land an amendment in 1922, Chapter 26, Section 197, makes reference to "may acquire for a settler who is an Indian, land as well without as within an Indian reserve".

When the 1927 Revision of Statutes, Chapter 98, came out, the old Section 137 of the 1906 Act, Chapter 81, became Section 126 but with no change in language.

The first serious "on or off" reference in the legislation appears to come in with the repeal of ss. (c) of Section 126 and substitution of a new subsection (c) as follows:

> "is found in possession of any intoxicant in the house, room, tent, wigwam, or place of abode of any Indian or non-treaty Indian whether on or off a reserve, or of any person on any reserve or special reserve, or on any other part of any reserve or special reserve;" (1936, c. 20, s. 6).

The legislation then remained unchanged until the new Act, 1951, Chapter 29 came in on September 4th, 1951. This new Indian Act which is now Chapter 149 of the R.S.C. 1952, contains the present section 94 and others.

Reading from Section 88 down to Section 96A, there is not one section that does not in some manner contain a reference to on or off or outside or from a reserve.

Nowhere in this statute is there any reference to or carry over of the phrase "who follows the Indian mode of life" contained as part of the definition of non-treaty Indian in Sec. 2 (i), ch. 43, 1886, and carried forward in Section 135 (a), 1906, ch. 81 and in Section 122 A (1), 1918, ch. 26.

Chapter 40 of the Statutes of Canada 1956, by the repeal of Section 95 and insertion of a new Section 96A, introduces exceptions to the offences where provinces permit sales of liquor to Indians.

There can be no doubt but that The Indian Act applies throughout Canada, equally to the Northwest Territories as to the Yukon and to the provinces. Is one to say that an Indian who has always lived in the Northwest Territories where there have never been reserves is to be treated differently in the application of a section such as Section 94 than an Indian from an Alberta reserve who happens to be in the Northwest Territories on a visit -- and obviously

off a reserve? "It is desirable that there should be uniformity of Dominion legislation." R. v. Irwin (1919) 2 W.W.R. 226 and R. v. Schmolke (1919) 3 W.W.R. 409. A court should normally put that construction on legislation that will produce the greatest harmony and the least inconsistency. City of Victoria v. Mackay (1918) 1 W.W.R. 863 and 56 S.C.R. 524.

Although normally full effect should be given to every word in a section or in a statute "yet if no sensible meaning can be given to a word or phrase, or if it would defeat the real object of the enactment, it may, or rather it should, be eliminated." Maxwell on Statutes, Eleventh Edition, p. 228.

To apply the above basic rules of construction to Section 94 of The Indian Act it appears to me that I must read the section as if "off a reserve" were not an essential element of the offence but rather an incidental, and I so do.

I cannot help but remark, in passing from this subject, that I find it difficult to understand how such confusion in legislation could be allowed to continue for so long, particularly since the difficulty was clearly suggested in the judgments of Sissons, J. referred to above.

In respect to the first ground of appeal, therefore, I find against the appellant.

The second main ground of appeal is to the effect that Section 94 of The Indian Act offends the basic rights and freedoms guaranteed by the Canadian Bill of Rights, and particularly by Section 1 (b). The argument presented on behalf of the appellant is that the effect of Sections 94 and 96 taken together, by providing for a stiffer penalty (namely by a minimum penalty) and by its wider application (an offence to be intoxicated even in an Indian's own home) is placing an Indian because of his race or color in a different position to that of his fellow Canadians. The Liquor Ordinance, R.O.N.W.T. ch. 60, contains no minimum penalty and does not make it an offence to be drunk in one's own home. It is argued that this is discrimination based on race and color pure and simple.

Section 1 (a) and (b) 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:
>
> (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;"

Again, Section 2 of the Canadian Bill of Rights provides:

> "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 . . ."

The provisions contained in The Indian Act and directed to the problem of intoxication were all in effect before the passing of the Canadian Bill of Rights and so Section 2 above governs.

In considering this ground of appeal, which incidentally was also raised in Regina v. Peters (supra), two cases must be considered, namely Regina v. Gonzales (1962) 37 C.R. 56; 37 W.W.R. 257; 132 C.C.C. 237; 32 D.L.R. (2d) 290, and Robertson et al v. The Queen (1963) S.C.R. 651.

In Regina v. Gonzales (supra), the Court of Appeal of British Columbia was faced with essentially the same problem as is found in the present case, namely, the effect of possession under Section 94 of The Indian Act. Davey, J.A., without discussing the meaning of Section 1 of the Canadian Bill of Rights, got over the problem by treating the statute as a general Act and The Indian Act as a special

Act which, in his opinion, overrode it. Tysoe J.A. (concurred in by Bird J.A.) took the position that Section 1 (b) of the Canadian Bill of Rights did not mean that every person "should have the same rights, the same duties and the same liabilities as everyone else" and further on in his judgment takes the position that Section 1 (b) "means in a general sense that there has existed and there shall continue to exist in Canada a right in every person to whom a particular law relates or extends, no matter what may be a person's race, national origin, colour, religion or sex to stand on an equal footing with every other person to whom that particular law relates or extends . . .".

In Attorney General of British Columbia v. McDonald (1961) 131 C.C.C. 126, the same problem was resolved by holding that Section 94 (a) of The Indian Act was not in conflict with the Canadian Bill of Rights.

It seems clear to me that if this was all then I would be bound to follow, and indeed should follow, the reasoning of the learned appeal justices abovementioned. However, there are further factors that must be taken into consideration by me in this respect.

Since the Gonzales case, however, the Supreme Court of Canada has had occasion to consider the Canadian Bill of Rights, and although the problem involved the freedom of religion, namely Section 1 (c), the remarks of the court in

that decision lead me to believe that the Gonzales case can no longer be considered as completely governing on the subject. The Supreme Court decision is Robertson et al v. The Queen (1963) S.C.R. 651.

At page 657, Ritchie J. states that "the effect of the Lord's Day Act rather than its purpose must be looked at in order to determine whether its application involves the abrogation, abridgment or infringement of religious freedom . . .". If this be the test, and if I understand its application correctly, surely the effect of The Indian Act cannot be said to be other than to discriminate, in other words, to abrogate, abridge or infringe.

The present case, unlike the above ones, arises out of the application of The Indian Act to the Northwest Territories. In this region there is no provincial legislature as such but all levels of government are within the control of the Federal Government. It is not without some importance that the Supreme Court of Canada has already held that Eskimos (another racial group found mainly in the Northwest Territories) are to be considered as Indians within the meaning of Section 91 (24) of The British North America Act. Re Eskimos (1939) S.C.R. 104; (1939) 2 D.L.R. 417. Section 4 (1) of The Indian Act provides that references to an Indian in that statute do not include Eskimos. This means that in the Northwest Territories the authorities

in enforcing liquor legislation, if The Indian Act provisions are acceptable, must of necessity treat Indians not only differently from white Canadians but also from the other group of aborigines, namely, Eskimos. One can argue with force that in its original conception these provisions of The Indian Act were clearly intended to protect the Indian as an aborigine but surely the force of this argument was spent when Eskimos were excluded. As it stands, therefore, this portion of The Indian Act is to me a case of discrimination of sufficient seriousness that, despite my respect for the opinions of the learned Justices of the Appeal Court of British Columbia in the Gonzales case above, I feel I must differ from them, and hold that the intoxication sections of The Indian Act "abrogate, abridge or infringe" the Canadian Bill of Rights.

When considering "effect" here I restrict the application to only those sections of The Indian Act dealing with intoxicants, the statute in large part being not discriminatory but merely providing for such things as protection of property and other rights.

Again, in the same report at page 661, Mr. Justice Cartwright, admittedly dissenting, in referring to the statement of Davey J.A. in the Gonzales case found at page 239 of the C.C.C. reports, disagrees with the learned Justice of Appeal's view. He states:

> "With the greatest of respect, I find myself unable to agree with this view. The imperative words of s. 2 of the Canadian Bill of Rights, quoted above, appear to me to require the courts to refuse to apply any law, coming within the legislative authority of Parliament, which infringes freedom of religion unless it is expressly declared by an Act of Parliament that the law which does so infringe shall operate notwithstanding the Canadian Bill of Rights. As already pointed out s. 5 (2), quoted above, makes it plain that the Canadian Bill of Rights is to apply to all laws of Canada already in existence at the time it came into force as well as to those thereafter enacted. In my opinion where there is irreconcilable conflict between another Act of Parliament and the Canadian Bill of Rights the latter must prevail."

Under this heading of argument, counsel for the Crown, respondent, referred to the Order-in-Council No. 12 found at page 4150 of the Canada Gazette, Vol. 93, declaring that ss. (3) of Section 95 of The Indian Act should be brought into force. I cannot see how this event can assist in the present case except perhaps to show an awareness in the Government of the need to relax at least one of the Act's liquor provisions.

In the end result, therefore, the appeal is allowed and I direct that the fine and costs including security for costs for this appeal already paid, be refunded to the appellant.

I wish to thank counsel for both the appellant and the respondent for their assistance in this case.

Among the many authorities cited to me, I should perhaps mention the following: R. v. Otokiak (1959) 30 C.R. 401; R. v. Mellon (1900) 5 Terr. L.R. 301; Rogers-Majestic Corp. Ltd. v. Toronto (1943) S.C.R. 440; R. v. Williams (1958) 12 C.C.C. 34; R. v. Shade (1951-52) 4 W.W.R. 430; R. v. Johns (1962) 133 C.C.C. 43; R. v. Cooper (1925) 2 W.W.R. 778; Laskin's Canadian Constitutional Law, 3rd Ed., p. 976; (1964) 42 C.B.R. p. 147-156; and Tornopolsky on The Canadian Bill of Rights, comm. p. 208.

Since an appeal from this decision is almost inevitable, it is my hope that Crown counsel's generous undertaking to remand all further prosecutions under The Indian Act will be continued until the appeal can be heard.

sgd: W. G. Morrow

June 5, 1967.
Yellowknife, N.W.T.

O. J. T. Troy, Esq.,
Counsel for the respondent.

Brian Purdy, Esq.,
Counsel for the appellant.

REPORT OF CROWN APPEAL

Court House at Edmonton, Alberta
14th day of September, 1967

File No. N.W.T. App.80

Sir:

I report the following particulars:

Re: JOSEPH DRYBONES

Offence: Unlawfully intoxicated off a reserve, Sec. 94(b) of the Indian Act.

Convicted by: His Worship John Anderson-Thompson, a Justice of the Peace in and for the Northwest Territories,

At: Yellowknife, N.W.T. On: April 10th, 1967

Sentence: Fined $10.00 and Costs $3.50, I/D THREE (3) DAYS.

Appealed: Appeal heard by Mr. Justice W.G. Morrow, who allowed the Appeal and Quashed the Conviction.

Police Department Concerned: R.C.M.P.

ACTION TAKEN IN APPEAL COURT

Crown Appeal to: Court of Appeal - N.W.T.

Date Appeal Filed: June 27th, 1967

Date of Hearing: July 31st, 1967

Heard by: Chief Justice S. Bruce Smith,
Mr. Justice H. G. Johnson,
Mr. Justice G. H. Allen.

Date Released on Bail: --

Place of Hearing: Edmonton, Alberta

Result of Appeal: JUDGMENT WAS RESERVED ON JULY 31st, 1967,
Reasons delivered on August 25th, 1967.

THE APPEAL OF THE CROWN IS DISMISSED.

Appellant's Solicitor: J. C. Cavanagh, Esq., Q.C.,
Respondent's Solicitor: B. Purdy, Esq.,

Fine Paid or
Gaol Term Taken: -- Date Taken into Custody: --

CERTIFICATE

This is to certify that the information set out above is correct.

(a) ~~and that the fine and costs are to be refunded to the appellant.~~

(b) ~~and that the fine and costs are to be refunded to the appellant's solicitor.~~

(Strike out either (a), (b) or both)

sgd: (signature illegible)

D/ Registrar

(S E A L)

TO: 1. The Minister of Justice,
OTTAWA, Ontario.

2. Officer Commanding "G" Division,
Royal Canadian Mounted Police,
OTTAWA, Ontario (3 copies)

3. Clerk of the Court,
Court House,
YELLOWKNIFE, N.W.T.

IN THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES

The Court:

The Honourable the Chief Justice
The Honourable H. G. Johnson
The Honourable G. H. Allen

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

JOSEPH DRYBONES

Respondent

REASONS FOR JUDGMENT

of The Honourable Mr. Justice Johnson

This is an application for leave to appeal under Section 743 of the Criminal Code from the judgment of Morrow J., who heard the appeal from the magistrate under Section 719 (g). The appeal raises the question whether or not Section 94 of The Indian Act is rendered inoperative by reason of the Canadian Bill of Rights.

The respondent was convicted following a plea of guilty on a charge that he

> "on or about the 8th day of April, A.D. 1967, at Yellowknife, in the Northwest Territories, being an Indian, was unlawfully intoxicated off a reserve, contrary to Section 94 (b) of the Indian Act."

On his appeal he asked leave to change his plea from guilty to not guilty. Morrow, J. granted leave to change the plea, and, having heard the evidence on the trial de novo, found that on the date and in the place mentioned in the charge, the respondent was intoxicated. He allowed the appeal, however, holding that section 94 of The Indian Act was discriminatory legislation against Indians and thus came within section 1 (b) of the Canadian Bill of Rights. The Crown's appeal is limited to this part of the learned appeal judge's decision.

Section 94 of The Indian Act, R.S.C. 1952, c. 149, reads:

> "94. 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."

Persons other than Indians are only liable to a penalty of fine or imprisonment if they are intoxicated in a public place, Liquor Ordinance, R.O.N.W.T. 1957, c. 60, s. 19 (1).

The portions of the Canadian Bill of Rights, S.C. 1960, c. 44, relevant to this appeal are:

> "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;
>
> . . . ."
>
> "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 Billl 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, . . ."
>
> "5. (2) The expression 'law of Canada' in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, . . . 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."

We are all agreed that the decision of Morrow J. on this point is correct. We also agree with his reasons for arriving at this conclusion.

Because the argument of counsel for the Crown is based almost exclusively upon the contrary decision of the Court of Appeal of British Columbia in Regina v. Gonzales, 37 W.W.R. 257, it is necessary to consider that case. That court held, dismissing an appeal from Maclean J. of an appeal by way of stated case, that section 94 was unaffected by the Canadian Bill of Rights, and several different reasons for coming to that conclusion were given in that court and in the court below.

It is not, I think, necessary to discuss the reasons of Davey, J.A. Cartwright J. in Robertson and Rosetanni v. The Queen (1963) S.C.R. 651, at page 661 quotes from that judgment and on the following page states his reasons for disagreeing with the view that was stated in the quoted passage. Cartwright J. dissented from the judgment of the other members of the court but I can find nothing in the majority judgment that would conflict with the view that he expressed.

The reasons given by Tysoe J.A. (concurred in by Bird J.A.) for holding that this section of The Indian Act was unaffected by the Canadian Bill of Rights should, I think, be stated in his own words:

> "It would be difficult and indeed unwise to attempt an exact and inclusive definition of sec. 1 (b) applicable to all possible cases and circumstances and I have no intention of doing so. It is sufficient to say that in my opinion in its context sec. 1 (b) means in a general sense that there has existed and there shall continue to exist in Canada a right in every person to whom a particular law relates or extends, no matter what may be a person's race, national origin, colour, religion or sex, to stand on an equal footing with every other person to whom that particular law relates or extends, and a right to the protection of the law."

and later, at page 265, he says:

> "Equality before the law as I have explained it is quite a different thing to equal laws for everyone which, as I have already indicated, would be a practical impossibility. Never have our laws been the same for everyone regardless of such matters as age, ability and characteristics, but the two rights, 'equality before the law' and 'protection of the law' are deeply rooted in our traditions."

This interpretation would restrict equality before the law to equality before the courts. If this sub-section means no more than this, it would hardly have seemed necessary to include it for this right has always been jealously guarded by the courts. He also seems to say that section 1 (b) permits legislation that discriminates against race so long as all persons within the race that is discriminated against are treated in the same way. This

interpretation would permit Parliament, without the express declaration required by section 2, to enact respecting Indians the kind of legislation which was in force for so many years in the United States and which denied the coloured race equal rights with those enjoyed by white people and which has been struck down by the Supreme Court of that country during the last fifteen or so years. If such legislation is permitted to be so passed by the Parliament of Canada, the Act falls far short of the high purpose expressed both in the Act and its preamble.

In support of the interpretation that he placed upon this section, Tysoe J. refers to the many restrictions that are placed by legislation upon different classes of persons -- he refers specifically to the judges' inability to vote. Better known ones include special legislation as to infants and persons of unsound mind. There are, of course, many of these restrictions throughout our laws and there can be no question of the propriety of such legislation and the Bill of Rights leaves most of these discriminatory Acts unaffected. It is only those that discriminate "by reason of race, national origin, colour, religion or sex" that are affected by that Act.

In some of the judgments in the Gonzales case, stress is laid upon the necessity for special legislation to protect Indians. It has been the policy of the Canadian

government in the past and is, no doubt, its continuing policy, to treat Indians in many respects different from other races in Canada. One would have hoped that that could have been done without subjecting Indians to penalties and punishments different to those imposed on other races. If it is not possible to protect them otherwise, the Bill of Rights permits discriminatory legislation to continue or be enacted, but Parliament must expressly declare that such Acts "shall operate notwithstanding the Canadian Bill of Rights."

It is to be remembered that when considering whether legislation is affected by the Bill of Rights, it is not the purpose of such legislation, no matter how beneficial or necessary it may be thought to be, but its effect which must govern. (Ritchie J. in Robertson and Rosetanni v. The Queen (supra) at page 657).

Full effect should be given to the plain and ordinary meaning of the word "expressly" in the phrase "unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights. Once it has been found that a section of an Act is discriminatory by reason of race, national origin, colour, religion or sex, it follows that it will not be operative "unless it is expressly declared" to be operative.

The interpretation placed upon section 1 (b) by Morrow J. is consonant with the spirit and purpose of the Canadian Bill of Rights and I would accordingly refuse leave to appeal.

A cross-appeal was filed. If this case is further appealed, our views on the point raised by it may be of some value. Morrow J. held (and in this he disagreed with a judgment of an earlier judge of the Territorial Court), that the words "off a reserve" in section 94 permitted a conviction notwithstanding that there were no reserves in the Northwest Territories. The words "off a reserve" is an essential element to be proved in any charge laid under section 94. But once it is proved, as it was in the present case, that the offence was not committed upon a reserve, the requirement of the section was satisfied. The fact that there are no reserves in the Territories is quite irrelevant.

sgd: H. G. Johnson

J.A.

Edmonton, Alberta,
August 25, 1967.

J. C. Cavanagh, Esq., Q.C.
Counsel for the appellant.

G. Brian Purdy, Esq.,
Counsel for the respondent.

IN THE COURT OF APPEAL OF
THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

-and-

JOSEPH DRYBONES

Respondent

REASONS FOR JUDGMENT

I concur

(sgd: S. Bruce Smith)
C.J.A.

I concur

(sgd: G. H. Allen)
J.A.

(sgd) J.C. Cavanagh, Q.C., 7.20

IN THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES

The Court:

The Honourable the Chief Justice
The Honourable H. G. Johnson
The Honourable G.H. Allen

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

JOSEPH DRYBONES

Respondent

SUPPLEMENTARY JUDGMENT

of The Honourable Mr. Justice Johnson

It has been called to my attention that I stated in my judgment that leave to appeal had been refused. Leave to appeal was in fact granted and my judgment accordingly should have read that the appeal was dismissed rather than that leave to appeal was refused.

sgd: H. G. Johnson

J.A.

Edmonton, Alberta,
September 21, 1967.

J. C. Cavanagh, Esq., Q.C.,
Counsel for the Appellant.

G. Brian Purdy, Esq.,
Counsel for the Respondent.

ARGUMENT

This is a proper case in which to grant leave to appeal in order that the conflict between the judgment of the Northwest Territories Court of Appeal herein on the one hand and the judgments of the Yukon Territory Court of Appeal in R. v. Peters (1967) 50 C.R. 68 and the British Columbia Court of Appeal in R. v. Gonzales (1962) 37 C.R. 56 on the other might be resolved.

In Peters the accused was charged with consuming liquor while under age contrary to paragraph (a) of subsection (4) of Section 1 of the Liquor Ordinance of the Yukon Territory. The learned Magistrate before whom the accused was tried acquitted him and the acquittal was confirmed by the Yukon Territory Court of Appeal. McFarlane, J.A., who delivered the judgment of the Court of Appeal said this at pages 70-71:

> "Respondent's counsel places considerable reliance upon s. 87 of the Indian Act which reads:
>
> '87. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.'
>
> He submits that if The Liquor Ordinance, clearly in itself a law of general application, does apply to Indians it does make provision for possession, use and manufacture of intoxicants by Indians and that these are matters for which provision is made by the Indian Act, thus falling within the last exception

> "stated in s. 87. It is true that the Indian Act does not make specific provision for the offence with which the respondent was charged, namely, consuming liquor being under the age of 21 years. It may be that in considering whether a provincial or territorial law is inconsistent with the Indian Act it would be necessary to compare the respective enactments in specific detail. I am of the opinion, however, that the second exception 'the extent that such laws make provision for any matter for which provision is made by or under this Act' should be given a broad and liberal interpretation in order to give effect to the intention of Parliament which has clearly made provision, by the Indian Act, for the matter of the use and possession of intoxicants by Indians. The relevant provision of the Yukon Liquor Ordinance, being within the meaning of the second exception stated in s. 87, is accordingly not applicable to Indians."

And at pages 71-72:

> "Counsel for the appellant also submitted that s. 94 of the Indian Act should not be given effect because it provides for a more severe minimum penalty than does the Ordinance. He says that, for this reason, s. 94 offends against the right to 'equality before the law', a right declared to have existed and to continue to exist by s. 1 (b) of the Canadian Bill of Rights, 1960 (Can.), c. 44. Having decided that The Liquor Ordinance does not apply to Indians there is no conflict and I think further the argument is answered effectively by the reasoning of the Court of Appeal for British Columbia in Regina v. Gonzales (1962), 37 C.R. 56, 37 W.W.R. 257, 132 C.C.C. 237, 32 D.L.R. (2d) 290, with which I respectfully agree."

In Regina v. Gonzales the accused was charged with being in possession of liquor off an Indian reserve contrary to Section 94 (a) of the Indian Act. The conviction was affirmed on an appeal by way of stated case and on a further appeal to the British Columbia Court of Appeal. The Court of Appeal rejected the argument that Section 94 (a) infringes Section 1 (b) of the Canadian Bill of Rights which declares one of the human rights

and fundamental freedoms to be "the right of the individual to equality before the law and the protection of the law".

TABLE OF AUTHORITIES

1. R. v. Peters (1967), 50 C.R. 68; 57 W.W.R. 727

2. R. v. Gonzales (1962), 37 C.R. 56; 37 W.W.R. 257; 132 C.C.C. 237; 32 D.L.R. (2d) 290

FILED
24 JAN 1968
SUPREME COURT OF CANADA
COUR SUPREME DU CANADA
PRODUIT

11026

RITCHIE J.

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant,

-and-

JOSEPH DRYBONES

Respondent.

CASE ON APPEAL

D. S. Maxwell, Esq., Q.C.,
Deputy Attorney General of Canada,
Department of Justice,
OTTAWA, Ontario,

Solicitor for the Appellant.

G. Brian Purdy, Esq.,
Yellowknife,
Northwest Territories,

Solicitor for the Respondent.

Smart and Biggar,
70 Gloucester Street,
OTTAWA, Ontario,
Ottawa agents for the Solicitor
for the Respondent.

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant,

-and-

JOSEPH DRYBONES

Respondent.

CASE ON APPEAL

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Northwest Territories,

Solicitor for the Respondent.

Smart and Biggar,
70 Gloucester Street,
OTTAWA, Ontario,
Ottawa agents for the Solicitor
for the Respondent.

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3. Notice of Appeal on behalf of the Appellant to the Court of Appeal for the Northwest Territories dated the 27th day of June 1967. 5

4. Notice of Intention to Cross Appeal on behalf of the Respondent to the Court of Appeal for the Northwest Territories dated the 30th day of June 1967. 9

5. Notice of Motion for Leave to Appeal to the Supreme Court of Canada on behalf of the Appellant dated the 14th day of November 1967. 11

6. Affidavit of Clarence Donald MacKinnon dated the 9th day of November 1967 in support of the Notice of Motion dated the 14th day of November 1967. 14

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PART I

1.

Information and Complaint of Constable M.A. Mohr against the Respondent, dated the 10th day of April 1967

Criminal Code: Form 2 (Sections 439 and 695)

INFORMATION

CANADA)
NORTHWEST TERRITORIES) (ON BEHALF OF HER MAJESTY THE QUEEN)

This the information of Cst. M.A. MOHR, a member of the Royal Canadian Mounted Police, Yellowknife, Northwest Territories, (Peace Officer), hereinafter called the informant.

The Informant says that he has reasonable and probable grounds to believe and does believe that Joseph DRYBONES of Yellowknife, Northwest Territories on or about the 8th day of April A.D. 1967 at Yellowknife in the Northwest Territories, being an Indian, was unlawfully intoxicated off a reserve, contrary to Section 94(b) of the Indian Act.

SWORN BEFORE ME this 10th day of April A.D. 1967 at Yellowknife, Northwest Territories

sgd: John Anderson Thompson, MS, JP.
A Justice of the Peace in and for the Northwest Territories.

sgd: M.A. Mohr
(Signature of Informant)

I hereby certify that the foregoing is a true copy of the original of which it purports to be a copy.

sgd: J. Stewart
CLERK OF THE COURT

(S E A L)

Notice of Appeal of the Respondent to the Territorial Court of the Northwest Territories, dated the 26th day of April 1967

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

JUDICIAL DISTRICT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN on the information and complaint of Const. M.A. Mohr, a member of the Royal Canadian Mounted Police,

Respondent,

-and-

JOSEPH DRYBONES

Appellant.

NOTICE OF APPEAL

TAKE NOTICE THAT the appellant be aggrieved by a conviction on the 10th day of April, 1967, by John Anderson Thompson, a Justice of the Peace in and for the Northwest Territories, on a certain information and complaint whereby the appellant was charged that he was, on or about the 8th day of April, 1967, at Yellowknife in the Northwest Territories, being an Indian, was unlawfully intoxicated off a reserve, contrary to Section 94(b) of the Indian Act, whereupon the appellant pleaded guilty and was sentenced by the said Justice of the Peace to pay a fine of $10.00 and costs, and in default of payment to spend three days in custody;

Notice of Appeal of the Respondent to the Territorial Court of the Northwest Territories, dated the 26th day of April 1967

THE APPELLANT intends to appeal and does hereby appeal to the Territorial Court of the Northwest Territories, Judicial District of the Northwest Territories, at the next sittings thereof to be held at Yellowknife, in the Northwest Territories, or at such sittings thereof as this appeal may be lawfully entered and heard, against the said conviction only.

AND FURTHER TAKE NOTICE that the appellant appeals his conviction on the following grounds;

1. That the said conviction was contrary to law;
2. That the said conviction, had there been no plea of guilty, was against the evidence and the weight of the evidence;
3. That the learned Justice of the Peace failed to give the appellant the benefit of the reasonable doubt of his guilt which became apparent in the Crown's speech to sentence, and failed to direct that the plea of guilty be changed.

AND FURTHER TAKE NOTICE that the appellant will ask for leave of this Honourable Court to make an application to substitute a plea of not guilty for the plea of guilty entered before the said Justice of the Peace on the following grounds:

Notice of Appeal of the Respondent to the Territorial Court of the Northwest Territories, dated the 26th day of April 1967

1. That the appellant does not speak English, or adequate English, and was not given an adequate interpretation of the proceedings.

2. That the interpretation of the charge to the appellant was incorrect, and accordingly the appellant did not understand the true nature or consequences of the charge against him.

3. That the appellant was not advised of his right to counsel and was given no reasonable opportunity to obtain counsel, contrary to the Bill of Rights.

DATED at the Town of Yellowknife, in the Northwest Territories this 26th day of April, 1967.

sgd: BRIAN PURDY
Solicitor for the Appellant

TO: The Clerk of the Court,
Court House,
Yellowknife, N.W.T.

AND TO: Mr. John Anderson-Thompson,
Justice of the Peace,
Yellowknife, N.W.T.

AND TO: Const. M.A. Mohr,
R. C. M. P.,
Yellowknife, N.W.T.

Notice of Application for Leave to Appeal on behalf of the Appellant to the Court of Appeal for the Northwest Territories, dated the 27th day of June 1967

IN THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN — Applicant

-and-

JOSEPH DRYBONES — Respondent

10

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE that Orval J.T. Troy, being Crown Counsel and agent of the Attorney-General of Canada will apply for leave to appeal and does hereby appeal to this Honourable Court from the decision of the Honourable Mr. Justice W. G. Morrow, Judge of the Territorial Court of the Northwest Territories, made the 5th day of June, A.D. 1967, at Yellowknife in the Northwest Territories, allowing the Appeal of the Respondent from his conviction by

20 His Worship, John Anderson-Thompson, a Justice of the

Notice of Application for Leave to Appeal on behalf of the Appellant to the Court of Appeal for the Northwest Territories, dated the 27th day of June 1967

Peace in and for the Northwest Territories, made the 10th day of April, A.D. 1967 at Yellowknife in the Northwest Territories, upon the following offence, namely;

1. That the said Respondent, Joseph Drybones of Yellowknife, Northwest Territories, on or about the 8th day of April A.D. 1967 at Yellowknife in the Northwest Territories, being an Indian, was unlawfully intoxicated off a reserve, contrary to Section 94(b) of the Indian Act, whereupon the Respondent aforesaid was fined ten dollars ($10.00) and costs of three dollars and fifty cents ($3.50) and in default to spend three (3) days in custody (and was given one month to pay the fine and costs aforesaid).

AND TAKE NOTICE that the grounds of the said appeal are as follows:

(a) That the learned Judge of the Territorial Court erred in law in allowing the Appeal of the Respondent on the grounds that Section 94(b) of the Indian Act is inoperative and offends the basic rights and freedoms guaranteed by the Canadian Bill of Rights and in particular Section 1(b) of the said Canadian Bill of Rights.

(b) That the learned Judge of the Territorial Court erred in law in allowing the Appeal of the Respondent on the grounds that the "intoxication sections" of the Indian Act, "abrogate, abridge, and infringe" the Canadian Bill of Rights.

AND FURTHER TAKE NOTICE that this appeal is to this Honourable Court at the next sitting thereof to be holden at Yellowknife,

Notice of Application for Leave to Appeal on behalf of the Appellant to the Court of Appeal for the Northwest Territories, dated the 27th day of June 1967

Northwest Territories or at such other time and place as this Honourable Court may designate, in pursuance of the provisions of the Criminal Code of Canada in that behalf and the rules respecting appeals to the Court of Appeal of the Northwest Territories.

DATED at the Town of Yellowknife in the Northwest Territories, this 27th day of June, A.D. 1967.

sgd: Orval J.T. Troy

Crown Counsel and Agent for the Attorney General of Canada

TO: Mr. Joseph Drybones,
Yellowknife, N.W.T.

AND TO: Mr. Justice W.G. Morrow,
Judge of the Territorial Court,
Yellowknife, N.W.T.

Mr. A. Stewart (4)
Deputy Registrar of the Court of Appeal,
Yellowknife, N.W.T.

I hereby certify that the foregoing is a true copy of the original of which it purports to be a copy.

sgd: A. Stewart
Clerk of the Court

(S E A L)

Notice of Application for Leave to Appeal on behalf of the Appellant to the Court of Appeal for the Northwest Territories, dated the 27th day of June 1967

AND TO: Mr. C.G. Cioni,
Registrar of the Court of Appeal,
Edmonton, Alberta.

Mr. J.C. Cavanagh, Q.C.,
Agent of the Attorney General of Canada,
c/o Cavanagh, Henning, Buchanan, Kerr & Witten,
10 Barristers and Solicitors,
900 Bank of Montreal Building,
Edmonton, Alberta.

Mr. Brian Purdy,
Barrister and Solicitor,
Box 818,
Yellowknife, N.W.T.

Notice of Intention to Cross-Appeal of the Respondent to the Court of Appeal for the Northwest Territories, dated the 30th day of June 1967

IN THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

BETWEEN:

JOSEPH DRYBONES — Applicant

-and-

HER MAJESTY THE QUEEN — Respondent

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NOTICE OF INTENTION TO CROSS-APPEAL

WHEREAS a Notice of Application for Leave to Appeal has been filed by the Agent for the Attorney-General of Canada from the judgment of the Honourable Mr. Justice W.G. Morrow pronounced the 5th day of June, 1967 at Yellowknife, in the Northwest Territories allowing the appeal of the applicant from his conviction by His Worship, John Anderson-Thompson, a Justice of the Peace in and for the Northwest Territories, made the 10th day of April, A.D. 1967 at Yellowknife in the

20 Northwest Territories, upon the following offence, namely:

1. That the said Applicant, Joseph Drybones, of Yellowknife, in the Northwest Territories, on or about the 8th day of April, A.D. 1967 at Yellowknife in the Northwest Territories, being an Indian, was unlawfully intoxicated off a reserve, contrary to Section 94(b) of the Indian Act, whereupon the Applicant aforesaid was fined ten dollars ($10.00) and costs of three dollars and fifty cents ($3.50) and in default

30 to spend three (3) days in custody (and was given one month to pay the fine and costs aforesaid).

AND WHEREAS the learned Mr. Justice W.G. Morrow rejected the argument of the Applicant upon appeal that an

Notice of Intention to Cross-Appeal of the Respondent to the Court of Appeal for the Northwest Territories, dated the 30th day of June 1967

Indian may not be convicted under Section 94 (b) of the Indian Act in the Northwest Territories and disallowed the said appeal of the Applicant on that ground;

TAKE NOTICE that the applicant intends to apply for leave to cross-appeal and does hereby cross-appeal pursuant to the provisions of Rules 607 and 608 of the Consolidated Rules and Rule 13 of the Rules respecting Criminal Appeals promulgated October 24th, 1962, on the following grounds:

1. That the learned Mr. Justice W. G. Morrow erred in law in disallowing the appeal of the Applicant on the ground that an Indian may not be convicted in the Northwest Territories under Section 94(b) of the Indian Act.

AND FURTHER TAKE NOTICE that this cross-appeal is to this Honourable Court at the same sittings thereof as may be held to determine the appeal of the Agent of the Attorney General of Canada herein.

DATED at the Town of Yellowknife, in the Northwest Territories, this 30th day of June, A.D. 1967.

sgd: Brian Purdy
Counsel for the Applicant herein.

TO: Mr. Justice W.G. Morrow,
Judge of the Territorial Court,
Court House,
Yellowknife, N.W.T.

Mr. A. Stewart (4),
Deputy Registrar of the Court of Appeal,
Court House,
Yellowknife, N.W.T.

Notice of Motion for Leave to Appeal to the Supreme Court of Canada dated the 14th day of November 1967

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL

FOR THE NORTHWEST TERRITORIES

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant,

and

JOSEPH DRYBONES

Respondent.

NOTICE OF MOTION FOR LEAVE TO APPEAL

TAKE NOTICE that application will be made to this Honourable Court by Counsel on behalf of the Attorney General of Canada on Monday, the 27th day of November, 1967 at the hour of 10:30 o'clock in the forenoon, or so soon thereafter as Counsel may be heard, for an order granting leave to appeal to this Honourable Court from the decision of the Court of Appeal for the Northwest Territories pronounced on the 25th day of August, 1967 and supplemented by judgment dated the 21st day of September, 1967 dismissing the appellant's appeal from a judgment of His Lordship Mr. Justice W.G. Morrow of the Territorial Court of the

Notice of Motion for Leave to Appeal to the Supreme Court of Canada dated the 14th day of November 1967

Northwest Territories pronounced at Yellowknife, in the Northwest Territories on the 5th day of June, 1967 reversing an order made at Yellowknife by Mr. John Anderson Thompson, a Justice of the Peace in and for the Northwest Territories, on April 10, 1967 convicting the Respondent, an Indian, on a charge that he was on or about the 8th day of April, 1967 at Yellowknife unlawfully intoxicated off a reserve, contrary to subsection (b) of section 94 of the Indian Act, R.S.C. 1952, c. 149.

AND FURTHER TAKE NOTICE that the question of law upon which the Application for Leave to Appeal is based is that the Court of Appeal for the Northwest Territories erred in finding that section 94 of the Indian Act is rendered inoperative by reason of the Canadian Bill of Rights.

AND FURTHER TAKE NOTICE that in support of this Application will be read the Reasons for Judgment of the Court of Appeal for the Northwest Territories, the Affidavit of Clarence Donald MacKinnon, sworn the

Notice of Motion for Leave to Appeal to the Supreme Court of Canada dated the 14th day of November 1967

9th day of November, 1967, and such further and other material as Counsel may advise and this Honourable Court may permit.

DATED at Ottawa in the Province of Ontario, this 14th day of November, 1967.

D.S. Maxwell, Q.C.,
Deputy Attorney General
of Canada

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TO: The Registrar of the
Supreme Court of Canada;

AND TO: Joseph Drybones, Esq.,
the Respondent;

AND TO: Brian Purdy, Esq.,
Counsel for the Respondent.

Affidavit of Clarence Donald MacKinnon in support of the Notice of Motion, dated the 9th day of November 1967

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL

FOR THE NORTHWEST TERRITORIES

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant,

and

JOSEPH DRYBONES

Respondent.

AFFIDAVIT

I, Clarence Donald MacKinnon, Barrister and Solicitor, of the City of Ottawa in the County of Carleton and Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. THAT I am a legal officer of the Department of Justice and as such have knowledge of the matters hereinafter deposed to.

Affidavit of Clarence Donald MacKinnon in support of the Notice of Motion, dated the 9th day of November 1967

2. THAT on the 10th day of April 1967 an Information was sworn charging "... that Joseph DRYBONES of Yellowknife, Northwest Territories, on or about the 8th day of April, A.D. 1967, at Yellowknife, in the Northwest Territories, being an Indian, was unlawfully intoxicated off a reserve, contrary to section 94(b) of the Indian Act".

10 3. THAT on the 10th day of April 1967 the Respondent entered a plea of guilty to said charge before His Worship John Anderson Thompson, a Justice of the Peace in and for the Northwest Territories, and was sentenced to pay a fine of ten dollars and costs and, in default of payment, three days' imprisonment.

4. THAT the Respondent appealed by way of trial de novo and the appeal was allowed on the 5th day of June, 1967, by Mr. Justice W.G. Morrow of the Territorial Court of the Northwest Territories.

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5. THAT Counsel on behalf of the Attorney General of Canada made application for leave to appeal to the Court of Appeal for the Northwest Territories which was granted, but the appeal was dismissed by said Court on the 25th day of August, 1967.

Affidavit of Clarence Donald MacKinnon in support of the Notice of Motion, dated the 9th day of November 1967

6. THAT in dismissing the appeal the Northwest Territories Court of Appeal held that section 94 of the Indian Act, R.S.C. 1952, c. 149, has been rendered inoperative by the Canadian Bill of Rights, Statutes of Canada 1960, c. 44.

SWORN BEFORE ME at the City of Ottawa in the County of Carleton, Province of Ontario, this 9th day of November, 1967.

sgd: Pauline Sprague

A Commissioner for taking Affidavits within the Province of Ontario.

sgd: Clarence Donald MacKinno

17.

Order of the Supreme Court of Canada Granting Leave to Appeal, dated November 28, 1967

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

Tuesday, the 28th day of November, 1967

BEFORE: THE HONOURABLE JOHN ROBERT CARTWRIGHT, P.C.., C.J.C.
THE HONOURABLE MR. JUSTICE JUDSON
THE HONOURABLE MR. JUSTICE SPENCE

BETWEEN:

HER MAJESTY THE QUEEN — Applicant

and

JOSEPH DRYBONES — Respondent

O R D E R

THE MOTION of the Applicant herein for an Order Granting Leave to Appeal to this Honourable Court from the judgment of the Court of Appeal for the Northwest Territories dated the 25th day of August 1967 and supplemented by judgment dated the 21st day of September 1967, on the ground that there is an important question of law involved, namely:-

> whether the Court of Appeal for the Northwest Territories erred in finding that Section 94 of the Indian Act R.S.C. 1952 cap. 149 as amended is rendered inoperative by reason of the Canadian Bill of Rights, Stat. Can. 1960 cap. 44,

having come on for hearing before this Honourable Court on this day in the presence of Counsel for the Applicant and Counsel for the Respondent, and upon hearing what was alleged by Counsel aforesaid:

Order of the Supreme Court of Canada Granting Leave to Appeal, dated November 28, 1967

THIS COURT DOTH ORDER AND ADJUDGE that the Applicant herein be, and hereby is, granted leave to appeal to this Court from the said judgment of the Court of Appeal for the Northwest Territories on the undertaking of Counsel that suitable arrangements be made for the cost of representation of the Respondent and if such cannot be made, this Court may then be spoken to.

sgd: Kenneth J. Matheson
REGISTRAR

Notice of Appeal to the Supreme Court of Canada, dated December 11th, 1967

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Appellant,

and

JOSEPH DRYBONES

Respondent.

NOTICE OF APPEAL

TAKE NOTICE that the above noted Appellant hereby appeals to the Supreme Court of Canada from the Judgment of the Court of Appeal of the Northwest Territories dated the 25th day of August, 1967, and supplemented by Judgment dated the 21st day of September, 1967, dismissing the appeal of the above noted Appellant upon the following ground:-

THAT the Court of Appeal for the Northwest Territories erred in upholding the decision of the Territorial Court of the Northwest Territories acquitting the Respondent of an offence contrary to Section 94 (b) of the Indian Act, R.S.C. 1952,

ch. 149, on the ground that Section 94 of the Indian Act is rendered inoperative by reason of the Canadian Bill of Rights, Stat. Can. 1960, ch. 44.

DATED at Ottawa, in the Province of Ontario, this 11th day of December, 1967.

D.S. Maxwell,
Deputy Attorney General of Canada.

10 TO: The Respondent and his Solicitor

AND TO: The Registrar of this Honourable Court.

Agreement as to Contents of Case.

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES.

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant,

and

JOSEPH DRYBONES

Respondent.

AGREEMENT AS TO CONTENTS OF CASE

IT IS AGREED between the parties hereto that the case on appeal shall comprise the following:

PART I

1) Information and complaint of Constable M. A. Mohr against the respondent herein dated the 10th day of April 1967.

2) Notice of Appeal on behalf of the Respondent to the Territorial Court of the Northwest Territories dated the 26th day of April 1967.

Agreement as to Contents of Case.

3) Notice of Appeal on behalf of the Appellant to the Court of Appeal for the Northwest Territories dated the 27th day of June 1967.

4) Notice of Intention to Cross Appeal on behalf of the Respondent to the Court of Appeal for the Northwest Territories dated the 30th day of June 1967.

5) Notice of Motion for Leave to Appeal to the Supreme Court of Canada on behalf of the Appellant dated the 14th day of November 1967.

6) Affidavit of Clarence Donald MacKinnon dated the 9th day of November 1967 in support of the Notice of Motion dated the 14th day of November 1967.

7) Order of the Supreme Court of Canada granting leave to appeal herein dated the 28th day of November 1967.

8) Notice of Appeal to the Supreme Court of Canada dated the 11th day of December 1967.

9) Agreement as to Contents of Case on Appeal.

Agreement as to Contents of Case.

PART II - EVIDENCE - Nil

PART III - EXHIBITS - Nil

PART IV - JUDGMENTS, REASON FOR JUDGMENTS

1) Judgment of John Anderson Thompson, a Justice of the Peace convicting the accused (Respondent) dated the 10th day of April 1967.

2) Judgment of the Territorial Court of the Northwest Territories acquitting the accused respondent dated the 5th day of June 1967.

3) Reasons for Judgment of the Honourable Mr. Justice W. G. Morrow of the Territorial Court of the Northwest Territories dated the 5th day of June 1967.

4) Judgment of the Court of Appeal for the Northwest Territories dated the 14th day of September 1967.

5) Reasons for Judgment of the Court of Appeal for the Northwest Territories dated the 25th day of August 1967.

Agreement as to Contents of Case.

6) Supplementary Reasons for Judgment of the Territorial Court of the Northwest Territories dated the 21st day of September 1967.

7) Certificate of the Registrar of the Court of Appeal for the Northwest Territories.

8) Certificate of the Solicitor.

DATED this 18th day of December 1967.

"D. H. Christie"
Solicitor for the Appellant

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"Brian Purdy, per R.H. Barrigar"
Solicitor for the Respondent

PART II - EVIDENCE - NIL

PART III - EXHIBITS - NIL

PART IV - JUDGMENTS, REASON FOR JUDGMENTS

Order of John Anderson-Thompson, J.P. convicting the Respondent, dated the 10th day of April 1967

JUDGMENT

PLACE ..... Yellowknife, N.W.T.

DATE: ..... April 10, 1967

FOR CROWN: ..... R.C.M.P.

FOR DEFENCE: ..... Mr. George Smith (sworn)

INTERPRETER: ..... None

PLEA: ..... Guilty

Crown Witness: ... -

Defence Witnesses: -

JUDGMENT: ..... Found guilty as charged.

SENTENCE: ..... Fined $10.00 and costs $3.50 and in default to spend 3 days in custody, and given one month to pay fine.

EXHIBITS: -

sgd: John Anderson-Thompson, MS.,JP.

Magistrate or Justice of the Peace.

(S E A L)

Order of the Territorial Court of the Northwest Territories Acquitting the Respondent, dated the 5th day of June 1967

Criminal Code
Form 33.
(Section 482)

ORDER ACQUITTING ACCUSED

CANADA)
NORTHWEST TERRITORIES)

BE IT REMEMBERED that on the 5th day of June A.D. 1967 at Yellowknife, Northwest Territories, Joseph DRYBONES of Yellowknife, Northwest Territories, was tried upon the charge that

JOSEPH DRYBONES of Yellowknife, Northwest Territories, on or about the 8th day of April A.D. 1967 at Yellowknife in the Northwest Territories, being an Indian, was unlawfully intoxicated off a reserve, contrary to Section 94(b) of the Indian Act, and was found not guilty of the said offence.

DATED this 5th day of June A.D. 1967
at Yellowknife, Northwest Territories

sgd: J. Stewart
Clerk of the Territorial Court

I hereby certify that the foregoing is a true copy of the original of which it purports to be a copy.

(S E A L)

sgd: J. Stewart
Clerk of the Court

Reasons for Judgment of The Honourable Mr. Justice W.G. Morrow of the Territorial Court of the Northwest Territories, dated the 5th day of June 1967

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

-and-

JOSEPH DRYBONES

Appellant

REASONS FOR JUDGMENT

of The Honourable Mr. Justice W. G. Morrow

The appellant was found guilty at Yellowknife, in the Northwest Territories, on April 10, 1967, and sentenced by John Anderson Thompson, a Justice of the Peace. The plea was guilty and the sentence was a fine of $10.00 and costs or three days on default. The appellant was not represented by counsel at the trial.

The charge to which the appellant plead guilty was that the appellant:

Reasons for Judgment of The Honourable Mr. Justice W.G. Morrow of the Territorial Court of the Northwest Territories, dated the 5th day of June 1967

> "on or about the 8th day of April, A.D. 1967 at Yellowknife in the Northwest Territories, being an Indian, was unlawfully intoxicated off a reserve, contrary to Section 94(b) of the Indian Act."

Notice of appeal was filed April 27, 1967, and raised legal as well as factual grounds for interfering with the verdict of the Justice of the Peace.

At the opening of the appeal before me an application was made by counsel for the appellant to include the Canadian Bill of Rights as a further ground of appeal and to permit the plea of "Guilty" to be withdrawn.

When it became clear that the appellant did not understand English and that therefore there was some serious doubt as to whether he fully appreciated his plea in the lower court, he was allowed to withdraw his original plea and the appeal proceeded as a trial de novo with a plea of "Not Guilty". The Canadian Bill of Rights was allowed to become a ground of appeal.

Six witnesses in all were called by the Crown and none by the defence.

It would appear from Section 94 (b) of The Indian Act, R.S.C. 1952, c. 149, set out below that there are three elements of the offence charged, and it was common ground that failure to establish one or more could be fatal to the Crown's caae (Regina v. Modeste (1959) 31 W.W.R. 84).

Reasons for Judgment of The Honourable Mr. Justice W. G. Morrow of the Territorial Court of the Northwest Territories, dated the 5th day of June 1967

Section 94 states:

"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."

The suggested three elements of the offence are: (1) he is an Indian, (2) he is intoxicated, and (3) he is off a reserve.

The events leading up to the laying of the charge took place shortly after 11:00 p.m. o'clock in the evening of April 8, 1967, on the premises of Old Stope Hotel in Yellowknife.

The evidence of R.C.M.Police Constables P. W. Pertson and J. Woll and of Hilda Rasche, wife of the hotel manager, satisfies me that when the appellant was found by them on the floor of the hotel lobby he was intoxicated and I so find.

Brian Purdy, counsel for the appellant, asked me to hold that his client was not proven to be an Indian.

Reasons for Judgment of The Honourable Mr. Justice W. G. Morrow of the Territorial Court of the Northwest Territories, dated the 5th day of June 1967

His argument was based on the definition of an Indian contained in The Indian Act, namely Section 2 (g). This section defines an Indian as "a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian". He proceeded to argue that the Crown had failed to establish that the appellant was in a band (Section 2 (1) (a)), that no Indian Register (Section 5) was produced, and that the entitlement to be registered as an Indian (Section 6) was not proven with failure to produce a band list, and that there was no evidence before me of a declaration by the Governor in Council (Section 2 (1) (a) (iii)).

The Crown produced as a witness one Joe Sangris, who has held the position of Chief and leader of the Indian Village at Yellowknife for some sixteen years. He described how he had known the appellant from the time he was born, he knew his wife Madeline, and the father of the appellant. This witness described how the appellant moved from the previous Indian Settlement to the present village, how he had been raised there from infancy, and was in receipt of Treaty money once a year.

David George Greyeyes, a second Crown witness, was Regional Director of Indian Affairs, and the officer

responsible to look after Indian records, contractual obligations, and otherwise represent his Department in its carrying out the various Treaties affecting the Indians. This witness produced the official record sheet showing that an Indian by the name of Drybones was carried on the Department records as an Indian, that he was shown as having no children, and was married to a Madeline Crapeau. A photostat of this record was marked Exhibit 1. The record was used for payment of Treaty money. Under cross-examination by defence counsel this witness described how records such as Exhibit 1 are maintained for each Treaty and are made up from a master list.

I am satisfied from the above that the appellant is an Indian within the meaning of The Indian Act. R. v. Myers (1925) 2 W.W.R. 471 and R. v. Howson (1894) 1 Terr. L.R. 492, have been helpful to me under this heading.

This brings me to the third suggested element of the offence. Both Chief Joe Sangris and David George Greyeyes testified that there are no Indian reserves in the Northwest Territories and I so find. There remains the problem of whether the Crown has proven its case by establishing that the appellant cannot in fact be on a reserve

Reasons for Judgment of The Honourable Mr. Justice W. G. Morrow of the Territorial Court of the Northwest Territories, dated the 5th day of June 1967

if there are none to be on, and therefore he is off a reserve, or whether it is possible for a person to be off a reserve in the language of The Indian Act if there is no reserve to be off of.

To me the question at this point resolves itself into a question of law and I must refer to what cases, if any, have already discussed this question.

It would appear that this question is peculiar to the Northwest Territories and the Yukon, where, unlike the rest of Canada, no reservations have been set aside or designated.

The problem appears to have been considered by Mr. Justice Sissons of this court in two cases, one of which is reported.

The reported decision, R. v. Modeste (supra), deals with the very same problem as is before me. At page 88 of the report the learned justice remarks on the fact that the lands granted to the Indians under their treaties had not yet been designated and reserves never established. He does state, however, "The accused must be intoxicated off a reserve. It seems implied that there is a reserve to which and on which the Indian belongs."

Reasons for Judgment of The Honourable Mr. Justice W. G. Morrow of the Territorial Court of the Northwest Territories, dated the 5th day of June 1967

While at first blush it would seem that Sissons J. has decided the question now before me, as I read the judgment he has treated the question as one of fact rather than law and although I must, and would in any event out of my respect for Justice Sissons, pay great deference to his ruling, nevertheless, if I am correct here, then he has not settled the legal point.

Again in his second decision, R. v. Gully (unreported), he treats it as a question of fact saying, "I am still firmly of the view that the prosecution has not established that he was intoxicated off a reserve."

In so far as these two decisions go, therefore, they suggest that "off a reserve" is an element of the offence charged and that possibly had the learned Justice been required to settle the legal point he was inclined to the view that it was implicit in a charge of being "intoxicated off a reserve" that there be a reserve in existence to be off of.

The above two cases appear to be the only cases in which the Territorial Court of the Northwest Territories has been concerned with this problem.

Reasons for Judgment of The Honourable Mr. Justice W. G. Morrow of the Territorial Court of the Northwest Territories, dated the 5th day of June 1967

The circumstance of there being "no reserve" appears to be found in the Yukon Territory as well, Regina v. Peters (1967) 50 C.R. 68; 57 W.W.R. 727.

In Regina v. Peters (supra) the Yukon Territory Court of Appeal was faced with the problem of whether an Indian within the meaning of The Indian Act could be prose-
10 cuted for a liquor offence under The Liquor Ordinance, R.O.Y.T. 1958, c. 67. The court held that the Ordinance was not applicable to Indians because The Indian Act made provision for the use and possession of intoxicants by Indians. Although the judgment makes reference to the lack of reserves in the Yukon Territory there does not appear to be any direction by thecourt in that connection. An examination of the actual appeal book giving rise to the appeal indicates this point was not before the court.

In a second case, Regina v. Corbek (1966), 3 C.C.C.
20 323, Magistrate W. J. Trainor of the Yukon had occasion to discuss a charge involving an Indian found in "an intoxicated condition in a public place" also under The Liquor Ordinance (supra). Although, again, the decision is based on the inapplicability of The Liquor Ordinance because of The Indian Act applying, the learned magistrate's reasons

for judgment do contain the phrase: "There are no reserves in the Yukon Territory so anywhere in the Yukon Territory is off a reserve within the meaning of the Indian Act."

It would appear, therefore, that although there is a divergence of opinion to be found in the abovementioned decisions, nonetheless, the field is open and must be settled in the present case.

A review of the legislation relating to Indians and leading up to the present Section 94 therefore becomes desirable.

As early as 1886 references are found to "reserves" in the legislation, The Indian Act 1886, R.S.C. c. 43. In this statute prohibitions with respect to intoxicants and the supplying of same are found. "Every one who sells . . . supplies . . . any Indian or non-treaty Indian, any intoxicant, . . ."(Sec. 94); "any constable may . . . arrest any Indian or non-treaty Indian whom he finds in a state of intoxication," (Sec. 104). The only reference to reserve (on or off) in these sections relates to a person who "opens on any reserve . . . a tavern house . . ." (Sec. 94).

Section 94 above was amended by Chapter 22, 1888, but retained the same essential language and meaning.

In 1894, Chapter 32, a change takes place and Section 99 contains "may arrest . . . any person or Indian found gambling, or drunk . . . on any part of a reserve."

Reasons for Judgment of The Honourable Mr. Justice W. G. Morrow of the Territorial Court of the Northwest Territories, dated the 5th day of June 1967

When the 1886 statute is carried forward in the 1906 Revised Statutes of Canada as Chapter 81, we find a greater area covered in respect of intoxicants, but little material change. Again it is an offence to: "sell . . . supply . . . to any Indian . . . any intoxicant" (Sec. 135 (a)), "found in possession in wigwam . . ." (Sec. 135 (c)); "Indian . . . has in his possession intoxicant" (Sec. 137). In this statute Section 135 (b) refers to "opens . . . on any reserve", Section 135 (c) refers to the wigwam "on reserve", and Section 139 again states: ". . . may arrest Indian found drunk . . . on any part of a reserve".

In 1914, Chapter 35, a new section 149 (2) is introduced. It has nothing to do with intoxication as such but is interesting in its reference to inciting Indians to partake in ceremonial dances and such. Part of the language is: "any Indian, in the province of Manitoba, Saskatchewan, Alberta, British Columbia, or the Territories who participates in any Indian dance outside the bounds of his own reserve".

It is to be noted that at this time the Government of Canada is referring to "outside the bounds of his own reserve" in respect to the Territories at a time when not only were there no reserves in the Territories but where

there had not yet been a treaty with the Indians in the Territories (Treaty No. 11, Sikyea v. The Queen (1964) S.C.R. 642).

Chapter 26, 1918, introduces a new Section 122A in reference to enfranchisement of Indians and part of the wording is perhaps of some interest: ss. (1) "If an Indian who holds no land in a reserve, does not reside on a reserve and does not follow the Indian mode of life, makes application to be enfranchised . . .", and ss. (3) "This section shall apply to the Indians in any part of Canada."

In respect to acquirement of land an amendment in 1922, Chapter 26, Section 197, makes reference to "may acquire for a settler who is an Indian, land as well without as within an Indian reserve".

When the 1927 Revision of Statutes, Chapter 98, came out, the old Section 137 of the 1906 Act, Chapter 81, became Section 126 but with no change in language.

The first serious "on or off" reference in the legislation appears to come in with the repeal of ss. (c) of Section 126 and substitution of a new subsection (c) as follows:

Reasons for Judgment of The Honourable Mr. Justice W. G. Morrow of the Territorial Court of the Northwest Territories, dated the 5th day of June 1967

> "is found in possession of any intoxicant in the house, room, tent, wigwam, or place of abode of any Indian or non-treaty Indian whether on or off a reserve, or of any person on any reserve or special reserve, or on any other part of any reserve or special reserve;" (1936, c. 20, s. 6).

The legislation then remained unchanged until the new Act, 1951, Chapter 29 came in on September 4th, 1951. This new Indian Act which is now Chapter 149 of the R.S.C. 1952, contains the present section 94 and others.

Reading from Section 88 down to Section 96A, there is not one section that does not in some manner contain a reference to on or off or outside or from a reserve.

Nowhere in this statute is there any reference to or carry over of the phrase "who follows the Indian mode of life" contained as part of the definition of non-treaty Indian in Sec. 2 (i), ch. 43, 1886, and carried forward in Section 135 (a), 1906, ch. 81 and in Section 122 A (1), 1918, ch. 26.

Chapter 40 of the Statutes of Canada 1956, by the repeal of Section 95 and insertion of a new Section 96A, introduces exceptions to the offences where provinces permit sales of liquor to Indians.

Reasons for Judgment of The Honourable Mr. Justice W. G. Morrow of the Territorial Court of the Northwest Territories, dated the 5th day of June 1967

There can be no doubt but that The Indian Act applies throughout Canada, equally to the Northwest Territories as to the Yukon and to the provinces. Is one to say that an Indian who has always lived in the Northwest Territories where there have never been reserves is to be treated differently in the application of a section such as Section 94 than an Indian from an Alberta reserve who happens to be in the Northwest Territories on a visit -- and obviously off a reserve? "It is desirable that there should be uniformity of Dominion legislation." R. v. Irwin (1919) 2 W.W.R. 226 and R. v. Schmolke (1919) 3 W.W.R. 409. A court should normally put that construction on legislation that will produce the greatest harmony and the least inconsistency. City of Victoria v. Mackay (1918) 1 W.W.R. 863 and 56 S.C.R. 524.

Although normally full effect should be given to every word in a section or in a statute "yet if no sensible meaning can be given to a word or phrase, or if it would defeat the real object of the enactment, it may, or rather it should, be eliminated." Maxwell on Statutes, Eleventh Edition, p. 228.

Reasons for Judgment of The Honourable Mr. Justice W. G. Morrow of the Territorial Court of the Northwest Territories, dated the 5th day of June 1967

To apply the above basic rules of construction to Section 94 of The Indian Act it appears to me that I must read the section as if "off a reserve" were not an essential element of the offence but rather an incidental, and I so do.

I cannot help but remark, in passing from this subject, that I find it difficult to understand how such confusion in legislation could be allowed to continue for so long, particularly since the difficulty was clearly suggested in the judgments of Sissons, J. referred to above.

In respect to the first ground of appeal, therefore, I find against the appellant.

The second main ground of appeal is to the effect that Section 94 of The Indian Act offends the basic rights and freedoms guaranteed by the Canadian Bill of Rights, and particularly by Section 1 (b). The argument presented on behalf of the appellant is that the effect of Sections 94 and 96 taken together, by providing for a stiffer penalty (namely by a minimum penalty) and by its wider application (an offence to be intoxicated even in an Indian's own home) is placing an Indian because of his race or color in a different position to that of his fellow Canadians. The Liquor Ordinance, R.O.N.W.T. ch. 60, contains no minimum

Reasons for Judgment of The Honourable Mr. Justice W. G. Morrow of the Territorial Court of the Northwest Territories, dated the 5th day of June 1967

penalty and does not make it an offence to be drunk in one's own home. It is argued that this is discrimination based on race and color pure and simple.

Section 1 (a) and (b) 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:
>
> (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;

Again, Section 2 of the Canadian Bill of Rights provides:

> "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 . . ."

Reasons for Judgment of The Honourable Mr. Justice W. G. Morrow of the Territorial Court of the Northwest Territories, dated the 5th day of June 1967

The provisions contained in The Indian Act and directed to the problem of intoxication were all in effect before the passing of the Canadian Bill of Rights and so Section 2 above governs.

In considering this ground of appeal, which incidentally was also raised in Regina v. Peters (supra), two cases must be considered, namely Regina v. Gonzales (1962) 37 C.R. 56; 37 W.W.R. 257; 132 C.C.C. 237; 32 D.L.R. (2d) 290, and Robertson et al v. The Queen (1963) S.C.R. 651.

In Regina v. Gonzales (supra), the Court of Appeal of British Columbia was faced with essentially the same problem as is found in the present case, namely, the effect of possession under Section 94 of The Indian Act. Davey, J.A., without discussing the meaning of Section 1 of the Canadian Bill of Rights, got over the problem by treating the statute as a general Act and The Indian Act as a special Act which, in his opinion, overrode it. Tysoe J.A. (concurred in by Bird J.A.) took the position that Section 1 (b) of the Canadian Bill of Rights did not mean that every person "should have the same rights, the same duties and the same liabilities as everyone else" and further on in his

Reasons for Judgment of The Honourable Mr. Justice W. G. Morrow of the Territorial Court of the Northwest Territories, dated the 5th day of June 1967

judgment takes the position that Section 1 (b) "means in a general sense that there has existed and there shall continue to exist in Canada a right in every person to whom a particular law relates or extends, no matter what may be a person's race, national origin, colour, religion or sex to stand on an equal footing with every other person to whom that particular law relates or extends . . .".

In Attorney General of British Columbia v. McDonald (1961) 131 C.C.C. 126, the same problem was resolved by holding that Section 94 (a) of The Indian Act was not in conflict with the Canadian Bill of Rights.

It seems clear to me that if this was all then I would be bound to follow, and indeed should follow, the reasoning of the learned appeal justices abovementioned. However, there are further factors that must be taken into consideration by me in this respect.

Since the Gonzales case, however, the Supreme Court of Canada has had occasion to consider the Canadian Bill of Rights, and although the problem involved the freedom of religion, namely Section 1 (c), the remarks of the court in that decision lead me to believe that the Gonzales case can no longer be considered as completely governing on the subject. The Supreme Court decision is Robertson et al v. The Queen (1963) S.C.R. 651.

Reasons for Judgment of The Honourable Mr. Justice W. G. Morrow of the Territorial Court of the Northwest Territories, dated the 5th day of June 1967

At page 657, Ritchie J. states that "the effect of the Lord's Day Act rather than its purpose must be looked at in order to determine whether its application involves the abrogation, abridgment or infringement of religious freedom . . .". If this be the test, and if I understand its application correctly, surely the effect of The Indian Act cannot be said to be other than to discriminate, in other words, to abrogate, abridge or infringe.

The present case, unlike the above ones, arises out of the application of The Indian Act to the Northwest Territories. In this region there is no provincial legislature as such but all levels of government are within the control of the Federal Government. It is not without some importance that the Supreme Court of Canada has already held that Eskimos (another racial group found mainly in the Northwest Territories) are to be considered as Indians within the meaning of Section 91 (24) of The British North America Act. Re Eskimos (1939) S.C.R. 104; (1939) 2 D.L.R. 417. Section 4 (1) of The Indian Act provides that references to an Indian in that statute do not include Eskimos. This means that in the Northwest Territories the authorities in enforcing liquor legislation, if The Indian Act provisions are acceptable, must of necessity treat Indians not

only differently from white Canadians but also from the other group of aborigines, namely, Eskimos. One can argue with force that in its original conception these provisions of The Indian Act were clearly intended to protect the Indian as an aborigine but surely the force of this argument was spent when Eskimos were excluded. As it stands, therefore, this portion of The Indian Act is to me a case of discrimination of sufficient seriousness that, despite my respect for the opinions of the learned Justices of the Appeal Court of British Columbia in the Gonzales case above, I feel I must differ from them, and hold that the intoxication sections of The Indian Act "abrogate, abridge or infringe" the Canadian Bill of Rights.

When considering "effect" here I restrict the application to only those sections of The Indian Act dealing with intoxicants, the statute in large part being not discriminatory but merely providing for such things as protection of property and other rights.

Again, in the same report at page 661, Mr. Justice Cartwright, admittedly dissenting, in referring to the statement of Davey J.A. in the Gonzales case found at page 239 of the C.C.C. reports, disagrees with the learned Justice of Appeal's view. He states:

Reasons for Judgment of The Honourable Mr. Justice W. G. Morrow of the Territorial Court of the Northwest Territories, dated the 5th day of June 1967

"With the greatest of respect, I find myself unable to agree with this view. The imperative words of s. 2 of the Canadian Bill of Rights, quoted above, appear to me to require the courts to refuse to apply any law, coming within the legislative authority of Parliament, which infringes freedom of religion unless it is expressly declared by an Act of Parliament that the law which does so infringe shall operate notwithstanding the Canadian Bill of Rights. As already pointed out s. 5 (2), quoted above, makes it plain that the Canadian Bill of Rights is to apply to all laws of Canada already in existence at the time it came into force as well as those thereafter enacted. In my opinion where there is irreconcilable conflict between another Act of Parliament and the Canadian Bill of Rights the latter must prevail."

Under this heading of argument, counsel for the Crown, respondent, referred to the Order-in-Council No. 12 found at page 4150 of the Canada Gazette, Vol. 93, declaring that ss. (3) of Section 95 of The Indian Act should be brought into force. I cannot see how this event can assist in the present case except perhaps to show an awareness in the Government of the need to relax at least one of the Act's liquor provisions.

In the end result, therefore, the appeal is allowed and I direct that the fine and costs including security for costs for this appeal already paid, be refunded to the appellant.

Reasons for Judgment of The Honourable Mr. Justice W. G. Morrow of the Territorial Court of the Northwest Territories, dated the 5th day of June 1967

I wish to thank counsel for both the appellant and the respondent for their assistance in this case. Among the many authorities cited to me, I should perhaps mention the following: R. v. Otokiak (1959) 30 C.R. 401; R. v. Mellon (1900) 5 Terr. L.R. 301; Rogers-Majestic Corp. Ltd. v. Toronto (1943) S.C.R. 440; R. v. Williams (1958) 12 C.C.C. 34; R. v. Shade (1951-52) 4 W.W.R. 430; R. v. Johns (1962) 133 C.C.C. 43; R. v. Cooper (1925) 2 W.W.R. 778; Laskin's Canadian Constitutional Law, 3rd Ed., p. 976; (1964) 42 C.B.R. p. 147-156; and Tornopolsky on The Canadian Bill of Rights, comm. p. 208.

Since an appeal from this decision is almost inevitable, it is my hope that Crown counsel's generous undertaking to remand all further prosecutions under The Indian Act will be continued until the appeal can be heard.

sgd: W. G. Morrow

June 5, 1967.
Yellowknife, N.W.T.

O. J. T. Troy, Esq.,
Counsel for the respondent.

Brian Purdy, Esq.,
Counsel for the appellant.

48.

Report of Crown Appeal to the Court of Appeal for the Northwest Territories showing that the appeal was dismissed, dated the 14th day of September 1967

REPORT OF CROWN APPEAL

Court House at Edmonton, Alberta
14th day of September, 1967
File No. N.W.T. App.80

Sir:

I report the following particulars:

Re: JOSEPH DRYBONES

Offence: Unlawfully intoxicated off a reserve, Sec. 94(b) of the Indian Act.

Convicted by: His Worship John Anderson-Thompson, a Justice of the Peace in and for the Northwest Territories,

At: Yellowknife, N.W.T. On: April 10th, 1967

Sentence: Fined $10.00 and Costs $3.50, I/D THREE (3) DAYS.

Appealed: Appeal heard by Mr. Justice W.G. Morrow, who allowed the Appeal and Quashed the Conviction.

Police Department Concerned: R.C.M.P.

ACTION TAKEN IN APPEAL COURT

Crown Appeal to: Court of Appeal - N.W.T.

Date Appeal Filed: June 27th, 1967

Date of Hearing: July 31st,1967

Heard by: Chief Justice S. Bruce Smith,
Mr. Justice H. G. Johnson,
Mr. Justice G. H. Allen.

Date Released on Bail: --

Place of Hearing: Edmonton, Alberta

Result of Appeal: JUDGMENT WAS RESERVED ON JULY 31st, 1967, Reasons delivered on August 25th, 1967.

THE APPEAL OF THE CROWN IS DISMISSED.

Appellant's Solicitor: J. C. Cavanagh, Esq., Q.C.,
Respondent's Solicitor: B. Purdy, Esq.,

Fine Paid or
Gaol Term Taken: -- Date Taken into Custody: --

Report of Crown Appeal to the Court of Appeal for the Northwest Territories showing that the appeal was dismissed, dated the 14th day of September 1967

CERTIFICATE

This is to certify that the information set out above is correct.

(a) ~~and that the fine and costs are to be refunded to the appellant.~~

(b) ~~and that the fine and costs are to be refunded to the appellant's solicitor.~~

(Strike out either (a), (b) or both.)

sgd: (signature illegible)

D/ Registrar

(S E A L)

TO:
1. The Minister of Justice,
OTTAWA, Ontario.

2. Officer Commanding "G" Division,
Royal Canadian Mounted Police,
OTTAWA, Ontario (3 copies)

3. Clerk of the Court,
Court House,
YELLOWKNIFE, N.W.T.

Reasons for Judgment of the Court of Appeal for the Northwest Territories, dated the 25th day of August 1967.

IN THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES

The Court:

The Honourable the Chief Justice
The Honourable H. G. Johnson
The Honourable G. H. Allen

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

JOSEPH DRYBONES

Respondent

REASONS FOR JUDGMENT

of The Honourable Mr. Justice Johnson

This is an application for leave to appeal under Section 743 of the Criminal Code from the judgment of Morrow J., who heard the appeal from the magistrate under Section 719 (g). The appeal raises the question whether or not Section 94 of The Indian Act is rendered inoperative by reason of the Canadian Bill of Rights.

Reasons for Judgment of the Court of Appeal for the Northwest Territories, dated the 25th day of August 1967.

The respondent was convicted following a plea of guilty on a charge that he

> "on or about the 8th day of April, A.D. 1967, at Yellowknife, in the Northwest Territories, being an Indian, was unlawfully intoxicated off a reserve, contrary to Section 94 (b) of the Indian Act."

On his appeal he asked leave to change his plea from guilty to not guilty. Morrow, J. granted leave to change the plea, and, having heard the evidence on the trial de novo, found that on the date and in the place mentioned in the charge, the respondent was intoxicated. He allowed the appeal, however, holding that section 94 of The Indian Act was discriminatory legislation against Indians and thus came within section 1 (b) of the Canadian Bill of Rights. The Crown's appeal is limited to this part of the learned appeal judge's decision.

Section 94 of The Indian Act, R.S.C. 1952, c. 149, reads:

> "94. 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."

Reasons for Judgment of the Court of Appeal for the Northwest Territories, dated the 25th day of August 1967.

Persons other than Indians are only liable to a penalty of fine or imprisonment if they are intoxicated in a public place, Liquor Ordinance, R.O.N.W.T. 1957, c. 60, s. 19 (1).

The portions of the Canadian Bill of Rights, S.C. 1960, c. 44, relevant to this appeal are:

> "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;
>
> . . . ."

> "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, . . ."

> "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, . . . 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."

Reasons for Judgment of the Court of Appeal for the Northwest Territories, dated the 25th day of August 1967.

We are all agreed that the decision of Morrow J. on this point is correct. We also agree with his reasons for arriving at this conclusion.

Because the argument of counsel for the Crown is based almost exclusively upon the contrary decision of the Court of Appeal of British Columbia in Regina v. Gonzales, 37 W.W.R. 257, it is necessary to consider that case. That court held, dismissing an appeal from Maclean J. of an appeal by way of stated case, that section 94 was unaffected by the Canadian Bill of Rights, and several different reasons for coming to that conclusion were given in that court and in the court below.

It is not, I think, necessary to discuss the reasons of Davey, J.A. Cartwright J. in Robertson and Rosetanni v. The Queen (1963) S.C.R. 651, at page 661 quotes from that judgment and on the following page states his reasons for disagreeing with the view that was stated in the quoted passage. Cartwright J. dissented from the judgment of the other members of the court but I can find nothing in the majority judgment that would conflict with the view that he expressed.

The reasons given by Tysoe J.A. (concurred in by Bird J.A.) for holding that this section of The Indian Act was unaffected by the Canadian Bill of Rights should, I think, be stated in his own words:

Reasons for Judgment of the Court of Appeal for the Northwest Territories, dated the 25th day of August 1967.

> "It would be difficult and indeed unwise to attempt an exact and inclusive definition of sec. 1 (b) applicable to all possible cases and circumstances and I have no intention of doing so. It is sufficient to say that in my opinion in its context sec. 1 (b) means in a general sense that there has existed and there shall continue to exist in Canada a right in every person to whom a particular law relates or extends, no matter what may be a person's race, national origin, colour, religion or sex, to stand on an equal footing with every other person to whom that particular law relates or extends, and a right to the protection of the law."

and later, at page 265, he says:

> "Equality before the law as I have explained it is quite a different thing to equal laws for everyone which, as I have already indicated, would be a practical impossibility. Never have our laws been the same for everyone regardless of such matters as age, ability and characteristics, but the two rights, 'equality before the law' and 'protection of the law' are deeply rooted in our traditions."

This interpretation would restrict equality before the law to equality before the courts. If this sub-section means no more than this, it would hardly have seemed necessary to include it for this right has always been jealously guarded by the courts. He also seems to say that section 1 (b) permits legislation that discriminates against race so long as all persons within the race that is discriminated against are treated in the same way. This

interpretation would permit Parliament, without the express declaration required by section 2, to enact respecting Indians the kind of legislation which was in force for so many years in the United States and which denied the coloured race equal rights with those enjoyed by white people and which has been struck down by the Supreme Court of that country during the last fifteen or so years. If such legislation is permitted to be so passed by the Parliament of Canada, the Act falls far short of the high purpose expressed both in the Act and its preamble.

In support of the interpretation that he placed upon this section, Tysoe J. refers to the many restrictions that are placed by legislation upon different classes of persons -- he refers specifically to the judges' inability to vote. Better known ones include special legislation as to infants and persons of unsound mind. There are, of course, many of these restrictions throughout our laws and there can be no question of the propriety of such legislation and the Bill of Rights leaves most of these discriminatory Acts unaffected. It is only those that discriminate "by reason of race, national origin, colour, religion or sex" that are affected by that Act.

In some of the judgments in the Gonzales case, stress is laid upon the necessity for special legislation to protect Indians. It has been the policy of the Canadian

government in the past and is, no doubt, its continuing policy, to treat Indians in many respects different from other races in Canada. One would have hoped that that could have been done without subjecting Indians to penalties and punishments different to those imposed on other races. If it is not possible to protect them otherwise, the Bill of Rights permits discriminatory legislation to continue or be enacted, but Parliament must expressly declare that such Acts "shall operate notwithstanding the Canadian Bill of Rights."

It is to be remembered that when considering whether legislation is affected by the Bill of Rights, it is not the purpose of such legislation, no matter how beneficial or necessary it may be thought to be, but its effect which must govern. (Ritchie J. in Robertson and Rosetanni v. The Queen (supra) at page 657).

Full effect should be given to the plain and ordinary meaning of the word "expressly" in the phrase "unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights. Once it has been found that a section of an Act is discriminatory by reason of race, national origin, colour, religion or sex, it follows that it will not be operative "unless it is expressly declared" to be operative.

Reasons for Judgment of the Court of Appeal for the Northwest Territories, dated the 25th day of August 1967.

The interpretation placed upon section 1 (b) by Morrow J. is consonant with the spirit and purpose of the Canadian Bill of Rights and I would accordingly refuse leave to appeal.

A cross-appeal was filed. If this case is further appealed, our views on the point raised by it may be of some value. Morrow J. held (and in this he disagreed with a judgment of an earlier judge of the Territorial Court), that the words "off a reserve" in section 94 permitted a conviction notwithstanding that there were no reserves in the Northwest Territories. "The words "off a reserve" is an essential element to be proved in any charge laid under section 94. But once it is proved, as it was in the present case, that the offence was not committed upon a reserve, the requirement of the section was satisfied. The fact that there are no reserves in the Territories is quite irrelevant."

sgd: H. G. Johnson

J.A.

Edmonton, Alberta,

August 25, 1967.

J. C. Cavanagh, Esq., Q.C.
Counsel for the appellant.

G. Brian Purdy, Esq.,
Counsel for the respondent.

Reasons for Judgment of the Court of Appeal for the Northwest Territories, dated the 25th day of August 1967.

IN THE COURT OF APPEAL OF
THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

-and-

JOSEPH DRYBONES

10 Respondent

REASONS FOR JUDGMENT

I concur

(sgd: S. Bruce Smith)
C.J.A.

I concur

(sgd: G. H. Allen)
J.A.

(sgd) J.C. Cavanagh, Q.C., 7.20

Supplementary Judgment of the Court of Appeal for the Northwest Territories, dated the 21st day of September 1967

IN THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES

The Court:

The Honourable the Chief Justice
The Honourable H. G. Johnson
The Honourable G. H. Allen

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

-and-

JOSEPH DRYBONES

Respondent

SUPPLEMENTARY JUDGMENT

of The Honourable Mr. Justice Johnson

It has been called to my attention that I stated in my judgment that leave to appeal had been refused. Leave to appeal was in fact granted and my judgment accordingly should have read that the appeal was dismissed rather than that Leave to appeal was refused.

sgd: H. G. Johnson

J.A.

Edmonton, Alberta,
September 21, 1967

Supplementary Judgment of the Court of Appeal for the Northwest Territories, dated the 21st day of September 1967

J. C. Cavanagh, Esq., Q.C.,
Counsel for the Appellant.

G. Brian Purdy, Esq.,
Counsel for the Respondent.

Certificate of the Registrar of the Court of Appeal for the Northwest Territories, dated December 21, 1967.

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant,

-and-

JOSEPH DRYBONES

Respondent.

CERTIFICATE OF REGISTRAR

I, the undersigned, Registrar of the Court of Appeal for the Northwest Territories DO HEREBY CERTIFY that the foregoing case in one volume, being pages numbered one to sixty-three which is the case agreed upon by the parties to the appeal, by their Consent as to Contents of Case dated the 18th day of December, 1967.

AND I DO FURTHER CERTIFY that all judgments and orders appearing therein have been settled and signed in the form in which they appear and where required entered, and that there are no recorded reasons for judgment other than those appearing in the said case.

Certificate of the Registrar of the Court of Appeal for the Northwest Territories, dated December 21, 1967.

IN TESTIMONY WHEREOF I have hereunto subscribed my hand and affixed the seal of the said Court of Appeal for the Northwest Territories, this 21st day of December A.D. 1967.

sgd: J. G. CIONI

REGISTRAR

Solicitor's Certificate.

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant,

and

JOSEPH DRYBONES

10 Respondent,

SOLICITOR'S CERTIFICATE

I, D. H. CHRISTIE, hereby certify that I have closely examined the annexed print of the case in appeal to the Supreme Court of Canada and verily believe that the same is a true and correct reproduction of the originals of which they purport to be copies and that all reasonable methods have been taken to attain that end and that the same has been proofread.

"D. H. CHRISTIE"

20 Solicitor for the Appellant

ABBOTT J.

FILED
10 SEP 1968
SUPREME COURT OF CANADA
COUR SUPREME DU CANADA
PRODUIT

11026

IN THE SUPREME COURT OF CANADA

On Appeal from the Court of Appeal of the Northwest Territories

BETWEEN:

HER MAJESTY THE QUEEN,

Appellant,

- and -

JOSEPH DRYBONES,

Respondent.

FACTUM OF THE ATTORNEY GENERAL OF CANADA

IN THE SUPREME COURT OF CANADA

On Appeal from the Court of Appeal of the Northwest Territories

BETWEEN:

HER MAJESTY THE QUEEN,

Appellant,

- and -

JOSEPH DRYBONES,

Respondent.

FACTUM OF THE ATTORNEY GENERAL OF CANADA

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IN THE SUPREME COURT OF CANADA

On Appeal from the Court of Appeal of the Northwest Territories

BETWEEN:

HER MAJESTY THE QUEEN,

Appellant,

- and -

JOSEPH DRYBONES,

Respondent.

FACTUM OF THE ATTORNEY GENERAL OF CANADA

PART I

STATEMENT OF FACTS

1. This is an appeal from an Order of the Court of Appeal of the Northwest Territories pronounced on the 25th day of August, 1967, with a supplementary judgment delivered on the 21st day of September, 1967, (Case pp. 48-59) dismissing an appeal by the Appellant from the Order of the Honourable Mr. Justice Morrow of the Territorial Court of the Northwest Territories pronounced on the 5th day of June, 1967, (Case pp. 26-47) allowing an appeal by the Respondent, in proceedings by way of trial de novo, from his conviction upon a plea of guilty on the 10th day of April, 1967, (Case p. 25) by Justice of the Peace John Anderson-Thompson for an alleged offence contrary to Section 94 (b) of the Indian Act R.S.C. 1952, c. 149. He was sentenced to pay a fine of $10.00 plus costs in the sum of $3.50 and in lieu of payment thereof a sentence of three days' imprisonment was imposed.

2. The Appellant is an Indian within the meaning of paragraph (g) of subsection (1) of Section 2 of the Indian Act. The charge upon which the Respondent was convicted on the 10th day of April, 1967, was that he "... on or about the 8th day of April, 1967, at Yellowknife in the Northwest Territories, being an Indian, was unlawfully intoxicated off a reserve, contrary to Section 94 (b) of the Indian Act".

3. Sections 94 and 96 of the Indian Act; Sections 19 (1) and 38 (1) of the Liquor Ordinance, Revised Ordinances of the Northwest Territories 1956, c. 60, and Sections 1 (a) and (b), 2 and 5 (2) of the Canadian Bill of Rights, Statutes of Canada, 1960, c. 44, provide:

"94. 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.

.....

"96. A person who is found
(a) with intoxicants in his possession, or
(b) intoxicated
on 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."

"19. (1) No person shall
(a) be in an intoxicated condition in a public place;
(b) supply liquor in a public place to a person who is intoxicated; or
(c) except as provided in this Ordinance, consume liquor in a public place.

.....

"38. (1) Every person, other than a corporation, who violates any provision of this Ordinance or the regulations for which no other penalty is provided in this Ordinance is guilty of an offence and liable upon summary conviction to a fine not exceeding fifty dollars or to imprisonment for a term not exceeding thirty days or to both such fine and imprisonment."

"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;

.....

"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 ...".

.....

"5. (2) The expression 'law of Canada' in Part I 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."

4. In quashing the conviction Mr. Justice Morrow states in his Reasons for Judgment that it was argued on behalf of the Respondent that the effect of Sections 94 and 96 of the Indian Act, taken together, is discriminatory legislation based on race and colour and, therefore, contrary to the Bill of Rights, particularly Section 1 (b) thereof because,

(a) Section 19 (1) of the Liquor Ordinance, which is of general application to persons other than Indians, does not prescribe a minimum penalty as do Sections 94 and 96 of the Indian Act; and

(b) It is an offence under the Indian Act for an Indian to be intoxicated even in his own home, but such conduct is not unlawful in relation to non-Indians.

After referring to the judgment of a Judge of the Caribou County Court in The Attorney General of British Columbia v. McDonald (1961) 131 C.C.C. 126, the judgments of the British Columbia Court of Appeal and the Yukon Territory Court of Appeal in Regina v. Gonzales (1962) 37 C.R. 56 and Regina v. Peters (1967) 50 C.R. 68 all of which consider Section 94 of the Indian Act in relation to the Bill of Rights, and Robertson and Rosetanni v. The Queen 1963 S.C.R. 651, His Lordship concludes "... that the intoxication sections of the Indian Act 'abrogate, abridge or infringe' the Canadian Bill of Rights". (Case p. 45).

5. The Northwest Territories Court of Appeal (Smith, CJ, Johnson and Allen, JJ.A) expressly agreed with the conclusion arrived at by Morrow, J., and with the latter's Reasons for arriving at that conclusion. (Case p. 53).

6. The Appellant made application for leave to appeal pursuant to Section 41 of the Supreme Court Act on the ground that there was an important question of law arising out of the judgment of the Northwest Territories Court of Appeal, namely, whether that Court erred in finding that Section 94 of the Indian Act is rendered inoperative by reason of the Canadian Bill of Rights. Leave was granted on the 28th day of November, 1967. (Case pp. 17 and 18).

PART II

POINT IN ISSUE

7. Whether the Court of Appeal for the Northwest Territories erred in finding that Section 94 of the Indian Act is rendered inoperative by reason of the Canadian Bill of Rights.

Mr. Chrusta

Three points

1. Bill 2 Rights does not envisage the possibility that legislation of the Parliament of Canada in existence at time of coming into force might infringe the human rights & fundamental freedoms referred to therein.

2. In any event the test applied by Morrow J. and the NWT Court of Appeal which involves a comparison of the provisions of the Territorial Ordinance with s. 94 of the Indian Act is not an appropriate test.

3. Legislation directed at a particular group in our society to the exclusion of others is not necessarily in compliance with the Bill of Rights even if that group may be identifiable on the basis of race e.g. the Indians.

PART III

ARGUMENT

8. Section 1 of the Canadian Bill of Rights expressly recognizes and declares that at the date of its enactment on the 10th day of August, 1960, there existed and would continue to exist without discrimination by reason of race, national origin, colour, religion or sex certain enumerated human rights and fundamental freedoms including the right of the individual to equality before the law and the protection of the law. The existence at that time of these human rights and fundamental freedoms must have reference to, and be circumscribed by, the laws of Canada as they then existed which laws included Section 94 of the Indian Act. See Robertson and Rosetanni v. The Queen (supra) per Ritchie, J. (Taschereau, CJC, Fauteux and Abbott, JJ. concurring) at pages 654-5.

9. In any event if the proper construction to be placed upon the Canadian Bill of Rights is that the law of Canada referred to therein includes laws enacted prior to the 10th day of August, 1960, the test applied in the courts below coming to the conclusion that Section 94 abrogates, abridges or infringes the Canadian Bill of Rights is not appropriate. It leaves the question whether Section 94 has been rendered inoperative having regard to the reasons assigned by those courts in coming to their conclusion entirely to whatever views might be expressed in legislation by legislative bodies subordinate to Parliament (the Territorial Council of the Northwest Territories and the Yukon Territory derive their existence and legislative authority exclusively from Parliament) or by the provincial legislatures in cognate matters. It follows, therefore, that while in enacting Section 94 Parliament was making a law of general application to Indians across Canada without reference to regional considerations the Canadian Bill of Rights has been construed as making the operation of the Section dependent upon legislation enacted, or a failure to enact legislation, by the ten Provinces and two Territories. Under these circumstances the operation of Section 94 could not only vary from place to place in Canada but also from time to time depending upon amendments which may be made to the Provincial and Territorial legislation.

10. It cannot be said that special legislation in relation to an identifiable group, even though it may impose special sanctions or burdens on that group, of itself necessarily is in conflict with the Canadian Bill of Rights. For example, under Head 25 of Section 91 and Section 95 of

On first point

Can legislature Parliament presumed to be aware with its competence

Wacker v King 1939 SCR 214 at 220

H. Young & Co v Mayor & City Royal Leamington Spa 8 AC 517 at 526.

Declaration in preamble to Bill of Rights recognizing with the fact that at times one of the freedoms was been infringed.

Sec 3 provides for judicial enquiry.

Reference Robinson v Regina 1963 SCR 651 at 654 655

Jones case before 1960 given this accepted & ordinary interpretation.

Second Point

Nevertheless that S. 94 would depend upon what various provincial legislatures thought appropriate. (See para 9 of petition)

(Summary of Provincial legislatures

the British North America Act Parliament has legislative jurisdiction in relation to aliens and immigration. Pursuant to this legislative authority Parliament has enacted the Immigration Act R.S.C. 1952, c. 325, which contains provisions of the kind just mentioned, but which are essential to the good government of Canada or, for that matter, to the good government of any other modern and organized society. Parliament should not be taken in employing the general language of the Canadian Bill of Rights to have manifested the intention of repealing all such legislation.

11. It is submitted that legislation enacted by Parliament should not be construed as abrogating, abridging or infringing the rights and freedoms enumerated in the Canadian Bill of Rights in the absence of clear evidence that its true design and effect are to discriminate against certain persons in the sense of placing them at a disadvantage, in the broad sense, in relation to the rest of the community without regard to any reasonable and legitimate object unrelated to the prohibited criteria of race, national origin, colour, religion or sex. There is nothing before this Honourable Court to support the conclusion that Section 94 of the Indian Act is legislation of that nature.

12. Reference will also be made to Regina v. Gonzales (supra), Regina v. Peters (supra) and The Attorney General of British Columbia v. McDonald (supra).

Thurrock

See para 10 of the Lecture

Gen. Broadcasting Act 1967-8

Cam.
C. 25.
A. 159 22

Act must be looked at as a whole.
Purpose was to ensure temporary bans.

PART IV

ORDER SOUGHT

13. It is submitted on behalf of the Attorney General of Canada that the appeal should be allowed. He does not ask for costs.

D. H. Christie
C. D. MacKinnon

AUTHORITIES

Robertson and Rosetanni v. The Queen 1963 S.C.R. 651

Regina v. Gonzales (1962) 37 C.R. 56

Regina v. Peters (1967) 50 C.R. 68

The Attorney General of British Columbia v. McDonald (1961) 131 C.C.C. 126

ABBOTT J.

11026

In the Supreme Court of Canada

ON APPEAL FROM THE COURT OF APPEAL
FOR THE NORTHWEST TERRITORIES

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant,

-and-

JOSEPH DRYBONES

Respondent.

Factum of the Respondent

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ROBERT L. STEPHEN, OTTAWA

In the Supreme Court of Canada

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ROBERT L. STEPHEN, OTTAWA

IN THE SUPREME COURT OF CANADA
ON APPEAL FROM THE COURT OF APPEAL
FOR THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN,

Appellant

- and -

JOSEPH DRYBONES,

Respondent.

MEMORANDUM OF THE
POINTS OF ARGUMENT OF THE RESPONDENT

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IN THE SUPREME COURT OF CANADA
ON APPEAL FROM THE COURT OF APPEAL
FOR THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN,

Appellant

- and -

JOSEPH DRYBONES,

Respondent.

MEMORANDUM OF THE POINTS OF ARGUMENT OF THE RESPONDENT

PART 1

STATEMENT OF FACTS

This is an appeal from the Judgment of the Court of Appeal for the Northwest Territories, dated the 25th day of August, 1967, (Case, p. 50) which Judgment dismissed an Appeal by the Crown of the Judgment of the Honourable Mr. Justice W. G. Morrow dated the 5th day of June, 1967, (Case, p. 27), who permitted a change of plea from guilty to not guilty and allowed an appeal by way of trial de novo from the conviction entered by Justice of the Peace John Anderson-Thompson, dated the 10th day of April, 1967 (Case, p. 25).

Leave to appeal to this Honourable Court from the Judgment of the Court of Appeal of the Northwest Territories was granted by Order dated the 28th day of November, 1967, (Case, p. 17), upon application by the Crown.

The Respondent has been charged that on the 8th day of April, 1967, at Yellowknife in the Northwest Territories, being an Indian, he was unlawfully intoxicated off a reserve, and thereby committed an offence contrary to Section 94(b) of the Indian Act. (Case, p. 1).

At about 11:40 o'clock in the evening on the 8th day of April, 1967, as a result of a complaint made by Hilda Rasche, assistant to the manager of the Old Stope Hotel in Yellowknife, Constables Wool and Pertson of the Royal Canadian Mounted Police investigated and discovered the Respondent in an intoxicated condition in the lobby portion of the hotel, and placed him under arrest.

Mrs. Rasche testified as to the condition of the Respondent and to the fact that about 10:50 p.m. a waiter had ejected the Respondent from the bar of the Old Stope Hotel for falling asleep at a table.

Daniel Konelsky, the Secretary Treasurer of the Town of Yellowknife, testified that the Old Stope Hotel was within the boundaries of the Town of Yellowknife, and that the Municipality's files did not disclose any Indian Reserves within the boundaries of the Town of Yellowknife.

Joe Sangris testified that he was the Chief of the Yellowknife band of Dogrib Indians, that he was well acquainted with the Respondent, and that the Respondent had been married for about twenty years to Madeline Crapeau. Mr. Sangris also testified that the Respondent's father was Michael Drybones, that the Respondent had no children and received treaty money. In his testimony Mr. Sangris stated that the Yellowknife band of Dogrib Indians had never lived on a reserve, and to the best of Mr. Sangris' knowledge there were no reserves in the Northwest Territories.

David George Greyeyes, the Regional Director of Indian Affairs at Fort Smith, whose responsibility it was to look after the contractual obligations of the government towards Indians and to maintain records of all the bands in the District of the MacKenzie, produced the official membership record of the Yellowknife band. The record of the Yellowknife band showed two other persons named Joseph Drybones as members of the band, but only one had a wife by the name of Madeline. Mr. Greyeyes explained that the document entered as Exhibit 1 was the individual record maintained by his office for the Joseph Drybones whose wife was named Madeline, and that the master band list listing

all of the members of the band was made up from the individual records.

The Respondent called no evidence on his own behalf.

PART II

POINTS IN ISSUE

1. Was the Court of Appeal for the Northwest Territories in error in upholding the decision of the Territorial Court of the Northwest Territories acquitting the Respondent of an offence contrary to Section 94(b) of the Indian Act, R.S.C. 1952, c. 149, on the ground that Section 94 of the Indian Act is rendered inoperative by reason of the Canadian Bill of Rights, Stats. Can. 1960, c. 44?

IT IS SUBMITTED that because the Indian Act applies selectively only to a certain race of people, and because Section 94(b) of the Indian Act imposes a more severe penalty and creates an offence of intoxication with broader application than does corresponding sections of the Liquor Ordinance, R.O.N.W.T. 1956, c. 60, thereby exposing Indians to a greater likelihood of prosecution and penal consequences for intoxication, that therefore Section 94(b) of the Indian Act abrogates, abridges and infringes the right of Indians, by reason of their race, to equality before the law, recognized by Section 1(b) of the Canadian Bill of Rights, Stats. Can. 1960, c. 44, and therefore Section 94(b) of the Indian Act is rendered inoperative by the effect of Section 2 of the Canadian Bill of Rights.

Ms. Purdy

Interpolation acb. S. 15.

PART III

A R G U M E N T

The charge against the Respondent in this case was laid under Section 94(b) of the Indian Act, R.S.C. 1952, c. 149, as amended, which reads:

> 94. 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.

It is respectfully submitted that any Court having jurisdiction in the Northwest Territories must, by virtue of the provisions of Section 17 of the Canada Evidence Act, R.S.C. 1952 c. 307 and Section 29 of the Evidence Ordinance R.O.N.W.T. 1956 c. 31, take judicial notice of Section 19 (1) (a) of the Liquor Ordinance, R.O. N.W.T. 1956 c. 60, which provides:

> 19.(1)No person shall:. . .
> (a) be in an intoxicated condition in a public place;. . .

The penalty provided for an offence under Section 19 (1)(a) of the Liquor Ordinance, R.O.N.W.T. 1956 c. 60, is set out in Section 38(1) which provides:

> 38.(1)Every person, other than a corporation, who violates any provision of this Ordinance or the regulations for which no other penalty is provided in this Ordinance is guilty of an offence and liable upon summary conviction to a fine not exceeding fifty dollars or to

imprisonment for a term not exceeding thirty days or to both such fine and imprisonment.

No other intoxication offences are created in the Territorial Ordinances.

It is apparent that the penalty provided for an intoxication offence under the Indian Act is more severe than the penalty provided under the Liquor Ordinance in that the Indian Act penalty provides for a minimum fine of ten dollars whereas no minimum fine is imposed under the Liquor Ordinance, and further the potential term of imprisonment under the Indian Act is a period of three months, whereas under the Liquor Ordinance the potential term of imprisonment cannot exceed thirty days.

It is also apparent that the intoxication offence created by the Indian Act applies more broadly than the offence created by the Liquor Ordinance in that the Indian Act offence is intoxication "off a reserve", whereas the Liquor Ordinance offence is merely intoxication "in a public place". If an Indian therefore is "off a reserve", which he is at all times in the Northwest Territories (Case, p. 57) he may be guilty of an offence if he is intoxicated in either a public place or a private place.

It has been common ground between the Appellant and the Respondent in this case that the Federal Parliament has exclusive jurisdiction to legislate in respect of Indians, and that the Respondent, being an Indian as defined by the Indian Act, was properly charged under the Indian Act rather than the Liquor Ordinance.

In determining whether Section 94(b) of the Indian Act is rendered inoperative by the effect of the Canadian Bill of Rights, it is submitted that the relevant sections of the Canadian Bill of Rights are Section 1(b), Section 2, and Section 5(2). Section 1(b) of the Canadian Bill of Rights 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;"

Section 2 of the Canadian Bill of Rights provides;

" 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,. . ... "

It is submitted that it is clear that the Indian Act is a "law of Canada" within the meaning of Section 2 of the Canadian Bill of Rights, particularly in view of the provisions of Section 5(2) of the Canadian Bill of Rights which states:

" 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."

Nowhere in the Indian Act is it expressly, or even impliedly, declared that the Indian Act shall operate notwithstanding the Canadian Bill of Rights.

It is respectfully submitted that because Section 94(b) of the Indian Act imposes a more severe punishment and a broader application of the offence of intoxication on Indians than is otherwise provided for all other persons in the Northwest Territories, and because the more severe penalty and broader application of the offence applies to Indians solely

because they are Indians and for no other reason, that Section 94(b) of the Indian Act is discriminatory by reason of race, and abridges, abrogates and infringes the right of Indians in the Northwest Territories to equality before the law.

It is further submitted that because Section 94(b) of the Indian Act abridges, abrogates and infringes the rights of Indians to equality before the law because of their race, that Section 94(b) is thereby rendered inoperative by the effect of Section 2 of the Canadian Bill of Rights. Section 2 of the Canadian Bill of Rights provides that no law of Canada shall be "construed and applied" so as to abrogate, abridge or infringe the fundamental rights or freedoms recognized by the Canadian Bill of Rights unless it is expressly declared that the legislation shall operate notwithstanding the Canadian Bill of Rights. By clear implication legislation which does not contain the express declaration that it shall operate notwithstanding the Canadian Bill of Rights, and which abrogates, abridges or infringes the recognized fundamental rights and freedoms shall not "operate".

It should be noted that the Canadian Bill of Rights provides for equality before the law, not equality before the Courts. It is submitted that this use of the word "law" contemplates all three basic aspects of the operation of our law - the legislative, administrative, and judicial functions which embody the entire operation of law. It is submitted that the Canadian Bill of Rights guarantees equality and impartial treatment without discrimination by race, national origin, colour, religion or sex, equally before the legislature and administrators of the law as before the Courts.

This submission is re-enforced by virtue of the fact that the Canadian Bill of Rights in Section 1(a) has separately and specifically recognized "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." It is submitted that this "due process" section has the effect of recognizing the right of the individual to receive equal treatment by the Courts in respect of the application of existing legislation to him. By adding a specific recognition of the right of the individual to equality before the law it would appear that the intent of Parliament is to guarantee a right more broad in its application than mere "due process".

Young v Com of Virginia
87 A Supreme Court Reporter
1817

Says S. 94. has effect of
abrogating right of Indians

§ 108 Indian Act

§ 2 is mandatory provision.
v. non obstante

S. 94(b) would appear to abrogate
treaty of Indian

This does not mean that all persons must receive equal treatment at all times from either the legislature or the courts. Clearly the Federal Parliament is entitled to enact legislation which may discriminate against persons because of their age, their employment, their official office, or because of mental or physical defects or other reasons of this sort. It is submitted, however, that the Federal Parliament by virtue of the operation of the Canadian Bill of Rights cannot expect legislation not expressly declared to be operable in spite of the Canadian Bill of Rights, to be applied so as to abrogate the rights of a certain group, where the basis of selection of that certain group is solely because of its race.

The relationship between the Canadian Bill of Rights and Section 94 of the Indian Act has been considered by the Courts in only a few instances. A case which would appear to be in direct conflict with the decision of the Court of Appeal for the Northwest Territories in this case is R. v. Gonzales (1962 37 C.R. 56 (B.C.C.A). The reasoning in the Gonzales case was adopted by the Yukon Territory Court of Appeal in R. v. Peters (1967) 50 C.R. 68. The Gonzales case was distinguished and the Canadian Bill of Rights applied by McFadden D.C.J. of the Saskatchewan District Court in Richards v. Cote (1963) 40 W.W.R. 340. In Attorney General of British Columbia v. McDonald (1961) 131 C.C.C. 126, Morrow Co. Ct. J. rejected the application of the Canadian Bill of Rights to Section 94 of the Indian Act for other reasons.

Since it is submitted that the reasoning of the British Columbia Court of Appeal in the Gonzales case should not be accepted, it is important to examine the Judgment in detail. Bird, Davey and Tysoe JJ. A sat on the case, and Bird J.A. concurred with the reasons for Judgment of Tysoe, J.A.

Davey, J.A., in his Judgment appears to take the view that the Canadian Bill of Rights merely provides a canon of construction for existing legislation where the language of the legislation permits, and it does not have the effect of rendering inoperable any existing legislation except insofar as the existing legislation purports to authorize any of the specifically prohibited things enumerated in the Subsections of Section 2 of the Canadian Bill of Rights.

The Learned Justice took the view that if legislation in existence prior to the passage of the Canadian Bill of Rights could not be construed and applied sensibly so

as not to abrogate, abridge or infringe the fundamental freedoms set out in Section 1(b) of the Canadian Bill of Rights, then the effect of Section 2 of the Canadian Bill of Rights was exhausted and the prior legislation must prevail according to its plain meaning.

It is respectfully submitted that the Judgment of Davey, J.A. does not take into account or consider Section 5(2) of the Canadian Bill of Rights, which specifically provides that the Canadian Bill of Rights applies to previously existing legislation, and further does not give recognition to the effect of the opening phrases of Section 2 of the Canadian Bill of Rights. That Section is mandatory in its terms, and refers not only to the construing of statutes, but also to the application of legislation. It is accordingly respectfully submitted that since the application of Section 94(b) results in an abridgement, abrogation and infringement of the right of Indians to equality before the law, that the reasoning of the Learned Justice should not be accepted.

It would appear that in the Gonzales case counsel for the appellant had argued before the British Columbia Court of Appeal that "equality before the law" meant application of the law equally to everyone and equal laws for everyone in the sense of the same laws for all persons. In commenting on this argument Tysoe, J.A., in his Judgment, stated:

> " In my opinion, the word "before" in the expression "equality before the law", in the sense in which the expression is used in Section 1(b) means "in the presence of". It seems to me this is the key to the correct interpretation of the expression and makes it clear that equality before the law has nothing to do with the application of the law equally to everyone and equal laws for everyone in the sense for which appellant's counsel contends, namely, the same laws for all persons, but to the position occupied by persons to whom the law relates or extends. They shall be entitled to have the law as it exists applied equally and without fear or favour to all persons to whom it relates or extends. "

By this statement, it is submitted with respect that Tysoe, J.A. is in effect saying that equality before the law means merely equality before the Courts, and means nothing more than the "due process" clause contained in Section 1(a) of the Canadian Bill of Rights. Since it is apparent that the "due process" clause relates only to the right of the individual to fair, proper and impartial procedure being followed in the administration, interpretation and application of the law, it would seem that Tysoe, J.A. has eliminated from his Judgment consideration of equality before the legislature, which it is submitted is one facet of the right recognized by the phrase in Section 1(b) of the Canadian Bill of Rights "equality before the law".

The Learned Justice in his Judgment refers to restrictions imposed upon different classes of persons by Federal legislation - specifically to a Judge's inability to vote. It is submitted with respect, however, that the Learned Justice of Appeal has not considered that the Canadian Bill of Rights refers to discrimination by reason of race, national origin, colour, religion or sex, and provides for equality before all facets of the law without discrimination only for those reasons. Discrimination by virtue of age, official office or other reasons, is not contemplated or affected by the Canadian Bill of Rights.

Tysoe, J.A. continues in his Judgment to say that the Indian Act provides for particular rights and privileges for Indians as well as particular disabilities. He therefore concludes that the Canadian Bill of Rights if construed so as to render ineffective the special disabilities conferred by the Indian Act must also be construed so as to render ineffective the special rights and privileges granted to the Indians under that Act. It is submitted with respect that this is not the effect of the Canadian Bill of Rights because the only application of the Canadian Bill of Rights is that it prevents abrogation, abridgment or infringement of rights or freedoms enumerated therein, but does not prevent enlargement of those rights or prevent the granting of special privileges to any particular group. It is submitted that the Canadian Bill of Rights provides for and guarantees certain basic and fundamental rights and freedoms without discrimination on the basis of race, but does not prevent the granting of special privileges on the basis of race, or the imposition of special disabilities or restrictions on grounds other than race, national origin, colour, religion or sex.

It is accordingly submitted with great respect that the Court of Appeal of the Northwest Territories was correct in rejecting the reasoning of the Gonzales case.

Two other cases which discuss the relationship between Section 94 of the Indian Act and the Canadian Bill of Rights are:

Attorney General of British Columbia v. McDonald (1961) 131 C.C.C. 126 (B.C. Co. Ct.)

Richards v. Cote (1963) 40 W.W.R. 340, Sask. D.C.

The Learned County Court Judge in Attorney General of British Columbia v. McDonald case, which was decided after the Gonzales case had been reported at the Magistrate's Court level, took the view that there was no conflict between the Canadian Bill of Rights and Section94 of the Indian Act, and that in any event a general enactment such as the Canadian Bill of Rights could not operate to repeal a specific enactment such as the Indian Act.

The Learned District Court Judge in the Richards v. Cote case, which was decided after the Gonzales case had been reported at the British Columbia Court of Appeal level, took the view that Section 94(b) of the Indian Act was contrary to the provisions of the Canadian Bill of Rights and therefore rendered inoperative.

A discussion of Section 1(b) of the Canadian Bill of Rights, with particular reference to the Indian Act is contained in Chapter 8 of the Canadian Bill of Rights by Tarnopolsky.

A further comment on the Judgment of Davey, J.A. in Gonzales case is contained in the dissenting Judgment of Cartwright J. in Robertson and Rosetanni v. The Queen (1964) 41 D.L.R. 2nd 485 (S.C.C.). After quoting a portion of the Judgment of Davey, J.A., the Learned Justice stated:

" The imperative words of Section 2 of the Canadian Bill of Rights, quoted above, appear to me to require the courts to refuse to apply any law, coming within the legislative authority of Parliament, which infringes freedom of

religion unless it is expressly declared by an Act of Parliament that the law which does so infringe shall operate notwithstanding the Canadian Bill of Rights. As already pointed out Section 5(2) quoted above, makes it plain that the Canadian Bill of Rights is to apply to all laws of Canada already in existence at the time it came into force as well as to those thereafter enacted. In my opinion where there is irreconcilable conflict between another act of Parliament and the Canadian Bill of Rights the latter must prevail. "

As has been pointed out by Johnson, J.A. in this case in the Court of Appeal for the Northwest Territories (Case, p. 53) the other members of the Court in the Robertson and Rosetanni v. The Queen case did not disagree with the view expressed by Cartwright J.

Richie J., in his Judgment in Robertson and Rosetanni v. The Queen which was concurred in by the majority of the Court, said at page 494:

" My own view is that the effect of the Lord's Day Act rather than its purpose must be looked to in order to determine whether its application involves the abrogation, abridgment or infringement of religious freedom. . . . "

Although it may be argued that the purpose of the Indian Act is to protect and benefit Indians, the effect of Section 94(b) is to impose a more severe punishment for intoxication than is imposed on other races, and to provide a broader application of the offence of intoxication with consequent greater liability for prosecution and penal consequences for Indians than is applied to other races. Since it is the effect, and not the purpose of the statute which must be considered, surely Section 94(b) of the Indian Act abridges, abrogates and infringes the right of Indians to equality before the law.

It is accordingly submitted that in the Northwest Territories there is an irreconcilable conflict between the provisions of the Canadian Bill of Rights and Section 94(b) of the Indian Act, and that the Canadian Bill of Rights must prevail, thereby rendering Section 94(b) of the Indian Act inoperative.

PART IV

NATURE OF THE ORDER DESIRED

For the above reasons, it is respectfully submitted that the appeal by the Crown herein should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

G. BRIAN PURDY
Counsel for the Respondent.

Yellowknife, Northwest Territories
March 11th, 1968.

APPENDIX 1

Canada Evidence Act, R.S.C. 1952 c. 307, Section 17:

" 17. Judicial notice shall be taken of all Acts of the Imperial Parliament, of all ordinances made by the Governor in Council, or the Lieutenant Governor in Council of any province or colony which, or some portion of which, now forms or hereafter may form part of Canada, and of all the Acts of the legislature of any such province of colony, whether enacted before or after the passing of the British North America Act, 1967. "

APPENDIX 11

The Evidence Ordinance, R.O.N.W.T. 1956 c. 31, Section 29:

" 29. Judicial notice shall be taken of
(a) Acts of the Imperial Parliament;
(b) Acts of the Parliament of Canada;
(c) Ordinances made by the Governor in Council of Canada;
(d) Ordinances of the legislature of, or other legislative body or authority competent to make laws for, any province; and
(e) Acts and Ordinances of thelegislature of, or other legislative body or authority competent to make laws for, any British possession. "

APPENDIX III

The Liquor Ordinance, R.O. N.W.T. 1956, c. 60:

" 19.(1) No person shall
(a) be in an intoxicated condition in a public place;
(b) supply liquor in a public place to a person who is intoxicated; or
(c) except as provided in this Ordinance, consume liquor in a public place. "

" 38.(1) Every person, other than a corporation, who violates any provision of this Ordinance or the regulations for which no other penalty is provided in this Ordinance is guilty of an offence and liable upon summary conviction to a fine not exceeding fifty dollars or to imprisonment for a term not exceeding thirty days or to both such fine and imprisonment. "

LIST OF AUTHORITIES

R. v. Gonzales (1962) 37 C.R. 56 (B.C.C.A.)

R. v. Peters (1967) 50 C.R. 68 (Y.T. C.A.)

Attorney General of British Columbia v. McDonald (1961) 131 C.C.C. 126 (B.C. Co. Ct.)

Richards v. Cote (1963) 40 W.W. R. 340 (Sask D.C.)

Robertson and Rosetanni v. The Queen, (1964) D.L.R. 2nd 485 (S.C.C.)

The Canadian Bill of Rights, Tarnopolsky, 1st Ed., 1966

11026

D. L. Tennent, B.A., LL.B.

Barrister and Solicitor

AGENT OF THE ATTORNEY GENERAL

OFFICES:
TORONTO-DOMINION BANK CHAMBERS
TELEPHONE 783-3651

Yorkton, Saskatchewan
CANADA

June 3, 1968

The Registrar,
The Supreme Court of Canada,
OTTAWA, Ontario.

Dear Sir:-

Re: Your Drybones vs Regina
North West Territories Court
1967 60 WWR 321
Indians- intoxication "off Reserve"

Re: My Raymond RAZOR vs The Queen
Sec. 96(a) Unlawful Possession of Intoxicants
D.C. Appeal
Dept. of Justice Reference #213738
Det Ref: 67K 400-17
S/D Ref: 67Y 400-1/231
"F" Div. Ref; 67F 400.

****

The hearing of a District Court Appeal by way of trial de novo in the above case of Raymond Razor vs The Queen proceeded at Yorkton on Nov. 29th last and at the end of argument was adjourned sine die pending delivery of the Supreme Court of Canada decision in the above case of Drybones vs The Queen.

Various persons interested in the disposition of the Razor file have inquired of me from time to time as to it's disposition which will of course depend on the disposition of the Drybones case.

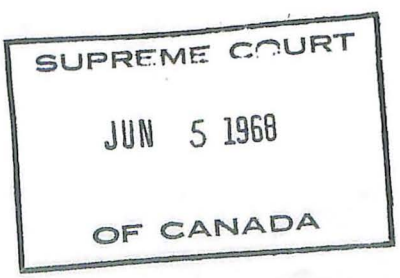
I would accordingly be pleased if you are in a position to give me any indication as to what sittings of the Supreme Court that the Drybones case maybe anticipated to be heard at.

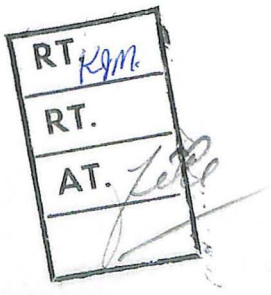
Yours truly

D.L. TENNENT

Per: "D.L. Tennent"
Acting Agent of the Minister of Justice.

DLT/cb





June 5, 1968.

D.L. Tennent, Esq.,
Barrister and Solicitor,
Yorkton, Sask.

Dear Sir:

I received your letter of June 3rd with respect to the *Queen v. Drybones*, an appeal to the Supreme Court of Canada. This appeal has yet to come on for hearing, however, it is anticipated that it will be on at the Autumn term which commences the first October next. It appears that everything is ready except the appellant's factum which is to be filed by the Attorney General of Canada.

Yours truly,

Kenneth J. Matheson,
Registrar

11026

In the Supreme Court of Canada



Pum

and

Dyborus

Required the inscription of the above cause for hearing at the ensuing sitting of this Court at Ottawa, on the 1st *day of* October *19*68.

Dated this 10th *day of* September *A.D. 19*68.

C D Wilson

The Supreme Court

OF

CANADA

Queen

AND

Dry Bones

PRÆCIPE FOR INSCRIPTION

CDM/jm

11026

Government Liquor Act R.S.B.C. 1960 c.166 -

Section 68 - Drunkenness in a public place.
Summary conviction no minimum - maximum $50 or 3 months, or both.

The Liquor Control Act, R.S.A. 1955 c.179

Section 152(2) makes it an offence to be in an intoxicated condition in a public place.

Penalty Section 176 -
1st offence max. $200 or in default 2 months.
2nd offence max. imprisonment 4 months or max. fine $500 in default to imprisonment for not more than four months.
3rd or subsequent - imprisonment for not more than six months without the option of a fine.

The Liquor Act, R.S.S. 1965 c. 382

Section 105 Intoxicated condition in any public place

105(2) Not less than $10 nor more than $100 in default not less than 2 days nor more than 30 days.

The Liquor Control Act, Stats. Man. 1956, c.40

Section 169(3) An offence to be intoxicated in a public place.

188(1) Penalty Section -
1st max. penalty $100, max. default 2 months
2nd min. $100, max. $300, default min. 2 - max 4 mos.
3rd min. $100,max. $500, default min 3 max 6 mos.

Liquor Control Act, R.S.O. 1960 , c.217

Section 80 (2) An offence to be intoxicated in a public place.

106 (2)
1st offence min. $10, max. $50, in default max 30 days
2nd offence min. $50, max. $100, in default min 1 mo. max 2 mos.
3rd offence no fine - min. 3 mos. max. 6 mos.

Amended by Stats. Ont. (1960-61) c. 47

Fine not more than $50. and if he has twice before been convicted during the preceding 12 months he may be detained in an alcoholic's hospital for up to 30 days and if he consents it may be as long as 90 days.

Amended by Stats. Ont. 1961-1962 c.72, s.4

Where a person has committed the offence at least twice during the preceding twelve months he is liable to imprisonment for 30 days or be ordered detained for 90 days in an institution for the treatment of alcoholics.

Liquor Control Act, Stats. N.B. 1961-2 c.3

Section 122 (2) Offence to be intoxicated in a public place.

Penalty Section 140 -
Fine not less than $10. nor more than $20.
In default to imprisonment for a term not less than 10 days nor more than 20 days.

Liquor Control Act, R.S. N.S. 1954 c.155

Section 85 Makes it an offence to be intoxicated in a public place.

Penalty Section 115 (7)-
Max. $10. In default maximum of 30 days.

The Liquor Control Act, R.S. P.E.I. c.159

Section 35 (2) Offence to be intoxicated in a public place.

Section 48(1) (e)
1st min. $20. max. $50. In default min. 15 days
max. 30 days
2nd min. $50. max.$200. In default min. 1 month
max. 3 months.

Alcoholic Liquor Act, R.S. N. 1952

Section 72(2) Offence to be intoxicated in a public place.

Section 122(g)1st Minimum $1.00, maximum $50. I/D min. 7 days,max 30 days

2nd Minimum $10.00, " $100. I/D min. 1 month,
max. 3 months.

Liquor Ordinance, R.O.Y.T. 1958, c.67

Section 50(3) An offence to be intoxicated in a public place.

Penalty Section 77(1) Maximum $100. or two months, or both.

April 2, 1968

11026

M.B. p._____

Cause: The Queen v Drybones

Amount involved:

Nature of Case:

No. of pages: No. of folios:

Case

App. Factum

Resp. Factum

Coram: C.J, F, A, M, J, R, H, S, P.

Counsel: for Appellant - (or Applicant) D. H. Christie, Q.C.
C.D. MacKinnon

for Respondent - G. Brian Purdy

Record of Hearing

Date	Counsel	Representing	Time From	To
28 Oct/68	Christie	Appt.	11:30	12:30
28 Oct/68	Purdy	Resp.	12:30	12:55
28 Oct/68	Christie	Reply	12:55	1:00

Judgment reserved.

Result:

11026

The University of Western Ontario, London, Canada

Faculty of Law

August 18, 1969.

Registrar,
Supreme Court of Canada,
Supreme Court Building,
OTTAWA, Ontario.

Dear Sir:

For purposes of review and scholastic inquiry, would it be feasible to obtain a xeroxed copy of the factums presented to the Supreme Court in the case of R. v. Drybones, on appeal from the Court of Appeal of the North-West Territories (as yet unreported)?

If any cost is involved, please notify prior to mailing material.

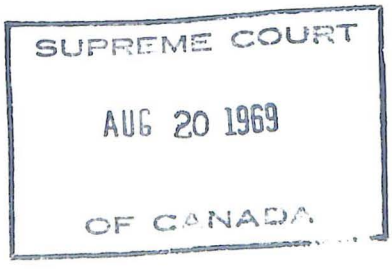
Could you, at the same time, explain whether Supreme Court factums are a matter of public record and available for distribution to the various law school libraries?

Thanking you for your consideration in these matters, I remain,

Yours very truly,

J. Craig Paterson,
c/o Faculty of Law,
University of Western Ontario.

JCP/db





11026

November 18, 1969.

Clerk,
Supreme Court of Canada.

Dear Sir:

Would it be convenient to have forwarded to me a copy of the factums presented to the Supreme Court in the case of R. v. DRYBONES on appeal from the Court of Appeal of the Northwest Territories?

I shall, upon receipt, enclose a cheque or postal order to cover xeroxing and postage costs.

copy of factums sent by mail 24/11/69 ad.

Thanking you for your consideration,

J. CRAIG PATERSON
% FACULTY OF LAW, UNIV. OF WESTERN ONT.
LONDON 72 ONTARIO.

SUPREME COURT
NOV 21 1969
OF CANADA

RT. cc
RT.
AT.

11026

K1A OJ1

December 6, 1971

Michael Funduk,
Registrar,
Appellate Division,
Supreme Court of Alberta,
Edmonton, Alta.

Dear Sir:

With reference to your letter of November 29, 1971, we are returning under separate cover the following files on the cases listed:

Regina vs. Skoberne
Regina vs. Bingham
Feldman vs. Feldman
Dziwenka vs. The Queen
Regina vs. Drybones

Yours truly,

Albert Danis
Asst. Clerk of Process

AD/ml

CN Express

11026

THE SUPREME COURT OF CANADA

HER MAJESTY THE QUEEN

v.

JOSEPH DRYBONES - (N.W.T.)

CORAM; The Chief Justice, Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

(Judgment pronounced November 20, 1969)

In both the French and English reasons of MR. JUSTICE HALL in the above appeal, please substitute, in the last line of the first para. on page 1: - "Regina v. Gonzales, 37 W.W.R. 257" for "Regina v. Gonzales, W.W.R. 356."

KENNETH J. MATHESON
REGISTRAR

December 8, 1969

Martland J

11026

8-9 ELIZABETH II.

CHAP. 44

An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms.

[*Assented to 10th August, 1960.*]

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:

PART I

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.

Duties of Minister of Justice.

3. The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every proposed regulation submitted in draft form

to the Clerk of the Privy Council pursuant to the *Regulations Act* and every Bill introduced in or presented to the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

Short title.

4. The provisions of this Part shall be known as the *Canadian Bill of Rights*.

PART II

Savings.

5. (1) Nothing in Part I shall be construed to abrogate or abridge any human right or fundamental freedom not enumerated therein that may have existed in Canada at the commencement of this Act.

"Law of Canada" defined.

(2) The expression "law of Canada" in Part I 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.

Jurisdiction of Parliament.

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

War Measures Act, R.S., c. 288.

6. Section 6 of the *War Measures Act* is repealed and the following substituted therefor:

Coming into force by proclamation.

"**6.** (1) Sections 3, 4 and 5 shall come into force only upon the issue of a proclamation of the Governor in Council declaring that war, invasion or insurrection, real or apprehended, exists.

Proclamation to be submitted to Parliament.

(2) A proclamation declaring that war, invasion or insurrection, real or apprehended, exists shall be laid before Parliament forthwith after its issue, or, if Parliament is then not sitting, within the first fifteen days next thereafter that Parliament is sitting.

Opportunity for debate.

(3) Where a proclamation has been laid before Parliament pursuant to subsection (2), a notice of motion in either House signed by ten members thereof and made in accordance with the rules of that House within ten days of the day the proclamation was laid before Parliament, praying that the proclamation be revoked, shall be debated in that House at the first convenient opportunity within the four sitting days next after the day the motion in that House was made.

Revocation of proclamation by resolution.

(4) If both Houses of Parliament resolve that the proclamation be revoked, it shall cease to have effect, and sections 3, 4 and 5 shall cease to be in force until those sections are again brought into force by a further proclamation but without prejudice to the previous operation of those sections or anything duly done or suffered thereunder or any offence committed or any penalty or forfeiture or punishment incurred.

Canadian Bill of Rights.

(5) Any act or thing done or authorized or any order or regulation made under the authority of this Act, shall be deemed not to be an abrogation, abridgement or infringement of any right or freedom recognized by the *Canadian Bill of Rights*."

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Minutes settled ✓

11026

SUPREME COURT OF CANADA, Wellington St., Ottawa

COUR SUPRÊME DU CANADA, rue Wellington, Ottawa

Me Paul Normandin,
Avocat de la ville,
Hôtel de Ville,
Montréal, P.Q.

Ottawa, Ont. le 8 décembre 1969

In a/c with The Registrar

Doit au Registraire

	$
Notes des juges re:	
Her Majesty the Queen v. Joseph Drybones - (N.W.T.)	5.00
Tel que demandé dans votre lettre du 3 décembre 1969	
PRIERRE D'ACQUITTER PAR RETOUR DU COURRIER TOUT CHEQUE OU MANDAT DE POSTE DEVANT ETRE FAIT PAYABLE AU RECEVEUR GENERAL DU CANADA	
Receipted invoice, with law Clerk's affidavit of receipt mailed Dec 22/69	

SUPREME COURT OF CANADA — RECEIVED PAYMENT WITH THANKS — 22 DEC. 1969 — POUR ACQUIT - MERCI — COUR SUP. DU CANADA

N.B.—Remittances (without any exchange added) should be made payable to the Receiver General of Canada and forwarded to the Registrar of this Court.

Les remises (sans frais d'encaissement) doivent être payables à l'ordre du Receveur Général du Canada et adressées au Registraire de cette Cour.

VILLE DE MONTRÉAL

CANADA

CITY OF MONTRÉAL

9722922

CONTENTIEUX

LAW OFFICE

HÔTEL DE VILLE.
CITY HALL.

le 3 décembre 1969.

Cromp
(875-H5 69)

Le Registraire,
Cour Suprême du Canada,
Edifice de la Cour Suprême,
Ottawa.

re: Décision récente sur la Déclaration Canadienne des Droits de l'Homme et la Loi sur les Indiens -

Cher Monsieur,

Auriez-vous l'amabilité de nous faire parvenir, de toute urgence, une copie certifiée du jugement rendu par la Cour Suprême dans la cause de droits constitutionnels concernant certaines dispositions de la Loi régissant les Indiens, que cette Cour a étudiées au regard de la Déclaration Canadienne des Droits de l'Homme.

Vous remerciant vivement à l'avance de votre collaboration, nous demeurons

Vos bien dévoués,

Reasons with Lavoie, Mailed Dec 8/69 C.C

Paul Normandin,
Avocat ~~adjoint~~ de la Ville.

PN/HOC

SUPREME COURT
DEC 8 1969
OF CANA

RT. cc
RT.
AT.

RETURN TO

BOX 300

MILLBROOK, ONT.



Registrar
Supreme Court of Canada
Supreme Court Building
Ottawa, Canada

Urgent
Attention
Requested

JOSEPH M. APPLETON
BOX 300
MILLBROOK, ONTARIO

BOX 300,
MILLBROOK, ONT.

Joseph M. Appleton
#4188
Box 300
Millbrook, Ontario

Registrar,
Supreme Court of Canada
Ottawa, Canada

Sept. 28, 1970

Re: Drybones Decision

Dear Sir,

I am incarcerated in the Ontario Reformatory at Millbrook.

I am in dire need of one of your Supreme Court of Canada decisions, that of the Drybones Case.

Could you please advise me of the cost of obtaining this decision? It will take me about one week to forward the money after receipt of your return letter.

In the interim, could you please allow me the use of one of your copies (on a loan basis) which I will return in good condition.

Are there any other decisions such as "Drybones" which deal with the Bill of Right guarantees of Equal Protection, Cruel and unusual punishments, due process, etc.

Please reply soon as possible, and I hope that I will be allowed to temporarily use your copy until such time as I can forward you the necessary funds to purchase a copy (from) 1-2 weeks.)

Thanking you in advance, I remain;

Respectfully,
Joseph M. Appleton

SUPREME COURT
OCT 6 1970
OF CANADA
RT. KJM
RT.
AT. file

11026

SUPREME COURT OF CANADA
REGISTRAR'S CHAMBERS

CANADA

COUR SUPRÊME DU CANADA
CABINET DU REGISTRAIRE

Ottawa, Ontario
K1A 0J1
January 25, 1974.

Mr. Robert Taylor,
1328 Military Trail,
West Hill, Ontario.
M1C 1A5

RE: Our file: 11026

Dear Sir:

Pursuant to our telephone conversation of the 24th instant, enclosed are the Case book and factums in the above mentioned appeal.

Please return them to me when they have served there purpose.

Yours truly,

Edouard J. Bisson,
Clerk of Process.

Encls.
EJB/gc

ON HER MAJESTY'S SERVICE
SERVICE DE SA MAJESTÉ

CANADA
POSTAGE PAID
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BY MESSENGER

BY HAND

THE REGISTRAR

SUPREME COURT OF CANADA

OTTAWA

IF NOT DELIVERED
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OTTAWA

SI NON RÉCLAMÉE
PRIÈRE DE RETOURNER AU
MINISTÈRE DE LA JUSTICE
OTTAWA

Supreme Court of Canada  Cour suprême du Canada

END OF FILE

FIN DU DOSSIER

COUR SUPRÊME DU CANADA

SA MAJESTÉ LA REINE

c.

JOSEPH DRYBONES

CORAM: Le Juge en chef et les Juges Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence et Pigeon.

LE JUGE ABBOTT:

Les faits pertinents, qui ne sont pas contestés, sont relatés dans les motifs de mes collègues les Juges Ritchie et Pigeon, que j'ai eu le privilège de lire.

L'interprétation de la Déclaration des droits qu'ont adoptée les tribunaux des Territoires implique nécessairement que le Parlement a délégué une partie importante de sa compétence législative aux tribunaux. Son pouvoir de le faire est incontestable mais, à mon avis, il faudrait que les termes employés soient des plus clairs pour prêter au Parlement l'intention d'adresser aux tribunaux une telle invitation à légiférer par le processus judiciaire. Je ne trouve pas que l'art. 2 de la Déclaration des droits exprime cette intention. Au contraire, je partage l'opinion exprimée par le Juge en chef, par mon collègue le Juge Pigeon et par le Juge Davey, alors Juge d'appel, dans l'affaire Gonzales, à l'effet qu'à l'égard de la législation

antérieure l'article ne donne qu'une simple règle d'interprétation.

Je disposerais du pourvoi de la même façon que mon collègue le Juge Pigeon.

COUR SUPREME DU CANADA

SA MAJESTÉ LA REINE

c.

JOSEPH DRYBONES

LE JUGE ABBOTT

COUR SUPRÊME DU CANADA

SA MAJESTÉ LA REINE

c.

JOSEPH DRYBONES

CORAM: Le Juge en chef et les Juges Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence et Pigeon.

LE JUGE ABBOTT:

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antérieure l'article ne donne qu'une simple règle d'interprétation.

Je disposerais du pourvoi de la même façon que mon collègue le Juge Pigeon.

COUR SUPRÊME DU CANADA

SA MAJESTÉ LA REINE

c.

JOSEPH DRYBONES

LE JUGE ABBOTT

IN THE SUPREME COURT OF CANADA

HER MAJESTY THE QUEEN

v.

JOSEPH DRYBONES

CORAM: The Chief Justice and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

PIGEON J.

The respondent is an Indian and the following charge was made against him before a magistrate in the Northwest Territories, namely that he,

> On or about the 8th of April, 1967 at Yellowknife in the Northwest Territories, being an Indian, was unlawfully intoxicated off a reserve, contrary to s. 94(b) of the Indian Act.

Respondent pleaded guilty and was sentenced to a fine of $10 and costs. On his appeal to the Territorial Court, he was allowed to withdraw his plea of guilty. Having then pleaded not guilty, he raised the contention that Section 94(b) of the Indian Act has been rendered inoperative by the Canadian Bill of Rights (8-9 Eliz.II, ch. 44, hereinafter called the "Bill"). This contention was accepted by Mr. Justice Morrow and the charge dismissed.

On appeal by the Crown to the Court of Appeal for the Northwest Territories, that Court refused to follow the contrary decision of the Court of Appeal of British Columbia in Regina v. Gonzales (37 W.W.R. 257) and affirmed the acquittal.

The Crown now appeals to this Court by special leave.

The question before us is essentially whether, in respect of existing federal legislation, Section 2 of the Bill enacts a canon of construction or casts upon the courts the task of removing therefrom, whenever the question is raised, every provision that may be considered as being in conflict with the enumerated rights and freedoms. In thus stating the question I am not unmindful of the fact that, due to the definition in Section 5.2 of the expression "law of Canada", Section 2 applies to subsequent federal statutes equally as to existing legislation. However, because different considerations may conceivably apply in the case of subsequent statutes, I find it desirable to go no further than necessary for the decision of the case at hand which has to do with existing legislation.

Before considering any enacting clause I must note that the Bill is prefaced by a preamble, as follows:

> 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:

Then, after the enacting formula and the title "Part I - Bill of Rights", Section 1 is in the following terms:

> 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.

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

There can be no doubt that in enacting legislation Parliament is presumed to be aware of the state of the law (Walker v. The King, 1939, S.C.R. 214). A fortiori must it be so when the enactment itself has reference thereto. Where is the extent of existing human rights and fundamental freedoms to be ascertained if not by reference to the statute books and other legislative instruments as well as to the decisions of the courts?

It must also be considered that the rights and freedoms enumerated in Section 1 are not legal concepts of precise and invariable content. If those words were to be taken by themselves, a great deal would be left undefined. However, by declaring those rights and freedoms as they existed a large measure of precision was supplied. Is this not an important purpose of Section 1 and a very effective way of defining some key words of the enactment?

In the instant case, the question whether all existing legislation should be considered as in accordance with the non-discrimination principle cannot fail to come immediately to mind seeing that it arises directly out of Head 24 of Section 91 of the B.N.A. Act whereby Parliament has exclusive legislative authority over

"Indians, and Lands reserved for the Indians".

As was pointed out by Riddell J. in Rex v. Martin (1917, 29 C.C.C. 189, at p. 192), this provision confers legislative authority over the Indians quâ Indians and not otherwise. Its very object in so far as it relates to Indians, as opposed to Lands reserved for the Indians, is to enable the Parliament of Canada to make legislation applicable only to Indians as such and therefore not applicable to Canadian citizens generally. This legislative authority is obviously intended to be exercized over matters that are, as regards persons other than Indians, within the exclusive legislative authority of the Provinces. Complete uniformity in provincial legislation is clearly not to be expected, not to mention the fact that further diversity must also result from special legislation for the territories. Equality before the law in the sense in which it was understood in the Courts below would require the Indians to be subject in every province to the same rules

below have effectively done is not to apply the statute, the Indian Act, but to decline to apply it.

The strongest argument against viewing Section 2 as a canon of construction is undoubtedly that the exception "unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights" is thereby deprived of any practical meaning. It cannot be denied that the operation of a rule of construction is not normally subject to such a qualification. On the contrary, the principle is that it has no effect against the clearly expressed will of Parliament in whatever form it is put.

On the other hand, in seeking to give effect to some words in Section 2 that cannot for obvious reasons be applicable to any existing law, one must always bear in mind the very starting point of the Bill, namely that the rights and freedoms therein recognized are declared as existing, not as being introduced or expanded. If in Section 1 the act means what it says and recognizes and declares existing rights and freedoms only, nothing more than proper construction of existing laws in accordance with the Bill is required to accomplish the intended result. There can never be any necessity for declaring any of them inoperative as coming in conflict with the rights and freedoms defined in the Bill seeing that these are declared as existing in them. Thus, it appears to me that Section 2 cannot be construed as suggested by respondent without coming in conflict with Section 1.

If, with respect to existing legislation, we had to choose between reading Section 1 as written and failing to adopt a construction of Section 2 that gives some meaningful effect to the exception, it seems to me that the choice

should be in favour of giving paramount effect to Section 1. It is the provision establishing the principle on which the whole act rests.

Another compelling reason is the presumption against implicit alteration of the law, Parliament must not be presumed to have intended to depart from the existing law any further than expressly stated (Maxwell, On Interpretation of Statutes, 9th Ed. p. 84, cited in Duchesneau v. Cook , 1955, S.C.R. 207 at p. 215). In the present case, the judgments below hold in effect that Parliament in enacting the Bill has implicitly repealed not only a large part of the Indian Act but also the fundamental principle that the duty of the courts is to apply the law as written and they are in no case authorized to fail to give effect to the clearly expressed will of Parliament. It would be a radical departure from this basic British constitutional rule to enact that henceforth the courts are to declare inoperative all enactments that are considered as not in conformity with some legal principles stated in very general language, or rather merely enumerated without any definition.

The meaning of such expressions as "due process of law", "equality before the law", "freedom of religion", "freedom of speech", is in truth largely unlimited and undefined. According to individual views and the evolution of current ideas, the actual content of such legal concepts is apt to expand and to vary as is strikingly apparent in other countries. In the traditional British system that is our own by virtue of the B.N.A. Act, the responsibility for updating the statutes in this changing world rests exclusively upon Parliament. If the Parliament of Canada intended to depart from that principle in enacting the Bill, one

would expect to find clear language expressing that intention. On the contrary, what do we find in Section 1 but an apparent desire to adhere to the traditional principle and to avoid the uncertainties inherent in broadly worded enactments by tying the broad words to the large body of existing law and in effect declaring the recognized human rights and fundamental freedoms to be as existing in the laws of Canada.

I fail to see how it can be considered that by taking this to be the fundamental intention, the apparent character of the Bill is not fully recognized. I also fail to see how it can be said that to read Section 2 as little more than a rule of construction is to fail to give effect to the Bill. On what basis is it assumed that anything else was intended in an act that is not of a constitutional character?

That canons of construction are of less importance than constitutional rules does not mean that they are of minimal importance. For instance, in our legal system, the rule against retrospective operation of enactments as well as the principle that a criminal offence requires mens rea are nothing more than canons of construction. It certainly does not mean that they are of secondary importance. Decisions such as Beaver v. The Queen (1957, S.C.R. 531), The Queen v. King (1962, S.C.R. 746) clearly show how far-reaching such principles are. If the Canadian Parliament should consider it desirable to enshrine them in a statute, would it be contended that those who subsequently read it as not altering their fundamental nature and letting them remain canons of construction are failing to give it effect?

On the whole, I cannot find in the Canadian Bill of Rights anything clearly showing that Parliament intended

to establish concerning human rights and fundamental freedoms some overriding general principles to be enforced by the courts against the clearly expressed will of Parliament in statutes existing at the time. In my opinion, Parliament did nothing more than instruct the courts to construe and apply those laws in accordance with the principles enunciated in the Bill on the basis that the recognized rights and freedoms did exist, not that they were to be brought into existence by the courts.

For those reasons I would allow the appeal, reverse the judgments of the Court of Appeal and of the Territorial Court of the Northwest Territories, and re-establish the conviction and sentence. In view of the terms of the order granting leave to appeal, it is presumed that suitable arrangements have been made for the costs of representation of the respondent and therefore, no order requires to be made in that regard.

Since writing the above I have had the advantage of reading the reasons of the Chief Justice and I wish to add that I agree with his observations entirely.

IN THE SUPREME COURT OF CANADA

HER MAJESTY THE QUEEN

v.

JOSEPH DRYBONES

PIGEON J.

COUR SUPRÊME DU CANADA

SA MAJESTÉ LA REINE

c.

JOSEPH DRYBONES

CORAM: Le Juge en chef et les Juges Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence et Pigeon.

LE JUGE PIGEON:

L'intimé est un Indien et l'accusation suivante a été portée contre lui devant un Magistrat des Territoires du Nord-Ouest, savoir que,

> "Le 8 avril 1967, ou vers cette date, à Yellowknife, dans les Territoires du Nord-Ouest, étant un Indien, il était ivre hors d'une réserve, illégalement, en contravention des dispositions de l'article 94 b) de la Loi sur les Indiens".

L'intimé a plaidé coupable et a été condamné à une amende de $10 et aux frais. A l'occasion de son appel à la Cour Territoriale, on lui a permis de rétracter son plaidoyer de culpabilité. Ayant plaidé non coupable, l'intimé a soutenu que l'article 94 b) de la Loi sur les Indiens avait été rendu inopérant par la Déclaration canadienne des droits (8-9 Eliz. II, ch. 44, que j'appellerai ci-après la "Déclaration"). Cet argument a été accueilli par le Juge Morrow et l'accusation a été rejetée.

La Couronne en a appelé à la Cour d'appel des Territoires du Nord-Ouest. Cette Cour a refusé de suivre la décision contraire de la Cour d'appel de la

Colombie-Britannique dans Regina v. Gonzales (37 W.W.R. p. 257) et elle a confirmé l'acquittement.

La Couronne en appelle maintenant à notre Cour, en vertu d'une permission spéciale.

La question dont nous sommes saisis est de savoir si, à l'égard de la législation fédérale existante, l'article 2 de la Déclaration édicte une règle d'interprétation ou impose aux tribunaux la tâche de retrancher de cette législation, chaque fois que la question est soulevée, toute disposition qui peut être considérée en conflit avec les droits et libertés énumérés. En énonçant ainsi la question, je n'oublie pas que, du fait de la définition de l'expression "loi du Canada" à l'article 5.2, l'article 2 s'applique aux lois fédérales à venir aussi bien qu'à la législation existante. Toutefois, parce qu'il n'est pas impossible que d'autres considérations entrent en jeu lorsqu'il s'agira des lois à venir, il me semble opportun de ne pas aller plus loin qu'il est nécessaire pour en arriver à une décision dans cette affaire, qui ne concerne que la législation existante.

Avant d'en considérer les dispositions, je dois noter que la Déclaration comporte un préambule, qui se lit comme suit:

> Le Parlement du Canada proclame que la nation canadienne repose sur des principes qui reconnaissent la suprématie de Dieu, la dignité et la valeur de la personne humaine ainsi que le rôle de la famille dans une société d'hommes libres et d'institutions libres;
>
> Il proclame en outre que les hommes et les institutions ne demeurent libres que dans la mesure où la liberté s'inspire du respect des valeurs morales et spirituelles et du règne du droit;

> Et afin d'expliciter ces principes ainsi que les droits de l'homme et les libertés fondamentales qui en découlent, dans une Déclaration de droits qui respecte la compétence législative du Parlement du Canada et qui assure à sa population la protection de ces droits et de ces libertés;

Ensuite, après la formule de promulgation et le titre "Partie I - Déclaration des Droits", l'article 1 est énoncé dans les termes suivants:

> 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:
>
> a) le droit de l'individu à la vie, à la liberté, à la sécurité de la personne ainsi qu'à la jouissance de ses biens, et le droit de ne s'en voir privé que par l'application régulière de la loi;
>
> b) le droit de l'individu à l'égalité devant la loi et à la protection de la loi;
>
> c) la liberté de religion;
>
> d) la liberté de parole;
>
> e) la liberté de réunion et d'association, et
>
> f) la liberté de la presse.

En considérant les dispositions que je viens de citer, il faut observer que la Déclaration elle-même débute par une déclaration solennelle du Parlement, sous forme de loi portant que, au Canada, les droits et libertés énumérés "ont existé et continueront à exister ...". Cette déclaration est l'élément essentiel de la première disposition de la Déclaration et elle n'est assortie d'aucune réserve. Elle est le point de départ de cette loi et il n'est pas facile de la concilier avec la prétention qu'en fait ces droits et libertés n'étaient pas entièrement et complètement existants, mais étaient restreints

par un nombre indéterminé de dispositions, statutaires et autres, à l'encontre.

Il ne fait pas de doute que lorsqu'il édicte des lois le Parlement est présumé au courant de l'état du droit (Walker c. Le Roi, 1939, R.C.S. 214). A fortiori, doit-il en être ainsi lorsque le texte même de la loi y fait allusion. Comment peut-on déterminer la portée des droits de l'homme et des libertés fondamentales existants si ce n'est en se reportant au texte des lois et autres actes législatifs, ainsi qu'aux décisions des tribunaux?

Il faut aussi tenir compte du fait que les droits et libertés énumérés à l'article 1 ne sont pas des concepts juridiques ayant un contenu précis et invariable. S'il fallait les considérer isolément, beaucoup resterait à définir. Toutefois, en déclarant ces droits et libertés comme ils existaient, on les a grandement précisés. N'est-ce pas là un but important de l'article 1 et une façon très efficace de définir certains mots clés de la Déclaration?

Dans la présente cause, la question de savoir si toute la législation exitante doit être considérée conforme au principe de non-discrimination ne peut manquer de venir immédiatement à l'esprit vu qu'elle découle directement du chef 24 de l'article 91 de l'Acte de l'Amérique du Nord britannique, en vertu duquel le Parlement a l'autorité législative exclusive sur

"Les Indiens et les terres réservées pour les Indiens".

Comme l'a souligné le Juge Riddell, dans Rex v. Martin (1917, 29 C.C.C. 189, à la p. 192), cette disposition confère l'autorité législative sur les Indiens en tant qu'Indiens et non autrement. Son objet même, en ce qui concerne les Indiens par opposition aux terres réservées pour les Indiens, est de permettre au Parlement du Canada d'édicter des lois qui ne s'appliquent qu'aux Indiens comme tels et qui, par conséquent, ne s'appliquent pas aux citoyens canadiens en général. Cette autorité législative est évidemment destinée à être exercée sur des matières qui, à l'égard de personnes autres que les Indiens, relèvent de l'autorité législative exclusive des provinces. On ne peut certainement pas s'attendre à une uniformité complète dans la législation provinciale, sans compter qu'une diversité additionnelle résulte des lois particulières pour les Territoires. L'égalité devant la loi, au sens que lui ont donné les cours des Territoires, exigerait que dans chaque province les Indiens soient soumis aux mêmes règles juridiques que les autres, sous tout rapport et non seulement en matière d'ébriété. En dehors des Territoires, vu la compétence provinciale sur l'éducation et la santé, les autorités fédérales ne pourraient pas facilement fournir ces services sans "discrimination" au sens des cours des Territoires.

Si l'un des effets de la Déclaration canadienne des droits est de rendre inopérantes toutes les dispositions en vertu desquelles les Indiens en tant que tels ne sont pas traités de la même façon que le grand public, on doit inévitablement conclure que le Parlement, en édictant la Déclaration, n'a pas seulement modifié

fondamentalement le statut des Indiens par ce procédé indirect, mais aussi qu'il a assujetti l'exercice futur de l'autorité législative fédérale sur les Indiens à l'exigence d'une déclaration expresse "que la loi s'appliquera nonobstant la Déclaration canadienne des droits". J'ai peine à croire que le Parlement avait cette intention lorsqu'il a édicté la Déclaration. Si l'on entendait supprimer pratiquement la législation fédérale sur les Indiens, on devrait s'attendre à ce que ce changement important soit fait explicitement et non subrepticement, pour ainsi dire.

A l'article 2, les mots essentiels sont que toute loi du Canada, sous réserve de l'exception citée plus haut, "doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre" l'un quelconque des droits ou des libertés reconnus et déclarés dans la Déclaration. Il s'agit de décider si ces mots édictent plus qu'une règle d'interprétation. Pris à la lettre, je ne le crois pas. "S'interpréter" ne comporte certainement rien d'autre. "S'appliquer" exprime-t-il une intention différente? Je ne le pense pas. Même si cela peut sembler un truisme, je dois souligner que ce que l'intimé demande à cette Cour de faire et ce que les cours des Territoires ont effectivement fait, ce n'est pas appliquer la Loi sur les Indiens, mais bien refuser de l'appliquer.

L'argument le plus fort contre cette manière de voir dans l'article 2 une règle d'interprétation c'est indubitablement que par là l'exception "à moins qu'une loi du Parlement du Canada ne déclare

expressément qu'elle s'appliquera nonobstant la Déclaration canadienne des droits" perd tout sens pratique. On ne peut nier que l'application d'une règle d'interprétation n'est pas normalement soumise à une telle réserve. Au contraire, le principe est qu'elle n'a aucun effet à l'encontre de la volonté clairement exprimée du Parlement, sous quelque forme que ce soit.

D'autre part, en cherchant à donner un effet à certains mots de l'article 2 qui, pour des raisons évidentes, ne sauraient s'appliquer à aucune loi existante, il ne faut jamais oublier le point de départ de la Déclaration, c'est-à-dire que l'on y déclare des droits et libertés reconnus comme existants et non pas qu'on les introduit ou élargit. Si, à l'article 1, la loi signifie ce qu'elle exprime et ne reconnaît et déclare que des droits et libertés existants, jamais rien de plus qu'une interprétation juste des lois existantes conformément à la Déclaration ne peut être nécessaire pour atteindre le but visé. Il ne peut jamais être nécessaire d'en déclarer aucune inopérante en raison d'un conflit avec les droits et libertés énoncés dans la Déclaration, vu que ceux-ci sont déclarés comme ils y existent. Il me paraît donc que l'article 2 ne peut pas être interprété comme le veut l'intimé sans venir en conflit avec l'article 1.

Si, en ce qui concerne la législation existante, il fallait choisir entre donner effet à l'article 1 tel qu'écrit et refuser d'interpréter l'article 2 de façon à donner un effet à l'exception, il me semble que le choix devrait donner la prépondérance à l'article 1. C'est la disposition qui établit le principe sur lequel toute la loi se fonde.

Une autre raison qui s'impose c'est la présomption contre toute modification implicite du droit. On ne peut présumer que le Parlement a l'intention de déroger au droit existant plus qu'il ne le déclare expressément (Maxwell, On Interpretation of Statutes, 9e Ed. p. 84, cité dans Duchesneau c. Cook, 1955, R.C.S. 207, à la p. 215). Dans la présente affaire, les jugements des tribunaux des Territoires décident en fait que le Parlement, en édictant la Déclaration, a implicitement abrogé non seulement une grande partie de la Loi sur les Indiens, mais aussi le principe fondamental que c'est le devoir des tribunaux d'appliquer la loi telle que rédigée, n'étant jamais autorisés à ne pas donner effet à la volonté clairement exprimée du Parlement. Cela aurait été une déviation radicale de cette importante règle constitutionnelle britannique que d'édicter que dorénavant les tribunaux doivent déclarer inopérante toute législation qu'ils considèrent non conforme à certains principes juridiques énoncés en termes très généraux, ou plutôt, simplement énumérés sans définition.

En vérité, le sens d'expressions telles que "l'application régulière de la loi", "l'égalité devant la loi", "la liberté de religion", "la liberté de parole", est largement indéfini et presque illimité. Selon les opinions individuelles et l'évolution des idées courantes, le contenu actuel de tels concepts juridiques est susceptible d'extension et de variation, comme on peut le voir de façon frappante dans d'autres pays. Dans le système britannique traditionnel qui est le nôtre en vertu de l'Acte de l'Amérique du Nord britannique, c'est le Parlement qui est exclusivement responsable de la mise

à jour de la législation dans notre monde en évolution. Si le Parlement du Canada avait eu l'intention de déroger à ce principe en édictant la Déclaration, on serait en droit de s'attendre à y trouver cette intention clairement exprimée. Au contraire, ce que l'on trouve à l'article 1 c'est la volonté manifeste de maintenir le principe traditionnel et d'éviter l'incertitude inhérente aux lois rédigées en termes généraux, en rattachant ces termes généraux à l'ensemble du droit existant et, en fait, en déclarant les droits de l'homme et libertés fondamentales reconnus comme ils existaient alors dans les lois du Canada.

Je ne vois pas comment on peut considérer que, prendre cela pour l'intention fondamentale, c'est méconnaître le caractère manifeste de la Déclaration. Je ne vois pas non plus comment on peut dire que, considérer l'article 2 comme rien de plus qu'une règle d'interprétation, c'est ne pas donner effet à la Déclaration. Sur quoi se fonde-t-on pour présumer que l'on a voulu faire autre chose dans une loi qui n'a pas de caractère constitutionnel?

Que les règles d'interprétation soient de moindre importance que les règles constitutionnelles ne signifie pas qu'elles sont sans importance. Par exemple, dans notre système juridique, la non-rétroactivité des lois, de même que le principe qu'il n'y a pas de crime sans intention coupable, ne sont rien de plus que des règles d'interprétation. Cela ne veut certainement pas dire qu'elles sont d'importance secondaire. Des arrêts comme Beaver c. La Reine (1957, R.C.S. 531) et La Reine

c. King (1962, R.C.S. 746) montrent clairement à quel point ces principes sont féconds. Si le Parlement canadien trouvait opportun de les consacrer dans une loi, prétendrait-on que ceux qui par la suite diraient que leur nature fondamentale est inchangée et qu'elles demeurent des règles d'interprétation, ne donnent pas à cette loi-là son plein effet?

En définitive, je ne trouve rien dans la Déclaration canadienne des droits qui démontre clairement que le Parlement avait l'intention d'établir à l'égard des droits de l'homme et des libertés fondamentales des principes primordiaux d'ordre général, que les tribunaux devraient appliquer à l'encontre de la volonté clairement exprimée du Parlement dans les lois existant à cette époque. À mon avis, le Parlement n'a fait rien de plus que de prescrire aux tribunaux d'interpréter et d'appliquer ces lois conformément aux principes énoncés dans la Déclaration, en considérant que les droits et libertés reconnus existaient alors et non pas qu'ils seraient établis par les tribunaux.

Pour ces motifs, j'accueillerais le pourvoi, j'infirmerais l'arrêt de la Cour d'appel et le jugement de la Cour territoriale des Territoires du Nord-Ouest, et je rétablirais la condamnation et la sentence. Vu les conditions de l'ordonnance accordant la permission d'en appeler, je présume qu'un arrangement satisfaisant a été conclu pour les frais d'avocat de l'intimé et qu'aucune directive n'est nécessaire à ce sujet.

Depuis que j'ai écrit ce qui précède, j'ai eu le privilège de lire les motifs du Juge en chef et je désire ajouter que je suis entièrement d'accord avec lui.

COUR SUPRÊME DU CANADA

SA MAJESTÉ LA REINE

c.

JOSEPH DRYBONES

LE JUGE PIGEON

11026

THE SUPREME COURT OF CANADA

COUR SUPRÊME DU CANADA

November 20, 1969. le 20 novembre 1969.

JUDGMENT
JUGEMENT

Her Majesty the Queen v. Joseph Drybones (N.W.T.)

The appeal is
terms of the Order granting leav
no Order as to costs; the Chief
dissenting.

Le pourvoi est
de l'autorisation d'interjeter l'
d'adjudication de frais. Le Juge
Abbott et Pigeon sont dissidents.

11026

THE SUPREME COURT OF CANADA

COUR SUPRÊME DU CANADA

November 20, 1969. le 20 novembre 1969.

JUDGMENT
JUGEMENT

Her Majesty the Queen v. Joseph Drybones (N.W.T.)

The appeal is dismissed. In view of the terms of the Order granting leave to appeal there will be no Order as to costs; the Chief Justice, Abbott and Pigeon JJ. dissenting.

Le pourvoi est rejeté. Vu les conditions de l'autorisation d'interjeter l'appel il n'y a pas d'adjudication de frais. Le Juge en chef et les Juges Abbott et Pigeon sont dissidents.

C.J.C.
J.C.C.

11026

THE SUPREME COURT OF CANADA

COUR SUPREME DU CANADA

HER MAJESTY THE QUEEN

v.

JOSEPH DRYBONES

Coram:-	Coram:
The Rt. Hon. J.R. Cartwright, P.C., C.J.C.	Le très honorable J.R. Cartwright, C.P., J.C.C.
The Hon. Mr. Justice Fauteux	L'honorable juge Fauteux
The Hon. Mr. Justice Abbott, P.C.	L'honorable juge Abbott, C.P.
The Hon. Mr. Justice Martland	L'honorable juge Martland
The Hon. Mr. Justice Judson	L'honorable juge Judson
The Hon. Mr. Justice Ritchie	L'honorable juge Ritchie
The Hon. Mr. Justice Hall	L'honorable juge Hall
The Hon. Mr. Justice Spence	L'honorable juge Spence
The Hon. Mr. Justice Pigeon	L'honorable juge Pigeon
Appeal heard Oct. 28, 1968.	Appel entendu le 28 octobre 1968.
Judgment pronounced November 20, 1969.	Jugement prononcé le 20 novembre 1969.
Reasons of the Court by	Motifs de jugement par
Mr. Justice Ritchie	M. le juge Ritchie
concurred in by	Souscrivent à l'avis de M. le juge Ritchie
Mr. Justice Fauteux	M. le juge Fauteux
Mr. Justice Martland	M. le juge Martland
Mr. Justice Judson	M. le juge Judson
Mr. Justice Spence	M. le juge Spence
Reasons concurring in result: by	Partage l'opinion de M. le juge Ritchie et exprime ses motifs:
Mr. Justice Hall	M. le juge Hall

Dissenting reasons by
The Chief Justice

Dissenting reasons by
Mr. Justice Abbott

Dissenting reasons by
Mr. Justice Pigeon

Motifs de la dissidence par
Le Juge en chef

Motifs de la dissidence par
M. le juge Abbott

Motifs de la dissidence par
M. le juge Pigeon

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For the respondent -

G. Brian Purdy, Esq.

Avocats à l'audience:

Pour l'appelante -

Me D.H. Christie, c.r.
Me C.D. Mackinnon

Pour l'intimé -

Me G. Brian Purdy

IN THE SUPREME COURT OF CANADA

HER MAJESTY THE QUEEN

v.

JOSEPH DRYBONES

Coram: The Chief Justice and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon, JJ.

RITCHIE J.:

This is an appeal brought with leave of this Court from a judgment of the Court of Appeal for the Northwest Territories dismissing an appeal by the Crown from a judgment of Mr. Justice W.G. Morrow of the Territorial Court of the Northwest Territories by which he had acquitted Joseph Drybones of being "unlawfully intoxicated off a reserve" contrary to s.94(b) of the *Indian Act*, R.S.C. 1952 Ch. 149, after having heard an appeal by way of trial *de novo* from a judgment of Magistrate Anderson-Thompson who had convicted the respondent of this offence and sentenced him to be fined $10.00 and costs and in default to spend three days in custody. The full charge against Drybones was that he,

> On or about the 8th of April, 1967 at Yellowknife in the Northwest Territories, being an Indian, was unlawfully intoxicated off a reserve, contrary to s.94(b) of the Indian Act.

The respondent is an Indian and he was indeed intoxicated on the evening of April 8th, 1967, on the premises of the Old Stope Hotel in Yellowknife in the Northwest Territories where there is no "reserve" within the meaning of the *Indian Act*.

When he was first arraigned before Magistrate Anderson-Thompson, Drybones, who spoke no English, pleaded guilty to this offence, but on appeal to the Territorial Court, Mr. Justice Morrow found that there was some serious doubt as to whether he fully appreciated his plea in the lower court and he was allowed to withdraw that plea whereafter the appeal proceeded as a trial *de novo* with a plea of not guilty. Section 94 of the *Indian Act* reads as follows:

> 94. 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.

I agree with the Court of Appeal that the use of the words "off a reserve" creates

> ...an essential element to be proved in any charge laid under section 94. But once it is proved, as it was in the present case, that the offence was not committed upon a reserve, the requirement of the section was satisfied. The fact that there are no reserves in the Territories is quite irrelevant.

The important question raised by this appeal has its origin in the fact that in the Northwest Territories it is not an offence for anyone except an Indian to be intoxicated otherwise than in a public place. The Liquor Ordinance which is of general application in the Territories, (R.O.N.W.T. 1957 Ch. 60s.19(1)) provides that:

> No person shall be in an intoxicated condition in a public place ...

but unlike s.94 of the *Indian Act*, there is no provision for a minimum fine and the maximum term of imprisonment is only 30 days as opposed to 3 months under the *Indian Act*.

The result is that an Indian who is intoxicated in his own home "off a reserve" is guilty of an offence and subject to a minimum fine of not less than $10 or a term of imprisonment not exceeding 3 months or both, whereas all other

citizens in the Territories may, if they see fit, become intoxicated otherwise than in a public place without committing any offence at all. And even if any such other citizen is convicted of being intoxicated in a public place, the only penalty provided by the Ordinance is "a fine not exceeding $50 or ... imprisonment for a term not exceeding 30 days or ... both fine and imprisonment."

The argument which was successfully advanced by the respondent before Mr. Justice Morrow and before the Court of Appeal was that because of this legislation, Indians in the Northwest Territories, by reason of their race, are denied "equality before the law" with their fellow Canadians, and that s.94(b) of the *Indian Act* therefore authorizes the abrogation, abridgement or infringement of one of the human rights and fundamental freedoms recognized and declared as existing in Canada without discrimination by reason of race, pursuant to the provisions of the *Canadian Bill of Rights*, Statutes of Canada 8-9 Elizabeth II Ch. 44 (hereinafter sometimes referred to as "The Bill of Rights" or "The Bill") which provides, *inter alia:*

> 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;
>
> 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, abridgement or infringement of any of the rights or freedoms herein recognized and declared ...
>
> 5. (2) The expression 'law of Canada' in Part I 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.

The Court of Appeal agreed with Mr. Justice Morrow that s.94(b) of the *Indian Act* is rendered inoperative by reason of this legislation and the Notice to appeal to this Court is limited to the single ground

> That the Court of Appeal in the Northwest Territories in upholding the decision of the Territorial Court of the Northwest Territories erred in acquitting the respondent of 'an offence contrary to s.94 (b) of the Indian Act, R.S.C. 1952 Ch. 149 on the ground that s.94 of the Indian Act is rendered inoperative by reason of the Canadian Bill of Rights, Stat. Can. 1960 Ch.44.'

It was contended on behalf of the appellant that the reasoning and conclusion of the courts below makes the question of whether s.94 has been rendered inoperative by the *Bill of Rights* dependent upon whether or not the law of any province or territory makes it an offence to be intoxicated otherwise than in a public place and that its operation could therefore not only vary from place to place in Canada but also from time to time, depending upon amendments which might be made to the provincial or territorial legislation. I can, however, find no room for the application of this argument in the present case as the ordinance in question is a law of Canada within the meaning of s.5(2) of the *Bill of Rights* (see *Northwest Territories Act*, R.S.C. 1952 Ch. 195 s.17), and it is a law of general application in the Territories, whereas the *Indian Act* is, of course, also a law of Canada although it has special application to Indians alone.

The question of whether s.94 of the *Indian Act* is rendered inoperative by reason of the provisions of the *Bill of Rights* on the ground that it abrogates,abridges or infringes the right of Canadians of the Indian race to "equality before the law" was considered by the Court of Appeal of British

Columbia in *Regina v. Gonzales*, 37 W.W.R. 257 where Tysoe, J.A., speaking for the majority of the Court, concluded that:

> Sec. 94(a) of the *Indian Act* does not abrogate or infringe the right of the appellant to 'equality before the law' as I understand it. Sec. 2 of the *Canadian Bill of Rights* does not therefore affect it.

In reaching the same conclusion, Davey, J.A., (as he then was) who wrote separate reasons for judgment from the other two members of the Court, took the view that sec. (1) of the *Bill of Rights* should be treated as merely providing a canon of construction for the interpretation of legislation existing at the time when the statute was enacted. The learned judge said:

> In so far as existing legislation does not offend against any of the matters specifically mentioned in clauses (a) to (g) of sec. 2, but is said to otherwise infringe upon some of the human rights and fundamental freedoms declared in sec. 1, in my opinion the section does not repeal such legislation either expressly or by implication. On the contrary, it expressly recognizes the continued existence of such legislation, but provides that it shall be construed and applied so as not to derogate from those rights and freedoms. By that it seems merely to provide a canon or rule of interpretation for such legislation. The very language of sec. 2, '...be so construed and applied as not to abrogate ...' assumes that the prior Act may be sensibly construed and applied in a way that will avoid derogating from the rights and freedoms declared in sec. 1. If the prior legislation cannot be so construed and applied sensibly, then the effect of sec. 2 is exhausted, and the prior legislation must prevail according to its plain meaning.
>
> The application of that rule of construction to existing legislation may require a change in the judicial interpretation of some statutes where the language permits and thus change the law.
>
> The difficulty with sec. 94(a) of the *Indian Act* is that it admits of no construction or application that would avoid conflict with sec. 1(b) of the *Canadian Bill of Rights* as appellant's counsel interprets it. Since the effect of the *Canadian Bill of Rights* is not to repeal such legislation, it is the duty of the courts to apply sec. 94(a) in the only way its plain language permits, and that the learned magistrate did when he convicted.

This proposition appears to me to strike at the very foundations of the *Bill of Rights* and to convert it from its apparent character as a statutory declaration of the fundamental

human rights and freedoms which it recognizes, into being little more than a rule for the construction of federal statutes, but as this approach has found favour with some eminent legal commentators, it seems to me to be important that priority should be given to a consideration of it.

I will hereafter refer to the case of *Robertson and Rosetanni v. The Queen*, 1963 S.C.R. 651, but in the present context I mention it only to say that like the courts below I agree with what was said by the present Chief Justice in his dissenting reasons for judgment when commenting on the above view expressed by Mr. Justice Davey. He there said, a page 662:

> With the greatest respect I find myself unable to agree with this view. The imperative words of s.2 of the *Canadian Bill of Rights*, quoted above, appear to me to require the courts to refuse to apply any law, coming within the legislative authority of Parliament, which infringes freedom of religion unless it is expressly declared by an Act of Parliament that the law which does so infringe shall operate notwithstanding the *Canadian Bill of Rights*. As already pointed out s.5(2), quoted above, makes it plain that the *Canadian Bill of Rights* is to apply to all laws of Canada already in existence at the time it came into force as well as to those thereafter enacted. In my opinion where there is irreconcilable conflict between another Act of Parliament and the *Canadian Bill of Rights* the latter must prevail.

I do not find that this expression of opinion in any way conflicts with the reasoning of the majority of this Court in *Robertson and Rosetanni v. The Queen, supra*, which held that there was no conflict between the impugned section of the *Lord's Day Act* and the *Bill of Rights*.

I am, however, with respect, of the opinion that Mr. Justice Davey's reasoning is untenable on another ground. The result of that reasoning is to conclude that any law of Canada which can only be "construed and applied sensibly" so that it offends against the *Bill of Rights*, is to operate notwithstanding the provisions of that Bill. I am unable to reconcile this interpretation with the opening words of s.2 where it is provided that:

> 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 ...

The italics are my own.

If Mr. Justice Davey's reasoning were correct and the *Bill of Rights* were to be construed as meaning that all laws of Canada which clearly offend the Bill were to operate notwithstanding its provisions, then the words which I have italisized in section 2 would be superfluous unless it be suggested that Parliament intended to reserve unto itself the right to exclude from the effect of the *Bill of Rights* only such statutes as are unclear in their meaning.

It seems to me that a more realistic meaning must be given to the words in question and they afford, in my view, the clearest indication that s. 2 is intended to mean and does mean that if a law of Canada cannot be "sensibly construed and applied" so that it does not abrogate, abridge or infringe one of the rights and freedoms recognized and declared by the Bill, then such law is inoperative "unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*".

I think a declaration by the courts that a section or portion of a section of a statute is inoperative is to be distinguished from the repeal of such a section and is to be confined to the particular circumstances of the case in which the declaration is made. The situation appears to me to be somewhat analogous to a case where valid provincial legislation in an otherwise unoccupied field ceases to be operative by reason of conflicting federal legislation.

I think it is desirable at this stage to deal with the submission made on behalf of the appellant to the effect that the rights and freedoms recognized and declared by the *Bill of Rights* must have reference to *and be circumscribed by* the laws of Canada as they existed on the 10th of August, 1960, when the Bill was passed, which laws included s.94 of the

Indian Act. This submission is based in large measure on the following paragraph from the reasons for judgment of this Court in *Robertson and Rosetanni v. The Queen, supra,* where it was said:

> It is to be noted at the outset that the *Canadian Bill of Rights* is not concerned with 'human rights and fundamental freedoms' in any abstract sense but rather with such rights and freedoms as existed in Canada immediately before the statute was enacted (see also s.5(1)). It is therefore the 'religious freedom' then existing in this country that is safeguarded by the provisions of s.2 ...

What was at issue in that case was whether the *Lord's Day Act,* in providing that "it shall be unlawful for any person on the Lord's Day ... to carry on or transact any business of his ordinary calling..." abrogated, abridged or infringed the right to "freedom of religion", and it was contended on behalf of the appellant that the phrase "freedom of religion" as used in the *Bill of Rights* meant "freedom to enjoy the freedom which my own religion allows without being confined by restrictions imposed by Parliament for the purpose of enforcing the tenets of a faith to which I do not subscribe". In considering this contention, it became necessary to examine the decided cases in order to determine what was the accepted meaning of "freedom of religion" as it existed in Canada immediately before the *Bill of Rights* was enacted and the last-quoted excerpt from the reasons for justment must, in my view, be read in this sense. This appears to me to be confirmed by the succeeding paragraph of these reasons where it is said:

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

If it had been accepted that the right to "freedom of religion" as declared in the *Bill of Rights* was circumscribed by the provisions of the Canadian statutes in force at the date of its enactment, there would have been no need, in determining the validity of the *Lord's Day Act* to consider the authorities

in order to examine the situation in light of the concept of religious freedom which was recognized in Canada at the time of the enactment of the *Bill of Rights*. It would have been enough to say that "freedom of religion" as used in the Bill must mean freedom of religion subject to the provisions of the *Lord's Day Act*. This construction would, however, have run contrary to the provisions of s.5(2) of the Bill which makes it applicable to every"Act of the Parliament of Canada enacted before or after the coming into force of this Act."

In any event, it was not necessary to decide this question in *Robertson and Rosetanni* because it was found that the impugned provisions of the *Lord's Day Act* and the *Bill of Rights* were not in conflict, and I accordingly do not consider that case to be any authority for the suggestion that the *Bill of Rights* is to be treated as being subject to federal legislation existing at the time of its enactment, and more particularly I do not consider that the provisions of s.1(b) of the *Bill of Rights* are to be treated as being in any way limited or affected by the terms of s.94(b) of the *Indian Act*.

The right which is here at issue is "the right of the individual to equality before the law and the protection of the law". Mr. Justice Tysoe, who wrote the reasons for judgment on behalf of the majority of the Court of Appeal of British Columbia in the *Gonzales Case, supra,* expressed the opinion that as these words occur in the *Bill of Rights* they mean

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

(The italics are Mr. Justice Tysoe's)

Like the members of the courts below, I cannot agree with this interpretation pursuant to which it seems to me that

the most glaring discriminatory legislation against a racial group would have to be construed as recognizing the right of each of its individual members "to equality before the law", so long as all the other members are being discriminated against in the same way.

I think that the word "law" as used in s. 1.(b) of the *Bill of Rights* is to be construed as meaning "the law of Canada" as defined in s.5(2) (i.e. Acts of the Parliament of Canada and any orders, rules or regulations thereunder) and without attempting any exhaustive definition of "equality before the law" I think that s.1(b) means at least that no individual or group of individuals is to be treated more harshly than another under that law, and I am therefore of 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*.

For all the above reasons I would dismiss this appeal.

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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*.

For all the above reasons I would dismiss this appeal.

Since writing the above I have had the advantage of reading the reasons for judgment prepared by the Chief Justice and by Mr. Justice Pigeon which, when read together, appear to me to lead to the conclusion that, even on the assumption that the application of the provisions of prior federal legislation has the effect of denying equality before the law, and thus discriminating against, a sector of the population "by reason of race", they must nevertheless be given full effect notwithstanding the provisions of the *Bill of Rights*. In view of this conclusion, I find it necessary to restate the position which I take in the matter.

I am in full agreement with the Chief Justice that the question here raised was not decided in the case of *Robertson and Rosetanni v. Her Majesty the Queen*, *supra*, and that this is the first occasion on which it has become necessary for this Court to decide it.

In my view under the provisions of section 1 of the *Bill of Rights* "the right of the individual to equality before the law" "without discrimination by reason of race" is recognized as a right which exists in Canada, and by sections 2 and 5 of that Bill it is provided that every law of Canada enacted before or after the coming into force of the Bill, unless Parliament makes an express declaration to the contrary, is to be "so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement" of any of the rights so recognized and declared.

It may well be that the implementation of the *Canadian Bill of Rights* by the courts can give rise to great difficulties, but in my view full effect must be given to the terms of section 2 thereof.

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 section 2 of the *Bill of Rights*, then section 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*.

HER MAJESTY THE QUEEN

v.

JOSEPH DRYBONES

R I T C H I E J.

COUR SUPRÊME DU CANADA

SA MAJESTÉ LA REINE

c.

JOSEPH DRYBONES

CORAM: Le Juge en chef, les Juges Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence et Pigeon.

LE JUGE RITCHIE:

Le pourvoi, que cette Cour a autorisé, est à l'encontre d'un arrêt de la Cour d'appel des Territoires du Nord-Ouest. Cet arrêt a rejeté l'appel de la Couronne à l'encontre d'un jugement du Juge W.G. Morrow, de la Cour territoriale des Territoires du Nord-Ouest acquittant Joseph Drybones, de l'inculpation d'avoir été ivre hors d'une réserve, illégalement, en contravention des dispositions de l'art. 94 b) de la Loi sur les Indiens, S.R.C. 1952 ch. 149. La décision du Juge Morrow faisait suite à un appel par procès de novo du jugement du Magistrat Anderson-Thompson qui avait déclaré l'intimé coupable de cette infraction et l'avait condamné à payer $10 d'amende et les frais ou, à défaut, à trois jours de détention. L'inculpation de Drybones tenait dans le texte suivant: (traduction)

> "Le 8 avril 1967, ou vers cette date, à Yellowknife, dans les Territoires du Nord-Ouest, étant un Indien, il était ivre hors d'une réserve, illégalement, en contravention des dispositions de l'article 94 b) de la Loi sur les Indiens."

L'intimé est Indien et il était réellement ivre, le soir du 8 avril 1967, à l'hôtel Old Stope, à Yellowknife, dans les Territoires du Nord-Ouest, où il n'y a pas de "réserve" au sens que donne à ce mot la Loi sur les Indiens.

Traduit devant le Magistrat Anderson-Thompson, Drybones, qui ne parlait pas l'anglais, s'avoua coupable de l'infraction précitée. Lors de l'appel, en Cour territoriale, le Juge Morrow doutant beaucoup que Drybones ait bien compris le sens de son plaidoyer devant le Magistrat, lui permit de le rétracter et l'appel se poursuivit comme procès de novo, sur plaidoyer de non-culpabilité. L'article 94 de la Loi sur les Indiens se lit comme suit:

> 94. Un Indien qui
> a) a des spiritueux en sa possession;
> b) est ivre; ou
> c) fait ou fabrique des spiritueux
> hors d'une réserve, est coupable d'une infraction et passible, sur déclaration sommaire de culpabilité, d'une amende d'au moins dix dollars et d'au plus cinquante dollars ou d'un emprisonnement n'excédant pas trois mois, ou de l'amende et de l'emprisonnement à la fois.

Je conviens avec la Cour d'appel que les mots "hors d'une réserve" constituent (traduction)

> "... un élément essentiel qui doit être prouvé dans toute accusation portée en vertu de l'article 94. Cependant, une fois qu'il est prouvé, comme dans l'affaire qui nous intéresse, que l'infraction n'a pas été commise sur une réserve, l'exigence de l'article est satisfaite. Le fait qu'il n'existe pas de réserve dans les Territoires n'a rien à voir avec la question."

La question importante dans le présent appel tient à ce que dans les Territoires du Nord-Ouest le fait d'être ivre, ailleurs que dans un lieu public, ne constitue une infraction pour personne autre qu'un Indien.

L'ordonnance intitulée The Liquor Ordinance, (R.O.N.W.T.) 1957, ch. 60, art. 19 (1) qui y est d'application générale, édicte que: (traduction)

> "Nul ne doit se trouver en état d'ébriété dans un lieu public..."

mais à la différence de l'art. 94 de la Loi sur les Indiens elle ne prescrit pas une amende mininum et la peine maximum d'emprisonnement y est de 30 jours alors qu'elle est de 3 mois en vertu de la Loi sur les Indiens.

Il s'ensuit donc qu'un Indien qui est ivre chez lui, mais hors d'une réserve, est coupable d'une infraction et passible d'une amende d'au moins $10 ou d'un emprisonnement n'excédant pas 3 mois ou des deux peines à la fois, alors que n'importe quel autre citoyen des Territoires peut, à sa guise, s'enivrer ailleurs que dans un lieu public, sans commettre une infraction. Et même si cet autre citoyen est déclaré coupable de se trouver en état d'ivresse dans un lieu public, la seule peine que prévoit l'ordonnance est: (traduction) "une amende d'au plus $50. ou... un emprisonnement n'excédant pas 30 jours ou ... les deux peines à la fois."

L'intimé a fait valoir avec succès devant le Juge Morrow et la Cour d'appel qu'en raison de cette loi, les Indiens des Territoires du Nord-Ouest sont, à cause de leur race, privés de "l'égalité devant la loi" dont jouissent les autres Canadiens et qu'en conséquence l'art. 94 b) de la Loi sur les Indiens autorise la suppression, la diminution ou la transgression de l'un des droits de l'homme et libertés fondamentales reconnus et déclarés comme existant au Canada pour tout individu, quelle que soit sa race, par les dispositions de la

Déclaration canadienne des droits, Statuts du Canada, 8-9 Elizabeth II ch. 44 (ci-après appelée la "Déclaration des droits" ou la "Déclaration"). Celle-ci décrète, notamment:

> 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: ...
>
> b) le droit de l'individu à l'égalité devant la loi et à la protection de la loi; ...
>
> 2. Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la Déclaration canadienne des droits, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme ...
>
> 5. (2) L'expression "loi du Canada", à la Partie I, désigne une loi du Parlement du Canada, édictée avant ou après la mise en vigueur de la présente loi, ou toute ordonnance, règle ou règlement établi sous son régime, et toute loi exécutoire au Canada ou dans une partie du Canada lors de l'entrée en application de la présente loi, qui est susceptible d'abrogation, d'abolition ou de modification par le Parlement du Canada.

La Cour d'appel a été d'accord avec le Juge Morrow que l'art. 94 b) de la Loi sur les Indiens est inopérant par suite de l'adoption de la Déclaration des droits. Aussi, l'avis d'appel à cette Cour se limite-t-il au seul motif suivant: (traduction)

> "Que la Cour d'appel des Territoires du Nord-Ouest, en confirmant la décision de la Cour territoriale des Territoires du Nord-Ouest, a fait erreur en acquittant

> l'intimé d'une infraction à l'article 94 b) de la Loi sur les Indiens, S.R.C. 1952, ch. 149, pour le motif que l'art. 94 de la Loi sur les Indiens est rendu inopérant en raison de la Déclaration canadienne des droits, S.C. 1960, ch.44."

On a prétendu au nom de l'appelante que d'après le raisonnement et la conclusion des cours des Territoires la Déclaration des droits rendrait l'art. 94 inopérant pour autant que les législations provinciales ou territoriales feraient une infraction de l'état d'ébriété ailleurs que dans un lieu public; que l'application de cet article varierait donc non seulement d'un endroit à l'autre au Canada, mais aussi d'une époque à l'autre, suivant les modifications que les provinces ou territoires pourraient apporter à leurs lois. Je ne vois pas comment ce raisonnement s'appliquerait à la présente affaire. L'ordonnance dont il est question est une loi du Canada au sens où l'entend l'art. 5 (2) de la Déclaration des droits (voir la Loi sur les Territoires du Nord-Ouest, S.R.C. ch. 195, art. 17), et c'est une loi d'application générale dans les Territoires, tandis que la Loi sur les Indiens, bien qu'étant aussi une loi du Canada s'applique aux Indiens seulement.

La Cour d'appel de la Colombie-Britannique a déjà examiné, dans l'affaire Regina v. Gonzales, 37 W.W.R. 257, la question de savoir si la Déclaration des droits rend inopérant l'art. 94 de la Loi sur les Indiens du fait qu'il supprime, restreint ou enfreint le droit des Canadiens de race indienne à l'"égalité devant la loi". Dans cette affaire-là, le Juge d'appel Tysoe a conclu de la façon suivante, au nom de la majorité: (traduction)

> "L'art. 94 a) de la Loi sur les Indiens ne supprime ni n'enfreint le droit de l'appelant à l'"égalité devant la loi" comme je l'entends. En conséquence, l'art. 2 de la Déclaration canadienne des droits ne l'infirme pas."

Tout en arrivant à la même conclusion, le Juge Davey, alors Juge d'appel, qui a donné des motifs différents de ceux de ses deux collègues, considéra qu'il ne faut voir dans l'art. 1 de la Déclaration des droits qu'une règle d'interprétation des lois en vigueur lors de l'adoption de la Déclaration. Ce savant Juge a dit: (traduction)

> "Dans le cas où une loi existante ne va pas à l'encontre de ce que mentionnent expressément les alinéas a) à g) de l'art. 2 mais on prétend qu'elle enfreint autrement certains des droits de l'homme et libertés fondamentales énoncés à l'art. 1, j'estime que l'article ne l'abroge ni expressément ni implicitement. Au contraire, il reconnaît expressément le maintien en existence de cette loi tout en prévoyant qu'elle doit être interprétée et appliquée de façon à ne pas porter atteinte à ces droits et libertés. Il semble ainsi simplement fournir une règle, un critère d'interprétation de cette loi. Le libellé même de l'art. 2 "... soit interprétée et appliquée de façon à ne pas abroger ..." implique que la loi antérieure peut être raisonnablement interprétée et appliquée de façon à éviter de porter atteinte aux droits et libertés énoncés à l'art. 1. Si la loi antérieure ne peut être ainsi raisonnablement interprétée et appliquée, alors l'art. 2 est sans effet et la loi antérieure doit l'emporter conformément à son sens clair.
>
> Il se peut que l'application de cette règle d'interprétation aux lois existantes nécessite un changement dans l'interprétation judiciaire de certaines lois dont la rédaction le permet et qu'elle modifie ainsi le droit.
>
> La difficulté quant à l'art. 94 a) de la Loi sur les Indiens c'est qu'il ne permet aucune interprétation qui l'empêche d'aller à l'encontre de l'art. 1 b) de la Déclaration canadienne des droits comme l'interprète l'avocat de l'appelant. La Déclaration canadienne des

> droits n'ayant pas pour effet d'abroger une telle loi, il incombe aux tribunaux d'appliquer l'art. 94 a) de la seule façon possible d'après ses termes clairs, et c'est ce qu'a fait le savant Magistrat lorsqu'il a prononcé la condamnation."

Cette affirmation me paraît saper la base même de la Déclaration des droits, méconnaître son caractère manifeste de déclaration statutaire des droits de l'homme et des libertés fondamentales qu'elle reconnait, pour la réduire à n'être guère plus qu'une règle d'interprétation des lois fédérales. Toutefois, comme cette manière de voir a reçu un accueil favorable auprès d'éminents commentateurs, il me semble important de l'examiner en premier lieu.

Je citerai plus loin l'affaire Robertson et Rosetanni c. La Reine, 1963 R.C.S. 651, ici je n'en parlerai que pour dire qu'à l'instar des tribunaux des Territoires, je partage l'avis exprimé par le Juge en chef actuel, dans ses motifs de dissidence, au sujet de l'opinion précitée du Juge Davey. Voici ce qu'il dit, à la page 662: (traduction)

> "En toute déférence, je ne puis accepter ce point de vue. A mon avis, les termes impératifs de l'art. 2 de la Déclaration canadienne des droits, cité plus haut, exigent des tribunaux qu'ils refusent d'appliquer toute loi de la compétence législative du Parlement, qui enfreint la liberté de religion, à moins qu'une loi du Parlement ne déclare expressément que la première doit s'appliquer nonobstant la Déclaration canadienne des droits. Comme on l'a déjà vu, l'art. 5 (2) cité plus haut montre bien que la Déclaration canadienne des droits doit s'appliquer à toutes les lois du Canada existant au moment où elle est entrée en vigueur de même qu'à celles qui sont promulguées par la suite. A mon sens, lorsqu'il y a contradiction irréductible entre une autre loi du Parlement et la Déclaration canadienne des droits, cette dernière doit prévaloir."

effectivement que, si une loi du Canada ne peut être "raisonnablement interprétée et appliquée" sans supprimer, restreindre ou enfreindre un des droits ou libertés reconnus et proclamés dans la Déclaration, une telle loi est inopérante "à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la Déclaration canadienne des droits".

Je crois qu'il y a une distinction à faire entre une déclaration des tribunaux à l'effet qu'un article ou une partie d'un article d'une loi est inopérant et l'abrogation d'un tel article et qu'il faut restreindre la déclaration aux circonstances de l'affaire où elle est faite. La situation me paraît analogue à celle d'une loi provinciale valide dans un champ autrement inoccupé qui devient inopérante par suite d'une loi fédérale en conflit.

Il convient maintenant, je pense, d'étudier la théorie avancée de la part de l'appelante à l'effet que les droits et libertés reconnus et déclarés dans la Déclaration des droits doivent être en relation avec les lois du Canada en vigueur le 10 août 1960, date de la sanction de la Déclaration et être délimités par ces lois, qui comprennent l'art. 94 de la Loi sur les Indiens. Cette théorie s'appuie principalement sur l'alinéa suivant des motifs de jugement de cette Cour dans l'affaire Robertson et Rosetanni c. La Reine, (précitée): (traduction)

> "Il faut remarquer tout d'abord que la Déclaration canadienne des droits ne s'intéresse pas aux "droits de l'homme et aux libertés fondamentales" dans un sens abstrait mais à ces droits et libertés qui existaient au Canada juste avant la promulgation de la loi (voir

> également l'art. 5 (1). C'est donc la "liberté de religion" alors existante dans ce pays qui est sauvegardée par les dispositions de l'art. 2..."

La question dans cette affaire-là était de savoir si la Loi sur le dimanche, en prescrivant que "nul ne peut légalement le dimanche... exercer ou poursuivre une besogne de son état ordinaire..." supprime, restreint ou enfreint le droit à la "liberté de religion". On soutenait de la part de l'appelante que, l'expression "liberté de religion" dans la Déclaration des droits, signifie (traduction) "la faculté de jouir de la liberté que m'accorde ma propre religion, sans être astreint aux restrictions qu'impose le Parlement pour faire observer la doctrine d'une foi à laquelle je n'adhère pas". Pour examiner cette prétention, il a fallu étudier les décisions antérieures et déterminer quelle était la définition reconnue de la "liberté de religion" comme elle existait au Canada juste avant la promulgation de la Déclaration des droits et c'est dans ce sens, je crois, qu'il faut lire l'extrait des motifs de jugement que je viens de citer. L'alinéa suivant de ces motifs me paraît le confirmer. Il se lit comme suit: (traduction)

> "Il est donc très important de bien comprendre le concept de liberté de religion qui était reconnu dans ce pays avant la promulgation de la Déclaration des droits et après la promulgation de la Loi sur le dimanche sous sa forme actuelle."

Si l'on avait admis que les lois du Canada en vigueur au moment de l'adoption de la Déclaration des droits délimitent le droit à la "liberté de religion" y mentionné, il n'eût pas été nécessaire, pour décider de la validité de la Loi sur le dimanche de se reporter aux précédents pour y étudier la situation à

la lumière de l'idée que l'on se faisait au Canada de la "liberté de religion" au moment de l'adoption de la Déclaration des droits. Il eût suffi de dire que l'expression "liberté de religion" au sens que lui donne la Déclaration des droits signifie la liberté de religion sous réserve des dispositions de la Loi sur le dimanche. Cette interprétation aurait cependant été contraire aux dispositions de l'art. 5(2) de la Déclaration, dispositions qui la rendent applicable à toute "loi du Parlement du Canada édictée avant ou après la mise en vigueur de la présente loi."

De toute façon, il n'était pas nécessaire de statuer sur cette question dans l'affaire Robertson et Rosetanni parce qu'on a jugé que la disposition contestée de la Loi sur le dimanche n'est pas en conflit avec la Déclaration des droits. Aussi, je ne considère pas que cette décision-là permette de soutenir que la Déclaration des droits doit être considérée comme subordonnée aux lois fédérales en vigueur au moment de son adoption. En particulier, je n'estime pas que le libellé de l'art. 94 b) de la Loi sur les Indiens limite ou modifie de quelque façon les dispositions de l'art. 1 b) de la Déclaration des droits.

Le droit dont il est question ici est celui "de l'individu à l'égalité devant la loi et à la protection de la loi". Le Juge Tysoe, qui a rédigé les motifs du jugement au nom de la majorité en Cour d'appel de la Colombie-Britannique dans l'affaire Gonzales (précitée) exprime l'opinion que ces termes, dans la Déclaration des droits, veulent dire: (traduction)

> "Le droit qu'a toute personne touchée ou visée par une loi particulière, quelle que soit sa race, son origine nationale, sa couleur, sa religion ou son sexe, d'être sur un pied d'égalité avec toute autre personne touchée ou visée par une loi particulière, et le droit à la protection de la loi."

(Les italiques sont du Juge Tysoe dans le texte original)

Tout comme les juges des Cours des Territoires, je ne puis admettre cette interprétation. Elle aurait pour conséquence, il me semble, qu'il faudrait considérer que la loi la plus manifestement discriminatoire envers un groupe ethnique reconnaît à chacun des membres de ce groupe "l'égalité devant la loi" si elle est également discriminatoire à l'égard de tous les autres membres du même groupe.

Je pense que le mot "loi" dans l'art. 1 b) de la Déclaration des droits doit s'interpréter comme signifiant une "loi du Canada" au sens de la définition à l'art. 5 (2) (c'est-à-dire, une loi du Parlement du Canada, ou une ordonnance, une règle ou un règlement établis sous son régime). Sans rechercher une définition complète de l'expression "égalité devant la loi", je pense que l'art. 1 b) signifie au moins qu'un individu ou un groupe d'individus ne doit pas être traité plus durement qu'un autre en vertu de la loi. J'en conclus donc qu'une personne est privée de l'égalité devant la loi, si pour elle, à cause de sa race, un acte qui, pour ses concitoyens canadiens, n'est pas une infraction et n'appelle aucune sanction devient une infraction punissable en justice.

Pour décider la présente affaire, il me

suffit de dire qu'à mon avis l'art. 94 b) de la Loi sur les Indiens, qui est une loi du Canada, crée une telle infraction et qu'en l'interprétant on ne peut que conclure que son application supprime, restreint ou enfreint l'un des droits déclarés et reconnus dans la Déclaration des droits. Pour les motifs que je viens d'indiquer, je suis donc d'avis que l'art. 94 b) est inopérant.

Pour décider la question soulevée par le pourvoi, il n'est pas nécessaire d'exprimer une opinion sur l'application d'aucun autre article de la Loi sur les Indiens.

Pour les motifs ci-dessus, je suis d'avis de rejeter le pourvoi.

Depuis la rédaction de ce qui précède, j'ai eu le privilège de lire les motifs du Juge en chef et du Juge Pigeon. D'après ces motifs considérés comme un tout, il faut à mon sens conclure que, même en présumant que l'application des dispositions d'une loi fédérale antérieure à la Déclaration des droits prive une catégorie de citoyens du droit à l'égalité devant la loi à cause de leur origine raciale et est ainsi discriminatoire à leur égard, il faut appliquer ces dispositions nonobstant celles de la Déclaration des droits. Ces opinions de mes collègues m'obligent à réaffirmer mon point de vue à ce sujet.

Je suis tout à fait d'accord avec le Juge en chef que le problème soulevé ici n'a pas été résolu dans l'affaire Robertson et Rosetanni c. La Reine (précitée) et que c'est la première fois que cette Cour se trouve obligée de le résoudre.

A mon avis, en vertu des dispositions de l'article 1 de la Déclaration des droits "le droit de l'individu à l'égalité devant la loi" "quelle que soit sa race" est reconnu comme un droit qui existe au Canada et les articles 2 et 5 de la Déclaration décrètent que toute loi du Canada édictée avant ou après la mise en vigueur de la Déclaration doit, à moins que le Parlement ne déclare expressément le contraire, "s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre" l'un quelconque des droits ainsi reconnus ni à en "autoriser la suppression, la diminution ou la transgression".

Il est bien possible que l'application judiciaire de la Déclaration canadienne des droits donne lieu à de grandes difficultés mais, à mon avis, il faut donner leur plein effet aux dispositions de l'art. 2.

L'affaire présentement devant nous démontre qu'il existe des lois du Canada qui suppriment, restreignent et enfreignent le droit d'un Indien à l'égalité devant la loi et, à mon avis, afin appliquer ces lois en se conformant aux termes explicites employés par le Parlement à l'article 2 de la Déclaration des droits il faut déclarer que l'art. 94 b) de la Loi sur les Indiens est inopérant.

Je crois utile d'affirmer clairement que ces motifs s'appliquent seulement à un cas où, en vertu des lois du Canada, est réputé infraction punissable en droit, pour une personne, à cause de sa race, un acte que ses concitoyens canadiens qui ne sont pas de cette race peuvent poser sans encourir aucune sanction. A mon avis, cela est bien loin d'être applicable à toutes les dispositions de la Loi sur les Indiens.

COUR SUPRÊME DU CANADA

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LE JUGE RITCHIE

THE SUPREME COURT OF CANADA

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v.

JOSEPH DRYBONES

CORAM: The Chief Justice, Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

HALL J.:

I agree with the reasons of my brother Ritchie and wish only to add some observations regarding the decision in Regina v. Gonzales, 37 W.W.R. 257.

The concept that the Canadian Bill of Rights is operative in the face of a law of Canada only when that law does not give equality to all persons within the class to whom that particular law extends or relates, as it was expressed by Tysoe J.A. at p. 264:

> Coming now to sec. 1(b) of the Canadian Bill of Rights. The meaning of the word "equality" is well known. In my opinion, the word "before" in the expression "equality before the law," in the sense in which that expression is used in sec. 1(b) means "in the presence of." It seems to me this is the key to the correct interpretation of the expression and makes it clear that "equality before the law" has nothing to do with the application of the law equally to everyone and equal laws for everyone in the sense for which appellant's counsel contends, namely, the same laws for all persons, but to the position occupied by persons to whom a law relates or extends. They shall be entitled to have the law as it exists applied equally and without fear or favour to all persons to whom it relates or extends.

is analogous to the position taken by the Supreme Court of the United States in Plessy v. Ferguson, (1896) 153 U.S. 537, and which was wholly rejected by the same Court in its historic desegregation judgment Brown v. Board of Education, (1953) 347 U.S. 483.

In Plessy v. Ferguson the Court had held that under the "separate but equal" doctrine equality of treatment is accorded when the races are provided substantially equal facilities even though these facilities be separate. In Brown v. Board of Education the Court held the "separate but equal" doctrine to be totally invalid.

The social situations in Brown v. Board of Education and in the instant case are, of course, very different, but the basic philosophic concept is the same. The Canadian Bill of Rights is not fulfilled if it merely equates Indians with Indians in terms of equality before the law, but can have validity and meaning only when subject to the single exception set out in s. 2 it is seen to repudiate discrimination in every law of Canada by reason of race, national origin, colour, religion or sex in respect of the human rights and fundamental freedoms set out in s. 1 in whatever way that discrimination may manifest itself not only as between Indian and Indian but as between all Canadians whether Indian or non-Indian.

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JOSEPH DRYBONES

CORAM: Le Juge en chef et les Juges Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence et Pigeon

LE JUGE HALL:

Je suis d'accord avec les motifs de mon collègue le Juge Ritchie et voudrais seulement ajouter certaines observations concernant la décision dans Regina v. Gonzales, 37 W.W.R. 257.

Le concept selon lequel la Déclaration canadienne des droits ne prend effet vis-à-vis d'une loi du Canada que lorsque cette loi n'accorde pas l'égalité à toutes les personnes de la classe visée ou touchée par cette loi particulière, comme l'a exprimé le Juge Tysoe de la Cour d'appel, à la page 264: (traduction)

> "Venons-en maintenant à l'article 1 b) de la Déclaration canadienne des droits. Le sens du mot "égalité" est bien connu. A mon avis, le mot "devant" dans l'expression "égalité devant la loi", au sens qui lui est donné à l'article 1 b), signifie "en présence de". D'après moi, c'est là l'interprétation correcte de l'expression et il en ressort que "égalité devant la loi" n'a rien à voir avec l'application de la loi également pour tous et de lois égales pour tous comme le soutient l'avocat de l'appelant, c'est-à-dire les mêmes lois pour tous, mais avec la situation des personnes visées ou touchées par une loi. Elles ont le droit de se voir appliquer la loi telle qu'elle existe, sur un plan d'égalité, sans distinction de personnes,"

est analogue à la position prise par la Cour Suprême des États-Unis dans Plessy v. Ferguson, (1896) 153 U.S. 537,

qui a été rejetée en totalité par la même Cour dans son jugement historique sur la déségrégation, Brown v. Board of Education, (1953) 347 U.S. 483.

Dans Plessy v. Ferguson la Cour a jugé qu'en vertu de la doctrine "distinct mais égal" les différentes races se voient accorder l'égalité de traitement lorsqu'on leur fournit des services sensiblement égaux bien que distincts. Dans Brown v. Board of Education la Cour a décidé que la doctrine "distinct mais égal" était entièrement erronée.

Les situations sociales considérées dans Brown v. Board of Education et dans la présente cause sont, bien entendu, très différentes, mais le concept philosophique fondamental est le même. La Déclaration canadienne des droits n'atteint pas son but si pour l'égalité devant la loi elle ne fait qu'établir un rapport d'égalité entre Indiens et Indiens; elle n'a de valeur et n'a de sens que lorsque, sous réserve de l'unique exception énoncée à l'article 2, elle répudie dans chaque loi du Canada la discrimination en raison de la race, de l'origine nationale, de la couleur, de la religion ou du sexe à l'égard des droits de l'homme et des libertés fondamentales énoncés à l'article 1, de quelque façon que cette discrimination puisse se manifester, non seulement entre Indiens et Indiens, mais entre tous les Canadiens qu'ils soient Indiens ou non-Indiens.

COUR SUPRÊME DU CANADA

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LE JUGE HALL

SUPREME COURT OF CANADA

HER MAJESTY THE QUEEN

v.

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Coram:- The Chief Justice, Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

THE CHIEF JUSTICE:-

The relevant facts, which are undisputed, and the course of the proceedings in the Courts below are set out in the reasons of my brothers Ritchie and Pigeon which I have had the advantage of reading.

There is no doubt that, on the facts, the respondent was guilty of a breach of s. 94(b) of the Indian Act and the question to be decided is whether that provision is rendered inoperative by the terms of the Canadian Bill of Rights, Statutes of Canada 8-9 Elizabeth II, c. 44, hereinafter referred to as the Bill.

In approaching this question I will assume the correctness of the view that s. 94(b) infringes the right of the respondent to equality before the law declared by Clause (b) of s. 1 of the Bill, in that because he is an Indian it renders him guilty of a punishable offence by reason of conduct which would not have been punishable if indulged in by any person who was not an Indian.

This is, I believe, the first occasion on which it has become necessary for this Court to decide this question. In Robertson and Rosetanni v. Her Majesty the Queen (1963) S.C.R. 651, the majority were of the view that the impugned

provisions of The Lord's Day Act did not infringe the right to freedom of religion declared by Clause (c) of s. 1 of the Bill, and consequently did not deal with the opinion which I expressed in my dissenting reasons as to the effect of the Bill on a provision of an Act of Parliament which does infringe one of the declared rights.

In the case at bar s. 94(b) of the Indian Act is expressed in plain and unequivocal words. It is not possible by the application of any rule of construction to give it a meaning other than that an Indian who is intoxicated off a reserve is guilty of an offence.

In these circumstances the choice open to us is to give effect to the section according to its plain meaning or to declare it inoperative, that is to say, to declare that the Indian Act is pro tanto repealed by the Bill.

In Robertson and Rosetanni v. The Queen (supra) I had to deal with a similar question as in my view The Lord's Day Act did infringe the freedom of religion. At pages 661 and 662 I used the following words:-

> " It remains to consider the reasons for judgment of Davey J.A. in Regina v. Gonzales (1962) 37 C.R. 56, 37 W.W.R. 257, 132 C.C.C. 237, 32 D.L.R. (2d) 290. At page 239 of the C.C.C. Reports the learned Justice of Appeal says:
>
> > ' In so far as existing legislation does not offend against any of the matters specifically mentioned in clauses (a) to (g) of s. 2, but is said to otherwise infringe upon some of the human rights and fundamental freedoms declared in s. 1, in my opinion the section does not repeal such legislation either expressly or by implication. On the contrary, it expressly recognizes the continued existence of such legislation, but provides that it shall be Construed and applied so as not to derogate from those rights and freedoms. By that

> it seems merely to provide a canon or rule of interpretation for such legislation. The very language of s. 2, "be so construed and applied as not to abrogate" assumes that the prior Act may be sensibly construed and applied in a way that will avoid derogating from the rights and freedoms declared in s. 1. If the prior legislation cannot be so construed and applied sensibly, then the effect of s. 2 is exhausted, and the prior legislation must prevail according to its plain meaning.'

With the greatest respect I find myself unable to agree with this view. The imperative words of s. 2 of the Canadian Bill of Rights, quoted above, appear to me to require the courts to refuse to apply any law, coming within the legislative authority of Parliament, which infringes freedom of religion unless it is expressly declared by an Act of Parliament that the law which does so infringe shall operate notwithstanding the Canadian Bill of Rights. As already pointed out s. 5(2), quoted above, makes it plain that the Canadian Bill of Rights is to apply to all laws of Canada already in existence at the time it came into force as well as to those thereafter enacted. In my opinion where there is irreconcilable conflict between another Act of Parliament and the Canadian Bill of Rights the latter must prevail.

Whether the imposition, under penal sanctions, of a certain standard of religious conduct on the whole population is desirable is, of course, a question for Parliament to decide. But in enacting the Canadian Bill of Rights Parliament has thrown upon the courts the responsibility of deciding, in each case in which the question arises, whether such an imposition infringes the freedom of religion in Canada. In the case at bar I have reached the conclusion that s. 4 of the Lord's Day Act does infringe the freedom of religion declared and preserved in the Canadian Bill of Rights and must therefore be treated as inoperative."

After a most anxious reconsideration of the whole question, in the light of the able arguments addressed to us by counsel, I have reached the conclusion that the view expressed by Davey J.A., as he then was, in the words quoted above is the better one.

The question is whether or not it is the intention of Parliament to confer the power and impose the responsibility upon the courts of declaring inoperative any provision in a Statute of Canada although expressed in clear and unequivocal terms, the meaning of which after calling in aid every rule of construction including that prescribed by s. 2 of the Bill is perfectly plain, if in the view of the court it infringes any of the rights or freedoms declared by s. 1 of the Bill.

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

If it were intended that the question should be answered in the affirmative there would, in my opinion, have been added after the word "declared" in the seventh line of the opening paragraph of s. 2 of the Bill some such words as the following "and if any law of Canada cannot be so construed and applied it shall be regarded as inoperative or pro tanto repealed".

What now appears to me to have been the error in my reasoning in the passage from Robertson and Rosetanni v. The Queen quoted above is found in the statement that the Bill requires the courts to refuse to apply any law of Canada which is successfully impugned as infringing one of the declared rights or freedoms whereas on the contrary, as Davey J.A. had pointed out, the Bill directs the courts to apply such a law not to refuse to apply it.

For these reasons I would dispose of the appeal as proposed by my brother Pigeon.

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THE CHIEF JUSTICE

COUR SUPRÊME DU CANADA

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CORAM: Le Juge en chef et les Juges Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence et Pigeon

LE JUGE EN CHEF:

Les faits pertinents, qui ne sont pas contestés, et la marche des procédures dans les cours des Territoires sont relatés dans les motifs de mes collègues les Juges Ritchie et Pigeon, que j'ai eu le privilège de lire.

En fait l'intimé est indubitablement coupable d'avoir enfreint l'art. 94 b) de la Loi sur les Indiens. Il s'agit de décider si cette disposition est rendue inopérante par la Déclaration canadienne des droits, Statuts du Canada 8-9 Elizabeth II, ch. 44, que j'appellerai ci-après la Déclaration.

En abordant cette question, je vais présumer que l'art. 94 b) enfreint réellement le droit de l'intimé à l'égalité devant la loi, tel qu'énoncé à l'alinéa b) de l'article 1 de la Déclaration, du fait que, parce qu'il est un Indien, ce texte le rend coupable d'une infraction en raison d'une façon d'agir qui ne donnerait lieu à aucune sanction pour tout autre qu'un Indien.

C'est, je crois, la première fois que cette Cour est appelée à trancher cette question. Dans Robertson et Rosetanni c. La Reine (1963) R.C.S. 651, la majorité a jugé que les dispositions contestées de la Loi sur le dimanche n'enfreignaient pas le droit à la liberté de religion énoncé à l'alinéa c) de l'article 1 de la Déclaration, elle n'a donc pas statué sur l'opinion que j'ai exprimée dans mes motifs de dissidence quant à l'effet de la Déclaration sur une disposition d'une loi du Parlement qui enfreint l'un des droits énoncés.

Dans la présente cause, l'art. 94 b) de la Loi sur les Indiens est rédigé en termes clairs et non équivoques. Aucune règle d'interprétation ne permet de lui donner un sens autre que celui-ci, savoir: un Indien qui est ivre hors d'une réserve est coupable d'une infraction.

Dans les circonstances, le seul choix que nous ayions est soit d'appliquer l'article suivant son sens clair, soit de le déclarer inopérant, c'est-à-dire, de déclarer que la Loi sur les Indiens est, pro tanto, abrogée par la Déclaration.

Dans Robertson et Rosetanni c. La Reine (déjà citée) j'avais à examiner une question semblable, vu qu'à mon avis la Loi sur le dimanche enfreignait la liberté de religion. Je me suis exprimé comme suit, aux pages 661 et 662: (traduction)

> "Il reste à considérer les motifs de jugement du Juge d'appel Davey dans Regina v. Gonzales (1962) 37 C.R. 56, 37 W.W.R. 257, 132 C.C.C. 237, 32 D.L.R. (2d) 290. A la page 239 des C.C.C. Reports, le savant Juge d'appel dit: (traduction)

> "Dans le cas où une loi existante ne va pas à l'encontre de ce que mentionnent expressément les alinéas a) à g) de l'article 2, mais on prétend qu'elle enfreint autrement certains des droits de l'homme et des libertés fondamentales énoncés à l'article 1, j'estime que l'article ne l'abroge ni expressément ni implicitement. Au contraire, il reconnait expressément le maintien en existence de cette loi tout en prévoyant qu'elle doit être interprétée et appliquée de façon à ne pas porter atteinte à ces droits et libertés. Il semble ainsi simplement fournir une règle, un critère d'interprétation de cette loi. Le libellé même de l'art. 2"... soit interprétée et appliquée de façon à ne pas abroger..." implique que la loi antérieure peut être raisonnablement interprétée et appliquée de façon à éviter de porter atteinte aux droits et libertés énoncés à l'art. 1. Si la loi antérieure ne peut être ainsi interprétée et appliquée, alors l'art. 2 est sans effet et la loi antérieure doit l'emporter conformément à son sens clair."

En toute déférence, je ne puis accepter ce point de vue. A mon avis, les termes impératifs de l'article 2 de la Déclaration canadienne des droits, cité plus haut, exigent des tribunaux qu'ils refusent d'appliquer toute loi de la compétence législative du Parlement, qui enfreint la liberté de religion, à moins qu'une loi du Parlement ne déclare expressément que la première doit s'appliquer nonobstant la Déclaration canadienne des droits. Comme on l'a déjà vu, l'art. 5(2) cité plus haut montre bien que la Déclaration canadienne des droits doit s'appliquer à toutes les lois du Canada existant au moment où elle est entrée en vigueur de même qu'à celles qui sont promulguées par la suite. A mon sens, lorsqu'il y a contradiction irréductible entre une autre loi du Parlement et la Déclaration canadienne des droits, cette dernière doit prévaloir.

C'est évidemment au Parlement qu'il appartient de décider s'il y a lieu d'imposer, sous peine de sanctions pénales, certaines normes de conduite religieuse à toute la population. Mais en édictant la Déclaration canadienne des droits, il a transmis aux tribunaux la responsabilité de décider, chaque fois que la question se pose, si cela enfreint la liberté de religion au Canada. Dans la présente cause, j'en suis venu à la conclusion que l'art. 4 de la Loi sur le dimanche enfreint la liberté de religion déclarée et garantie par la Déclaration canadienne des droits et que, par conséquent, il doit être déclaré inopérant."

Après avoir reconsidéré toute la question avec beaucoup de soin, à la lumière des arguments très sérieux que nous ont présentés les avocats, j'en suis venu à la conclusion que l'opinion exprimée par le Juge Davey, alors Juge d'appel, dans les motifs cités ci-haut, est celle qu'il faut retenir.

La question est la suivante: Est-ce l'intention du Parlement de conférer aux tribunaux le pouvoir et de leur imposer la responsabilité de déclarer inopérante toute disposition d'une loi du Canada si le tribunal est d'avis qu'elle enfreint l'un des droits ou libertés énoncés à l'art. 1 de la Déclaration, quoique cette disposition soit exprimée en termes clairs et non équivoques et que le sens, après avoir fait appel à toutes les règles d'interprétation y compris celle de l'art. 2 de la Déclaration, demeure parfaitement clair.

En abordant cette question, il ne faut pas oublier que la responsabilité ci-haut mentionnée, si elle existe vraiment, est imposée à tous les Juges de paix, Magistrats, et Juges de n'importe quel tribunal au pays appelés à appliquer une loi du Canada ou une ordonnance, une règle ou un règlement établis en vertu d'une telle loi.

Si l'on avait voulu que la réponse à cette question soit affirmative, on aurait, à mon avis, ajouté à l'art. 2 de la Déclaration, quelque chose comme: "et si une loi du Canada ne peut être ainsi interprétée et appliquée, elle sera considérée comme inopérante ou abrogée, pro tanto".

Je crois que dans le passage précité de mes motifs dans Robertson et Rosetanni c. La Reine mon erreur a été de dire que la Déclaration exige des tribunaux qu'ils refusent d'appliquer toute loi du Canada qui enfreint effectivement un des droits ou libertés énoncés alors qu'au contraire, comme le Juge d'appel Davey l'a signalé, la Déclaration enjoint aux tribunaux d'appliquer une telle loi et non de refuser de l'appliquer.

Pour ces motifs, je disposerais de ce pourvoi comme le propose mon collègue, le Juge Pigeon.

COUR SUPRÊME DU CANADA

SA MAJESTÉ LA REINE

c.

JOSEPH DRYBONES

LE JUGE EN CHEF

IN THE SUPREME COURT OF CANADA

HER MAJESTY THE QUEEN

v.

JOSEPH DRYBONES

Coram: The Chief Justice and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

ABBOTT J.:

The relevant facts, which are undisputed, are set out in the reasons of my brothers Ritchie and Pigeon which I have had the advantage of reading.

The interpretation of the Bill of Rights, adopted by the courts below, necessarily implies a wide delegation of the legislative authority of Parliament to the courts. The power to make such a delegation cannot be questioned but, in my view, it would require the plainest words to impute to Parliament an intention to extend to the courts, such an invitation to engage in judicial legislation. I cannot find that intention expressed in s. 2 of the Bill. On the contrary, I share the opinion expressed by the Chief Justice, by my brother Pigeon and by Davey J.A., as he then was, in the Gonzales case that, with respect to existing legislation, the section provides merely a canon or rule of interpretation for such legislation.

I would dispose of the appeal as proposed by my brother Pigeon.

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ABBOTT J.
