BEDARD v. ISAAC

(1971), 25 D.L.R. (3d) 551 (also reported: [1972] 2 O.R. 391)

Ontario High Court, Osler J., 15 December 1971

(Appealed to Supreme Court of Canada, reported sub nom. ATTORNEY-GENERAL OF CANADA v. LAVELL; ISAAC v. BEDARD, infra p.236)

> *Civil rights -- Equality before the law -- Indian Act (Can.) providing that an Indian woman loses status as an Indian on marrying a non- Indian or loses membership in a band on marrying a person not a member of that band -- No similar provision regarding marriage of Indian men -- Whether Act authorizes discrimination on basis of sex -- Canadian Bill of Rights.*
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> *Indians -- Indian woman marrying non-Indian and leaving reserve -- Subsequent return to reserve to live in house owned by her -- Band Council ordering her to dispose of house and leave reserve -- Council acting under provision in Indian Act providing that an Indian woman loses status as an Indian on marrying a non-Indian or loses membership in a band on marrying a person not a member of that band -- No similar provision regarding marriage of Indian men -- Whether Act authorizes discrimination on basis of sex contrary to Canadian Bill of Rights -- Indian Act (Can.), ss. 12, 14.*

The plaintiff, born a full-blooded Indian, married a non-Indian and lived with him until her separation from him six years later at which time she returned to the reserve to live in a house bequeathed to her by her mother. Upon her return the defendants, who comprise the Council of the Six Nations Indians and who, by virtue of their position, are given certain statutory powers and duties, passed a series of resolutions ordering the plaintiff to dispose of her property and expelling her from her home on the reserve. On a motion for an injunction restraining the defendants from expelling her from the reserve and an order setting aside the resolutions passed by the defendant, ***held***, the motion should be granted.

In so far as s.12(1) (*b*) of the *Indian Act*, R.S.C. 1970, c. I-6, which provides, *inter alia*, that a woman who marries a person who is not an Indian is not entitled to be registered as a member of the band, leads to a different result with respect to the rights of an Indian woman from that which obtains when a male Indian marries a person other than an Indian it authorizes discrimination by reason of sex contrary to the *Canadian Bill of Rights*, R.S.C. 1970, App. III, and is, accordingly, inoperative. While it is true that elsewhere in the Act Indian women are given some advantages that do not accrue to men and that such a distinction is not adverse to them, it remains the case that the loss of status as an Indian and the loss of the right to be registered and to occupy property on a reserve is discrimination which is adverse to the person affected. *Quære*, whether the entire *Indian Act* is inoperative by reason of the *Canadian Bill of Rights*.

[*R. v. Drybones*, [1970] S.C.R. 282, 9 D.L.R. (3d) 473, [1970] 3 C.C.C. 355, 10 C.R.N.S. 344, 71 W.W.R. 161, apld; *Re Lavell and A.-G. Can.* (1971), 22 D.L.R. (3d) 188, [1971] F.C. 347, 14 *Crim. L.Q.* 236, folld]

> *Courts -- Stare decisis -- Decision of Appeal Division of Federal Court -- No appeal from High Court of Justice to Appeal Division of Federal Court -- Stare decisis does not apply to bind High Court -- Federal Court of Appeal decisions treated in same way as decision of Courts of Appeal of other Provinces.*
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> *Courts -- Federal Court Act (Can.) -- Whether District Supervisor under Indian Act (Can.) "a federal board, commission or other tribunal" -- Whether in consequence jurisdiction to review acts of District Super- visor denied to provincial superior Court.*

The term "federal board, commission or other tribunal" is not sufficiently broad to encompass an individual such as a District Supervisor under the *Indian Act*, R.S.C. 1970, c. I-6, and, accordingly, jurisdiction to review his acts vests in a provincial superior Court. In any event nothing in the *Federal Court Act*, 1970-71 (Can.), c. 1, deprives a provincial superior Court of jurisdiction to construe and interpret that Act in a proper case and where action is taken under a federal statute which, upon construction, is found to be inoperative by virtue of the *Canadian Bill of Rights*, R.S.C. 1970, App. III, it can only be protected from review by a Court if the powers of review exercised by the provincial superior Courts are taken away by clear and unambiguous language.

MOTION for an injunction restraining defendants from expelling plaintiff from an Indian reserve.

Malcolm Montgomery, Q.C., for plaintiff.
Burton H. Kellock, for defendants.

OSLER, J.:-- In this action the plaintiff seeks an injunction restraining the defendants from expelling her and her two infant children from the home she occupies on the Six Nations Indian Reserve in the County of Brant and an order setting aside a certain resolution passed by the defendants which ordered the plaintiff to dispose of such property. By consent of counsel for the parties, the motion was treated as a motion for judgment and an additional claim was added for a declaratory judgment concerning the respective rights of the parties.

The matter is one of great interest and importance, concerning as it does the relationship of the *Indian Act*, R.S.C. 1970, c. I-6, and the *Canadian Bill of Rights*, R.S.C. 1970, App. III, and I am obliged to both counsel for the able and elaborate argument addressed to me. It is through force of other circumstances and by no means from lack of appreciation of their efforts that I have decided justice will best be served if I give shortly my reasons for disposing of the matter as I do rather than deferring it further for the purpose of writing a more elaborate opinion.

The plaintiff was born upon the Six Nations Indian Reserve in the County of Brant of parents, both of whom were members of the Six Nations Band at that time and until their death. She was thus born a full-blooded Six Nations Indian. On May 30, 1964, the plaintiff married a non-Indian and by him had two children. On or about June 23, 1970, the plaintiff separated from her husband and returned with her two children to the Six Nations Reserve to live in a house bequeathed to her by her mother, the late Carrie Williams.

The said house and the land upon which it stands is properly described as parcel 17 in lot 13, River Range, Tuscarora Indian Reserve No. 40, and the plaintiff's mother held a certificate of possession to such property under s. 20 of the *Indian Act*, R.S.C. 1970, c. I-6.

The last will and testament of an Indian is not probated in accordance with the *Surrogate Courts Act*, R.S.O. 1970, c. 451, but rather under the provisions of s. 42 of the *Indian Act* and under the provisions of that statute the terms of the will under which the plaintiff apparently took was approved by the Council of the Six Nations and by the Director of Operations, Indian and Eskimo Affairs, on behalf of the Minister of Indian Affairs, as required by the Act.

The defendants compose the Six Nations Council, a body recognized by s. 74 of the *Indian Act* and by that statute given certain statutory powers and duties.

Section 5 of the Act provides that a Register shall be maintained in which shall be recorded the name of every person who is entitled to be registered as an Indian. Every person who is entitled to be registered shall be entered either as a member of a band or in a General List. Section 12(1) (*b*) provides that:
(*b*) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11. is not entitled to be registered.

Section 14 provides that:
14. A woman who is a member of a band ceases to be a member of that band if she marries a person who is not a member of that band, . . .

A male Indian who marries outside the band or who marries a non-Indian is not by that Act deprived of his status as an Indian or a person entitled to be registered or to occupy Indian lands. Upon the return of the plaintiff to the reserve and her occupation of the dwelling purportedly bequeathed to her by her mother, the defendants passed a series of resolutions which successively (a) gave the plaintiff permission to reside on the reserve for a period of six months, during which time she was to dispose of the property; (b) extended that permission for a further six months from February 16, 1971; (c) granted the plaintiff a further period of two months' residence from June 15, 1971, and informed her that any further requests for residence would be denied and (d) determined to "request the Brantford District Supervisor to serve a notice to Mrs. Yvonne Bedard to quit the Six Nations Indian Reserve". This last was known as resolution 15 and was adopted by the Council of the Band on September 7, 1971.

Various procedural questions present themselves when the actions of the Band Council and its relationship with the District Supervisor under the *Indian Act* are examined. However, the main thrust of the plaintiff's case is that, assuming all procedural matters were properly carried out, the actions of the Band Council in requesting the District Supervisor to serve notice to quit, any action taken by the Supervisor pursuant to such request and the removal of her name from the Band Register simply because of her marriage to a non-Indian are actions that discriminate against her by reason of her race and her sex with reference to her right to the "enjoyment of property, and the right not to be deprived thereof except by due process of law" [*Canadian Bill of Rights*, s. 1 (*a*)] .

As the parties are agreed that the principal point for determination is whether or not the *Indian Act* or certain of its provisions is inoperative by reason of the *Canadian Bill of Rights*, and as they are further agreed upon the impropriety of enjoining the Crown or an agent thereof, under which description the District Supervisor may well fall, I shall confine myself to deciding whether or not a declaration should issue. The specific form of any consequential order may be later discussed with me by counsel.

One major difficulty that was not raised by counsel arises from the *Federal Court Act*, 1970-71 (Can.), c. 1, s. 18 of which reads as follows:

18. The Trial Division has exclusive original jurisdiction (*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and (*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

By s. 2 (*g*) of the Act, it is declared that: (*g*) "federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such peson or persons appointed under or in accordance with a law of a province or under section 96 of *The British North America Act, 1867*;

It would appear that the District Supervisor may well be a "person . . . having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada . . ." and that jurisdiction to deal with his acts is, by the statute mentioned, denied to the Superior Courts of the Provinces. However, it is undoubted law that the powers exercised or formerly exercised by superior Courts through the prerogative writs and now, in this Province at least, exercised by way of order in lieu of such writs, can only be taken away by the most clear and unambiguous language. I am not persuaded that the term "federal board, commission or other tribunal" is sufficiently broad to encompass an individual such as a District Supervisor under the *Indian Act*, or indeed perhaps even a Band Council. In any event, there is nothing in the Act that persuades me that this Court is deprived of jurisdiction to construe and interpret the *Federal Court Act* in a proper case. Both the Band Council and the District Supervisor in dealing with the plaintiff as they purported to do, were undoubtedly affecting a matter of property and civil rights within the Province of Ontario and, hence, their actions are subject to examination by the Supreme Court of the Provinces unless such actions are clearly authorized by valid federal statutes or other federal law enacted pursuant to the powers given to Parliament by s. 91 (24) of the *B.N.A. Act, 1867*, "Indians, and Lands reserved for the Indians".

Put succinctly, no action of such a person can be protected from review by this Court if such action purports to be justified only by a federal statute which is upon a true construction inoperative by virtue of the provisions of the *Canadian Bill of Rights*.

It was argued that the matter before me has been decided by a Court whose judgments and decisions are binding upon me. In a judgment which is as yet unreported, but which was filed on October 13, 1971, *Re Lavell and A.-G. Can.* [since reported 22 D.L.R. (3d) 188, [1971] F.C. 347, 14 *Crim. L.Q.* 236], the Appeal Division of the Federal Court decided that s. 12(1) (*b*) of the *Indian Act* was rendered inoperative by virtue of the *Canadian Bill of Rights*. There is no appeal from this Court to the Federal Court of Appeal and, hence, the rule of *stare decisis* is of no application. In my respectful view, the decisions of the Federal Court of Appeal are entitled to the same consideration and persuasive weight as would be given by this Court to the decisions of the Courts of Appeal in other Provinces and, hence, the decision in *Re Lavell and A.-G. Can.* is of persuasive value only and does not bind me.

Having said that, I go on to state that I agree with that decision, I find that it is in accordance with *R. v. Drybones*, [1970] S.C.R. 282, 9 D.L.R. (3d) 473, [1970] 3 C.C.C. 355, and I propose to follow it. I am not unmindful of the caution appended by Ritchie, J., to his decision in the *Drybones* case wherein he made it plain that the considerations he had discussed "do not by any means apply to all the provisions of the Indian Act". The Court there held that s. 94 (*b*) of the *Indian Act*, R.S.C. 1952, c. 149 (now s. 95(*b*)), did abrogate, abridge and infringe the right of an individual Indian to equality before the law. It was thus declared to be inoperative on grounds that it discriminated by reason of race. It was unnecessary for the Court to examine further the *Indian Act* in that case. Regardless of the larger question of whether virtually the entire *Indian Act*, which is plainly based upon a distinction of race and has no other reason for its existence, may be said to be a valid

exercise of the powers of Parliament and may remain in force despite the *Canadian Bill of Rights*, it is abundantly clear that under various provisions of the Act there follows "a different result with respect to the rights of an Indian woman who marries a person other than an Indian, or an Indian of another band, from that which is to obtain when a male Indian marries a person other than an Indian, or an Indian who is a member of another band" (*per* Thurlow, J., for the Court in *Re Lavell and A.-G. Can., supra* [p. 191]) and, hence, there is plainly discrimination by reason of sex with respect to the rights of an individual to the enjoyment of property. Indeed, the whole status of such a person as an Indian is completely altered as s. 2(1) provides that:

"Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian;

Such status is not specifically dealt with by the *Bill of Rights*, but the question of the enjoyment of property and the security thereof undoubtedly is.

It was most ably argued by counsel for the defendants that "discrimination" means not merely distinction, but distinction adverse to the person with respect to whom it is made. I am not at all sure the word is limited to the meaning thus put forward, but in any case, while it may be said that Indian women are given some advantages elsewhere in the Act that do not accrue to males and that these compensate for disadvantages, it is perfectly apparent that the loss of status as an Indian and the loss of the right to be registered and to occupy property upon a reserve is discrimination which is adverse to the interest of Indian women and, hence, is declared by the *Bill of Rights* not to have existed in Canada with respect to legislation enacted by Parliament, unless expressly declared otherwise by an Act of Parliament.

It is, therefore, the duty of the Court, applying the *Bill* in the way in which the majority in the *Drybones* case directed it should be applied, to declare s. 12(1) (*b*) of the *Indian Act* inoperative and accordingly, I do so.

As it was put to me by counsel in argument, the conclusion to be drawn from such a declaration may well be that virtually the entire Act must be held to be inoperable. I can only echo the statement of Ritchie, J., at p. 298 S.C.R., p. 485 D.L.R., in the *Drybones* case.

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 s. 2 thereof. Section 12(1) (*b*) of the Act is, therefore, inoperative and all acts of the Council Band and of the District Supervisor purporting to be based upon the provisions of that section can be of no effect.

The applicant is entitled to her costs.

If there are difficulties about the form of the order I may be spoken to.

Motion granted.