FEDERAL LIQUOR LEGISLATION IS HARDLY JUSTIFIABLE AS PROTECTIVE OF INDIANS – A Reply to Professor Bowker

In a Comment on the *Drybones*[1] case Professor Bowker has suggested that the argument that the liquor provisions of the *Indian Act*[2] are of a protective nature and not discriminatory has "considerable force".[3] He makes the following somewhat paternalistic analogy—"'We are doing this for your own good' can apply to Indians as well as to children who are chastised by their parents".[4]

Professor Bowker relies heavily in his analysis on American decisions dealing with the equal protection clause. In order that a classification not offend the equal protection clause in the United States, it must be reasonable. This in effect supposes that: (1) all persons within the same class be treated equally; (2) the legislation be pursuant to a legitimate legislative purpose; (3) the classification be a reasonable one bearing some relation to the purpose of the legislation; and (4) where classifications are based on race or colour, they be necessary and not merely reasonably related to the purpose

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1 *R. v. Drybones,* [1970] S.C.R. 282.

2 R.S.C. 1952, c. 149 as amended by *An Act to Amend the Indian Act,* 1956, 4-5 Eliz. II, c. 40, s. 23.

3 Bowker, (1970) 8 Alberta L.R. 409, 414. For additional comments on the *Drybones* case, see, Leigh, *The Indian Act, The Supremacy of Parliament and the Equal Protection of the Laws* (1970), 16 McGill L.J. 389; Marx, *La Declaration canadienne des droits et l'affaire Drybones: Perspectives nouvelles?* (1970), 5 R.J.T. 305; Sinclair, *The Queen v. Drybones: The Supreme Court of Canada and the Canadian Bill of Rights* (1970), 8 Osgoode Hall L.J. 599; and Smith, *Regina v. Drybones and Equality before the Law* (1971), 49 Can. Bar Rev. 163.

4 Bowker, *supra,* footnote 3, at 415. Leigh, *supra,* footnote 3, at 397, footnote 44, commenting on Professor Bowker's argument states that: "Mr. Bowker cites Committee findings in support of the claim that Indians still have difficulty in coping with liquor. This, but for the instant case, would appear to give colour of right to the *Indian Act,* s. 94 (b)."

of the legislation. Use of the Brandeis Brief in the United States permits the courts to decide on broad legal principles rather than on narrow technical formulations whether the classification is reasonable.

To support his position Professor Bowker cites *States v. Rorvick,*[5] which he styles as a "valuable case from Idaho".[6] In this case the Supreme Court of Idaho, reversing a trial court judgment by a bare majority of three to two, upheld a state statute proscribing the sale of intoxicants to Indians. The Court really never came to grips with the equal protection clause of the Fourteenth Amendment or with a similar provision in the Idaho Constitution. The dissenting opinion characterized the decision as follows:

> The real basis of the majority opinion is that the Indian as a race is more responsive to the baneful effects of intoxicants than any other race resident in our state. This is so because some ancient court has said so, and other courts have accepted the conclusion, all without inquiry or judicial determination. So, by means of mythology and folklore, it has become established beyond further question.
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> Injustice does not become venerable with age. . . .[7]

The better reasoning lies perhaps in the dissenting opinion that would have held the state legislation unconstitutional.

The problem with *Rorvick* is that nowhere in the decision is there allusion to facts that would uphold the classification as reasonable. In American jurisprudence there is a presumption that a classification is reasonable if any set of facts can be assumed to justify the classification. However, classifications based on colour and race are usually deemed to be discriminatory on their face and no rational facts are assumed that would validate them.[8]

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5 (1954), 277 P. 2d 566 (S.C. Idaho).

6 Bowker, *supra,* footnote 3, at 416.

7 (1954), 277 P. 2d at p. 576. One is reminded of the judicial notice that the Court took in *R. v. Pickard* (1908), 14 C.C.C. 33 (Dist. Ct. Alta.) at p. 36 to the effect that "Indians are so constituted as to be unable to withstand the appetite for liquor and unable to take it in moderation. . . .".

8 *See, e.g., McLaughlin v. Florida* (1964), 379 U.S. 184 (the Court struck down a Florida statute that forbade unmarried blacks and whites of the opposite sex to habitually live and occupy the same room at night).

Our attitude towards Indians when the first *Indian Act*[9] was adopted in Canada in 1868 is succinctly summed up in the French translation of the title of the *Act* which was - *Acte des Sauvages.* The current French titles is la *Loi sur les Indiens.* If nothing else, our translations have improved.

The problem in justifying the Canadian liquor provisions in *Drybones* is similar to that of *Rorvick.* In *Drybones* the Attorney-General of Canada argued as follows:

> 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.[10]

As concerns racial classifications this is a reversal of the burden of proof rule as it exists in the United States.

Professor Bowker also cites some old United States Supreme Court decisions to buttress his case.[11] What the Supreme Court of the United States would have done with a *Drybones* or *Rorvick* case in 1969 can only be speculative.[12] However, following old American cases in this instance could be akin to following the reasoning in *Plessy v. Ferguson*[13] in

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9 S.C. 1868, c. 42.

10 Factum of the Attorney-General of Canada to the Supreme Court of Canada (at p. 7). It has been suggested that in losing *Drybones* the Government won its case. See, Marx, *supra*, footnote 3.

11 Bowker, *supra*, footnote 3, at 416, footnote 20. These cases upheld federal law proscribing liquor sales to Indians on the commerce clause and on the theory of national guardianship, that is, the dependency of Indian tribes to the United States.

12 The minority opinion in *Rorvick (supra,* footnote 5, at p. 576) noted that discriminatory legislation applicable to Indians "is not now countenanced" in other states.

13 (1896), 163 U.S. 537 (holding that separate but equal facilities for whites and blacks did not violate the 13th and 14th amendments of the Constitution). Hall J. in *Drybones,* [1970] S.C.R. at p. 300, refers to this doctrine.

1952 before the Court had decided *Brown*[14] After all, before *Brown* over fifty years of American jurisprudence had extended the "separate but equal" doctrine of *Plessy* across the United States.

Assuming that liquor legislation extending only to Indians can somehow be justified as a protective and not a discriminatory measure, there is always a lurking suspicion that the reverse is closer to reality. Concerning Indian legislation in the United States, it has been pointed out that:

> For a long time Indians have been asking for the repeal of various ancient statutes, mostly dating from the era of the Indian wars, which make it illegal for Indians to buy liquor or ammunition or to sell various classes of livestock, agricultural implements, or cooking utensils. . .
>
> Every anti-discrimination bill so far introduced on behalf of Indians has been opposed by the [Indian] Bureau. Sometimes the argument is that the discriminatory laws to which Indians object—*e.g.*, the law which requires Indians to secure the approval of Government officials before selling their own cattle, even *after* they have paid off any liens or chattel mortgages—are really necessary for the Indian's protection.[15]

One should keep in mind that such race classifications are made by a white government and condoned by white courts with regard to a conquered race.[16]

However careful we may be of constructing a theory about protecting Indians with Federal "protective" liquor legislation, the particular legislative situation in Canada does not support the proposition that the liquor provisions of the *Indian Act* "are protective and not discriminatory".[17] Section 93 provides that a person cannot sell or give intoxicants to any person on a reserve or to an Indian outside a reserve.

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14 *Brown v. Board of Education* (1954), 347 U.S. 483 (overruling *Plessy*, it was held that segregation of school children in "separate but equal" facilities was contrary to the 14th amendment equal protection clause).

15 F.S. Cohen, *The Erosion of Indian Rights, A Case Study in Bureaucracy* (1952-53), 62 Yale L.J. 348, 356-357. For similar provisions in Canadian law, see, e.g., ss. 32 and 42-50 of the *Indian Act*.

16 *State v. Rorvick*, 277 P. 2d at 575 (dissenting opinion).

17 Bowker, *supra*, footnote 3, at 416.

Section 94 makes it a crime for an Indian to have intoxicants in his possession, be intoxicated or manufacture intoxicants off a reserve. However, section 95 provides that a province can by way of proclamation make exceptions to sections 93 and 94, to the extent of making it legal for Indians to drink off a reserve. Furthermore, s.96A of the *Act* permits Indian Bands to vote for "wet" reserves.

At present Indians can purchase and consume intoxicants in all provinces.[18] As well many Bands have opted for "wet" reserves.[19] So called "protective" legislation usually implies that Indians are to be deprived of intoxicants. Essentially, the *Indian Act* in fact provides special penalties for Indians who manufacture intoxicants or who are intoxicated—two measures that probably have little or no effect on Indian drinking. It seems rather difficult to justify the liquor provisions of the *Act* as "protective" legislation.[20]

Professor Bowker suggests that the liquor provisions concerning Indians during the latter part of the nineteenth century "were in their inception clearly intended to be protective".[21] This is of doubtful relevance insofar as it is present liquor restrictions that must be examined as to their "protective" or "discriminatory" character.

The problem with Professor Bowker's argument is similar to that found in *Drybones* and *Rorvick*. There is no factual presentation to prove that the classification is necessary or even merely reasonable. No doubt Professor Bowker's suggestion that "protective legislation is not discriminatory" can at times be justified.[22] However, no such justification has been made as concerns the liquor provisions of the *Indian Act*.

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18 The Canadian Corrections Association, *Indians and the Law* 30 (August, 1967).

19 *Ibid.*, at 32.

20 It is doubtful whether the rather weak penalties in the *Act* (ten to fifty dollars or three months in prison) will operate as a deterrent. Considering that similar provisions were in the first *Indian Act* (S.C. 1868, c. 42, ss. 12-13) and that the Indian liquor problem has not been solved is ample proof. We can note as well, that the much more severe penalties against the use of narcotics has had little effect as a deterrent on Canadians - and has not served as a protection for our children.

21 Bowker, *supra*, footnote 3, at 415.

22 *Ibid.*, at 416. *See, e.g., The Tobacco Restraint Act*, R.S.C. 1952, c. 266. (it is an offense to give or sell cigarettes to a minor under sixteen years of age and for such minors to smoke in a public place).

Some protective or preventive measures concerning alcoholism amongst Indians have been proposed. The Canadian Corrections Association has made the following suggestion:

> There are communities and reserves where agencies such as Alcoholics Anonymous or alcoholism foundations could well take more initiative. The churches and other service organizations might well re-examine their role. Similarly, realistic alcohol education programs by provincial and territorial governments, aimed specifically at the older people, seem warranted.[23]

Classifying Indians differently from other races is always suspect.

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23 The Canadian Corrections Association, *supra*, footnote 18, at 28.

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