

Landmark Case

EQUALITY RIGHTS, THE *INDIAN ACT*, AND THE *CANADIAN BILL OF RIGHTS: R. v. DRYBONES*

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R. v. Drybones [1970] S.C.R. 282

Introduction

In 1970, in the case of *R. v. Drybones*, the majority of the Supreme Court of Canada considered s. 94(b) of the *Indian Act*. This section made it an offence for an Indian to be intoxicated off a reserve. In effect, the section singled out Indians because there was no similar legislation penalizing intoxicated non-Indians. The Supreme Court of Canada ruled that this section contravened the equality guarantee in s. 1(b) of the *Canadian Bill of Rights* and struck down the offending section.

Indian Act

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.

Canadian Bill of Rights

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, ... and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.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 *Indian Act* is a federal government statute that regulates the relationship between Aboriginal people and the Canadian government. The Act defines who is considered an “Indian” and outlines the legal rights of registered Indians. When the legislation was enacted, the term “Indian” was still commonly used. Since then, society has come to understand the inaccurate and racist meaning of the term. Even though it is now understood to be an inappropriate way to refer to an Aboriginal person, the term “Indian” is still currently used in the *Indian Act*.

The *Canadian Bill of Rights*, an Act that recognizes and protects human rights and fundamental freedoms, was passed by the federal Parliament in 1960. This legislation was enacted as a federal **statute** rather than **entrenched** in the **Constitution**, therefore the *Bill of Rights* can be directly amended or repealed by Parliament and is only applicable to federal laws. *R. v. Drybones* is considered a landmark Supreme Court of Canada decision. However, from 1960 until 1982, when the *Canadian Charter of Rights and Freedoms* was enacted, this was the only case that relied on the *Bill of Rights* to declare a section of a federal law inoperative.

Facts

Joseph Drybones, an Aboriginal man, was drunk on the evening of April 8, 1967 at the Old Stope Hotel in Yellowknife, NWT where no “reserve”, as defined in the *Indian Act*, existed. Mr. Drybones was charged with being unlawfully intoxicated off a reserve, contrary to s. 94(b) of the *Indian Act*.

The Trial Decision

Mr. Drybones was first **arraigned** before Magistrate Anderson-Thompson. He spoke no English and was not represented by counsel. Mr. Drybones pled guilty to the charge and on April 10, 1967, he was sentenced to pay a fine of \$10 plus the costs of the proceedings.

Appeal to the Territorial Court of the Northwest Territories

Mr. Drybones, who was now represented by a lawyer, appealed the guilty verdict to the Territorial Court of the Northwest Territories on legal and factual grounds. Mr. Drybones did not understand English, creating serious doubt that he understood his plea in the lower court. Therefore, the Territorial Court allowed him to withdraw his guilty plea and the appeal proceeded as a **trial de novo** with a plea of “not guilty.” A trial de novo is a new trial before another tribunal than the one that held the first trial. It is usually ordered by an appellate court when the original trial is found to be unfair in some way. Mr. Drybones made an **application** to include the *Canadian Bill of Rights* as a further ground of appeal.

Mr. Drybones’ lawyer argued that his client was not, in fact, an “Indian” within the meaning of the *Indian Act*. This argument did not succeed because the Regional Director of Indian Affairs had official records proving that Mr. Drybones was an “Indian”, as defined by the *Indian Act*.

Mr. Drybones argued that since there were no Indian reserves in the Northwest Territories, it would not be possible for him to be “off a reserve” within the meaning of s. 94 of the *Indian Act*. The court looked at **precedent** cases, which suggested that “off a reserve” is an important element of the offence charged. In order to be “intoxicated off a reserve” there must be a reserve to be off of. However, Justice Morrow of the Territorial Court did not apply these precedents and found that the words “off a reserve” were not essential to the charge.

Mr. Drybones argued that section 94 of the *Indian Act* offended “the right of the individual to equality before the law and the protection of the law...”, set out in s. 1(b) of the *Bill of Rights*. The key issue raised by the appeal was the fact that it was not an offence for anyone except an Indian to be intoxicated elsewhere than in a public place. In other words, all non-Indian inhabitants of the Northwest Territories could be drunk as long as they were not in a public place. The legislation, which applied to all other Canadian citizens in the NWT, had no minimum penalty and did not make it an offence to be drunk in one's own home. This placed Aboriginal people, because of their race, in a different position from that of other Canadians. The Territorial Court agreed and **acquitted** Mr. Drybones of the charges. The court held that the intoxication sections of the *Indian Act* “abrogate, abridge or infringe” the *Bill of Rights* and were therefore **inoperative**.

Appeal to the Court of Appeal for the Northwest Territories

The crown appealed the decision of Territorial Court to the Court of Appeal for the Northwest Territories. The Court of Appeal dismissed the appeal, agreeing with the reasons of the Territorial Court. In the decision, the Court of Appeal emphasized the importance of examining the effect of the legislation, not its purpose. Since the effect of s. 94 of the *Indian Act* was discrimination against Aboriginal people, the Court of Appeal agreed with the lower court's ruling that the section was inoperative under section 1(b) of the *Bill of Rights*.

Appeal to the Supreme Court of Canada

The crown applied for permission to have the case heard by the Supreme Court of Canada. Six of the nine judges agreed with the decision of the Court of Appeal. The majority found that in the Northwest Territories it was not an offence for anyone except an “Indian” to be intoxicated anywhere other than in a public place. Therefore, the *Indian Act* made it an offence for an Aboriginal person to be intoxicated in his or her own home, while all other citizens may be intoxicated anywhere but a public place.

In the majority decision, Justice Ritchie stated:

“...I think that s.1(b) [of the *Canadian Bill of Rights*] means at least that no individual or group of individuals is to be treated more harshly than another under that law, and I am therefore of the opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty.” (p.297)

Due to this difference in treatment, Mr. Drybones successfully argued that Aboriginal people were denied “equality before the law” and that s. 94(b) of the *Indian Act* authorized the abrogation, abridgement or infringement of one of the human rights protected by the *Canadian Bill of Rights*, contrary to s. 2 of the *Canadian Bill of Rights*.

However, the Supreme Court of Canada disagreed with the lower courts in that it did not declare *all* of s. 94 inoperative. The court stated that declaring a section or portion of a section of a statute inoperative is different from repealing the entire section. Only the portions of the statute that apply

to the specific circumstances of the case can be declared inoperative. Therefore, the Supreme Court of Canada only declared s. 94(b) inoperative (not the entire section).

The Dissenting Opinions of the Supreme Court of Canada

The three **dissenting judges** discussed the intention of parliament and concluded that there was nothing in the language of the *Canadian Bill of Rights* to suggest that parliament intended to enable the courts to usurp the clearly expressed will of parliament in statutes. They felt that parliament was instructing the courts to construe and apply laws in accordance with the principles outlined in the *Canadian Bill of Rights*, but not to render laws inoperative.

The Result

The Crown's appeal was dismissed and Mr. Drybones' acquittal was upheld. Parliament **repealed** s. 94 of the *Indian Act* in 1971.



Classroom Discussion Questions

1. Where did the trial begin? To which courts was the case appealed?
2. What is a trial de novo? Why was Mr. Drybones given a trial de novo?
3. What arguments did Mr. Drybones' lawyer make on appeal to the Territorial Court of the Northwest Territories? What was the outcome for each?
4. What is the importance of the *Canadian Bill of Rights*?
5. What section of the *Canadian Bill of Rights* protected the accused's rights?
6. Is the *Canadian Bill of Rights* an ordinary piece of legislation or does it have special status?
7. How were Aboriginal people being treated differently from other Canadians with respect to alcohol consumption?
8. In your own words, describe the views of the dissenting judges.
9. The Supreme Court of Canada only holds that section 94(b) of the *Indian Act* is inoperative. Why did the Supreme Court of Canada not render all of s. 94 inoperative?
10. Why do you think *R. v. Drybones* is considered a landmark case?



R. v. Drybones: Worksheet 1

Using your textbook, a dictionary, the *Criminal Code*, *CanLII*, or any other resources available, define the following terms. They are in **bold** typeface in the case summary.

Canadian *Bill of Rights*

Statute

Entrenched

Constitution

Arraigned

Trial De Novo

Application

Precedent

Acquitted

Inoperative

Dissenting Judges

Repealed



R. v. Drybones: Worksheet 2

The *Canadian Bill of Rights* vs. The *Canadian Charter of Rights and Freedoms*

The *Canadian Bill of Rights* is an Act for the recognition and protection of human rights and fundamental freedoms, passed by the federal parliament in 1960. This legislation was enacted as a federal statute rather than entrenched in the Constitution, therefore the *Bill of Rights* can be directly amended or repealed by Parliament and is limited in its application to federal laws.

The *Bill of Rights* was followed by the *Canadian Charter of Rights and Freedoms*, which was entrenched into the Constitution of Canada in 1982. The *Charter* guarantees certain rights and freedoms to all Canadian citizens and neither parliament nor any provincial legislature can alter them.

Using a variety of resources available to you, including the Internet, your textbook, and library resources, answer the following questions about the *Canadian Bill of Rights* and the *Charter*.

Begin by looking at each of the documents:

Canadian Bill of Rights

<http://laws.justice.gc.ca/en/C-12.3/index.html>

Canadian Charter of Rights and Freedoms

http://laws.justice.gc.ca/en/const/annex_e.html#l

Questions

1. Complete the following chart to show which rights and freedoms are protected by the *Bill of Rights* and which by the *Charter*?

PROTECTED RIGHTS & FREEDOMS

<i>CANADIAN BILL OF RIGHTS</i>	<i>CANADIAN CHARTER OF RIGHTS AND FREEDOMS</i>

2. What similarities and differences do you notice between the two documents?
3. For each of the following scenarios, record what section(s) of the *Bill of Rights* and the *Charter* would protect the citizen in each case. Record your answers as follows:

Scenario #	<i>Bill of Rights</i>	<i>Charter</i>
Relevant Sections		
Arguments		

Scenario 1: An openly gay high school student is not allowed to bring his male date to a school dance at his Catholic high school. The school administration says that the school's religious policy only permits heterosexual couples to attend.

Scenario 2: A student is suspended for carrying a Kirpan to school. A kirpan is a dagger-shaped religious symbol of orthodox Sikh faith that must be worn on the body at all times.

Scenario 3: A high school student is suspended for wearing an iron-on patch on her school uniform that says "I really miss my clothes."

Scenario 4: A woman is denied the right to sit on a jury because she is in a wheelchair and the courthouse does not have an elevator.

4. The *Bill of Rights* is a federal statute while the *Charter* is entrenched into the Constitution. Explain this difference. What is the significance?
5. What are some of the strengths and weaknesses of the *Bill of Rights*?
6. What are some of the strengths and weaknesses of the *Charter*?
7. If the *Charter* had existed in 1969, how would *R. v. Drybones* have proceeded differently? What do you think the decision would have been?
8. Using the information you've gathered on the *Bill of Rights* and the *Charter*, complete the following compare and contrast diagram (Worksheet 3). Keep in mind the strengths and weaknesses of each document and try to draw some final conclusions about the following:
 - Why the *Charter* was created
 - What future changes you might make



R. v. Drybones: Worksheet 3

Canadian Bill of Rights

Canadian Charter of Rights & Freedoms

HOW ALIKE?

HOW DIFFERENT?

CONCLUSIONS
