CANADA'S INDIAN RESERVES: THE USUFRUCT IN OUR CONSTITUTION

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I. INTRODUCTION

At Confederation, the new Dominion was granted exclusive legislative powers over "Indians and Lands reserved for the Indians".[1] It is now fundamental to the constitutional position of natural resources that such grants of power did not operate as conveyances of provincial resources to Canada, and this principle was established in a case dealing with Indian lands.[2] The actual language used in that case, however, undoubtedly for the purpose of clarifying the position of Indian lands, was the language of usufruct: "the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign".[3] Indians, as will be seen, have paid a heavy price for this clarification.

The usufruct is well known to the civil law as a *ius in re aliena*, a right in the property of others, amounting to full possession. Thus, whatever else their Lordships may have had in mind, two immediate purposes were served by using the language of usufruct: first, it was established that possession lay with the Indians while title lay elsewhere; secondly, it was shown that the nature of this arrangement was not of a kind familiar to the common law as, for example, a life estate or a trust would be. The effects of the exercise, however, have far exceeded these limited purposes.

The effects of having a usufruct in our constitution have been stultifying. In the more than ninety years that it has been with us, there has been no determination of the extent of the interests it assures to Indian people. Courts and legislatures have single-mindedly avoided the issue: the former often content themselves with uncritical recitations of

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* Editor-in-Chief, 1979-80. The writer wishes to express his appreciation to the Department of Indian & Northern Affairs for assistance and support given to the research for this article and for permission to publish it here. The opinions are his own.

[1] B.N.A. ACT, s. 91(24).

[2] St. Catherines Milling & Lumber Co. v. The Queen, 14 App. Cas. 46 (P.C. 1888). *See also* the *Ontario Fisheries* case, [1898] A.C. 700, at 709-10 (P.C.); Reference *Re* Ownership of Off-shore Mineral Rights, [1967] S.C.R. 792, at 799, 65 D.L.R. (2d) 353, at 359. *See generally* G. LA FOREST, NATURAL RESOURCES AND PUBLIC PROPERTY UNDER THE CANADIAN CONSTITUTION (1969).

[3] *St. Catherines Milling*, *supra* note 2, at 54 (*per* Lord Watson).

Lord Watson's original statement;[4] the latter seek other means of dividing the constitutional spoils.[5] Indeed, the question remains outstanding whether the Indian interest in Indian lands *is* a usufruct or is merely *like* a usufruct.[6]

The purpose of this article is to dissipate, if it cannot dispel, the mystery of the usufruct in our constitution. To this end, the earlier part of the article is devoted to an historical examination of its introduction to our law. In the later sections, an alternative framework for analysis is suggested. If any greater justification for this lengthy treatment is required than clarity, the reader is reminded that the real rights of more than five hundred Indian bands, each inhabiting one or more Indian reserve communities, live under the cloud of usufruct. It is with these communities that the writer is primarily concerned.

II. ENTERS THE USUFRUCT

A. *The American View*

The earliest legal problems with Indian title were problems of the reception of European law. These legal problems were, in turn, a reflection of the practical problems of peacefully asserting sovereignty over vast areas of land by a minority of Europeans inhabiting only their fringes. As a legal problem, the purchase by individual Europeans of lands from Indians raised the question of whether or not such a purchase could give a good root of title as against a grant from the Crown. The United States Supreme Court held that it could not.[7] In one of several consistent decisions on this point, the Marshall Court stated the issue in the following terms:

> An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the crown subject only to the Indian right of occupancy, and recognized [*sic*] the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.[8]

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[4] *See, e.g.*, Isaac v. Davey, 5 O.R. (2d) 610, at 620, 51 D.L.R. (3d) 170, at 180 (C.A. 1974): "For the purposes of this case, it is sufficient to say that Indian title in Ontario has been 'a personal and usufructuary right, dependent upon the good will of the Sovereign'."

[5] *E.g.*, S.C. 1924, c. 48, S.O. 1924, c. 15; B.N.A. ACT, 1930, 21 Geo. V, c. 26; S.C. 1959, c. 47, S.N.B. 1958, c. 4; S.C. 1959, c. 50, S.N.S. 1959, c. 3.

[6] *See, e.g.*, P. CUMMING & N. MICKENBURG, NATIVE RIGHTS IN CANADA 40 (2d ed. 1972).

[7] Fletcher v. Peck, 10 U.S. (6 Cranch.) 162, at 179-80 (1810) (*per* Marshall C.J.).

[8] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 681, at 692 (1823) (*per* Marshall C.J.).

By setting up title in the Crown, and a right of occupancy to their traditional lands in the Indians, Chief Justice Marshall had in hand the elements of a *ius in re aliena*. It is interesting to note, however, that he did not use the language of usufruct although this was urged upon him by counsel for the defendants in the case.[9]

The American view of the legal problems of settling the continent can be expressed as stating simply that the purchaser of the Indian right of occupancy could not set his interest up against the absolute title of the Crown or the derivative title of a grantee of the Crown. But could the grantee of the Crown assert his title so as to pre-empt an unceded Indian right of occupancy? Marshall C.J. suggested that he could not.

> The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with a cession in fee than a lease for years, *and might as effectually bar an ejectment*.[10]

Thus, although the Crown can extinguish the Indian right of occupancy, it does not do so merely by granting the fee in the land; the grantee takes subject to the Indian right. This, however, was one of the principal issues that divided the Supreme Court of Canada in *Calder v. Attorney-General of British Columbia*.[11]

Along with the legal problems, however, there were the practical problems of settling an area already occupied as peacefully as possible. Settlement, at the best of times, was a source of discontent and unrest amongst the Indians.[12] Uncontrolled settlement was a positive threat to the peace. In the aftermath of the Seven Years' War, Britain attempted a measure of control. The Royal Proclamation of 1763 reserved vast tracts of land in North America to the use of the Indians as their hunting grounds and enjoined private parties from purchasing such lands from the Indians.[13] Was the Proclamation addressed to the legal problem or to the practical one?

Chief Justice Marshall, it is submitted, regarded the Proclamation as a practical measure, indeed as a temporary one.[14] When called upon to do

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[9] *Id.* at 687. The pattern was repeated in Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 99 L. Ed. 314, 75 S. Ct. 313 (1955).

[10] Johnson v. M'Intosh, *supra* note 8, at 693. [Emphasis added].

[11] [1973] S.C.R. 313, at 344 (*per* Judson J.), at 404 (*per* Hall J.).

[12] *See* PARKMAN, 1 THE CONSPIRACY OF PONTIAC 183 (1899).

[13] The full text of the Proclamation appears in R.S.C. 1970, Appendix II, No. 1. Questions as to the geographical areas to which it applies are discussed in: In the Matter of the Boundary Between the Dominion of Canada and the Colony of Newfoundland in the Labrador Peninsula, [1927] 2 D.L.R. 401 (P.C.); Calder v. Attorney-General of British Columbia, *supra* note 11. *See generally* Narvey, *The Royal Proclamation of 7 October 1763, The Common Law, and Native Rights to Land within the Territory Granted to the Hudson's Bay Company*, 38 SASK. L. REV. 123 (1973-74); NATIVE RIGHTS IN CANADA, *supra* note 6; LA FOREST, *supra* note 2.

[14] Fletcher v. Peck, *supra* note 7, at 179-80.

so, he affirmed its constitutionality under British law and went on to say that "the authority of this proclamation, so far as it respected this continent, has never been disputed and the titles it gave to lands have always been sustained in our courts".[15] Still, he regarded the Proclamation as merely confirming the legal relationship of the Crown with its grantees and the Indians that he had developed without reference to it. Nowhere is there any suggestion that the Proclamation is a source of the Indian right of occupancy.

B. *The Canadian View*

1. *Background*

In the years prior to Confederation, the Royal Proclamation had a considerable practical effect upon settlement towards the west and little or no effect upon the old colony of Quebec or the Maritime colonies. The Indian right of occupancy was extinguished by treaty, or surrenders as these came to be called, in the growing colony of Upper Canada. As a rule, these surrenders were taken before settlers arrived and, as they moved in, the former occupants would retreat from the frontier. This policy conformed with the provisions of the Proclamation and events proved it to be a wise one.

By 1830, however, there was little room left in the province for Indians to re-locate after surrendering their traditional lands. It became the established practice to make provision, within the terms of the surrender, for areas to be set aside as permanent communities for them. In some cases, such areas were simply excepted from the general surrender. In either event, the smaller tracts were known both popularly and legislatively[16] as "Indian reserves".

The Proclamation, however, took on a new legal significance with the passage of the B.N.A. Act. In the catalogue of federal legislative powers was the phrase "Lands reserved for the Indians". Did this phrase apply to traditional lands reserved under the Proclamation, to the scattered residential reserves, or to both? The question found its way into the courts in the *St. Catherines Milling* case.

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[15] Johnson v. M'Intosh, *supra* note 8, at 694.

[16] *E.g.*, S.C. 1860, c. 61. More common, however, are phrases such as the following: "Lands appropriated for the residence of certain Indian Tribes in this Province". S.U.C. 1839, c. 15. *But see* Of Indian Reserves, R.S.N.B. 1854, c. 85; An Act concerning Indian Reserves, S.N.S. 1859, c. 14. Of particular interest is the report of the Commissioners enquiring into Indian Affairs, dated 1844, where the distinction between Indian reserves and hunting grounds is maintained throughout. J.L.A.C. 1847, Appendix T., "Lands".

2. *The St. Catherines Milling Case*

In this case, the Privy Council was called upon for the second time to resolve a long-standing dispute between Ontario and the federal government, a struggle for control over the Northwest Angle of the province. In the first round, Canada simply denied that the land was within the territorial limits of Ontario at all and added it on to the new province of Manitoba in 1881.[17] Ontario had, however, already submitted the question to arbitration although the decision of the Privy Council in its favour was not rendered until 1884.[18] By this time Canada had developed a history of prior, unilateral dealings. In 1873 the Dominion had entered into a general surrender of the Indian title with the Ojibbeway of the area. This surrender was representative of the post-Confederation "numbered treaties" (No. 3) and provided for residential reserves, annuity payments, continuing services and once-and-for-all gifts. Ten years after the treaty, Canada issued a timber licence to the St. Catherines Milling & Lumber Company for a tract some twenty miles south-east of the present-day town of Dryden, Ontario.

Ontario balked. Canada had received $4,125.52 for the licence in 1883. The company had taken two million feet of timber. And then the Privy Council confirmed that the land had all along been in Ontario. In fact, the site is more than 100 miles east of the Manitoba border. Suit was filed in Chancery for ejectment and damages in trespass. The company replied that Canada's exclusive jurisdiction over "Lands reserved for the Indians" gave it not only the sole power to extinguish the Indian title, but also the power to collect the proceeds of dispositions of the resources on behalf of the Indians. Chancellor Boyd rendered a compendious decision on the subject of Indian lands and Indian title.[19] His conclusion, that the extinguishment of the Indian title by Canada inured to the benefit of the province, was affirmed at all levels of appeal. The reasoning, however, undergoes some remarkable transformations and will be set out in some detail.

At the outset it is important to emphasize that all the lands in dispute in the case were traditional lands, or to use the terminology of the Proclamation, "hunting grounds". There was no question of an Indian reserve; that is, of a residential community within a ceded tract of traditional land. With respect to the traditional lands within the Treaty 3 area, Boyd C. expressly adopted the language of *Johnson v. McIntosh*: the Indians had a "right to occupancy" which attached to them in their tribal character. They could not transfer it to any stranger, but it was capable of being extinguished.[20]

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[17] S.C. 1881, c. 14. It should be remembered that the natural resources of Manitoba were under Dominion control until 1930.

[18] The story of the Ontario Boundary Dispute is set out in 6 CANADA AND ITS PROVINCES 93-96 (A. Shortt & A. Doughty eds. 1914).

[19] Regina v. St. Catherines Milling & Lumber Co., 10 O.R. 196 (Ch. 1885).

[20] *Id.* at 209.

After a lengthy discussion of Indian policy prior to Confederation, he then turned to the meaning of the federal power to legislate for "Lands reserved for the Indians". What lands fell within the ambit of this power? Boyd C. adopted[21] the lower court holding in the earlier case of *Church v. Fenton*:[22] "[Lands reserved for the Indians] is an expression appropriate to the unsurrendered lands reserved for the use of Indians described in different Acts of Parliament as 'Indian reserves' and not lands in which, as here, the Indian title has been wholly extinguished."[23] It was certainly open to the Chancellor to give "reserves" a more expansive interpretation. He need only have found that the lands in dispute had been reserved by the Royal Proclamation of 1763. But this was not his view of it.

> The proclamation, no doubt, remained operative as a declaration of sound principles which then and thereafter guided the Executive in disposing of Indian claims, but as indicating for this century the scope of the Indian reservations, or the intent with which they have been created under provincial rule, it must be regarded as obsolete.[24]

Having excluded any federal power over the lands, Chancellor Boyd had only to affirm the provincial title in order to resolve the dispute. This he did in two steps. First, he found that the lands were physically situated within the province of Ontario.[25] Next, he found that the lands belonged to the province by virtue of section 109 of the B.N.A. Act.[26] These lands, he said, had previously been subject to "an interest other than that of the province", as provided in that section: the Indian's possessory interest,[27] the interest which had been extinguished by the treaty.

Still, having given much study to the problem, the Chancellor expanded upon his theory of Indian title. The "right of occupancy" found in *Johnson v. McIntosh*, which he also described as a possessory interest, attached to the hunting grounds described in the Royal Proclamation, although the Proclamation was in no sense a source of that interest. What interest, then, did Indians have in their reserves?

> Before the appropriation of reserves, the Indians have no claim except upon the bounty and benevolence of the Crown. After the appropriation, they become invested with a legally recognized tenure of defined lands; in which they have a present right to the *exclusive and absolute usufruct*, and a potential right of becoming individual owners in fee after enfranchisement. It is "lands reserved" in this sense for the Indians which form the subject of legislation in the B.N.A. Act.[28]

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[21] *Id.* at 224.

[22] 28 U.C.C.P. 384 (1878), *aff'd* 4 O.A.R. 159 (1879), *aff'd* 5 S.C.R. 239 (1880).

[23] *Id.*, 28 U.C.C.P. at 399.

[24] *St. Catherines Milling*, *supra* note 19, at 227.

[25] *Id.* at 204.

[26] *Id.* at 230.

[27] *Id.*

[28] *Id.* [Emphasis added].

At last comes the usufruct. In the view of Boyd C., it is a recognized tenure in defined lands, capable of ripening into a fee.[29] It was a higher interest in land than the mere right of occupancy and attached to a different category of land. Had this distinction not been made, and had this higher interest in reserve lands not been recognized, there would have been no need to use the language of usufruct.[30]

In many respects, *St. Catherines Milling* was a case of first impression and Chancellor Boyd seized upon the occasion to write a judgment that has rarely been approached for its scope or its grasp of the administration of Indian affairs in Canada. Even so, four problems, not strictly at issue, remained. First, it was not clear whether the Dominion's power to extinguish the Indian right of occupancy was exclusive.[31] Secondly, the Chancellor, having excluded traditional lands from the section 91(24) grant of legislative power, did not explain how that grant operated as a conveyance of the Crown's title to Indian reserves from the provincial to the federal authority. Thirdly, he concluded that when the purposes for which an appropriation of reserve land is made have ended, "the title, legal and equitable, reverts from the Dominion, whose trusteeship has thus ceased, to the proper constitutional owner," the province.[32] Here there is no indication whether a right to compensation for the land in favour of the Indians is one of the original purposes of appropriation, or whether the value of the land itself is one of the incidents of the provincial title. It is suggested that the Chancellor took the former view, but the language of usufruct would suggest the latter.

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[29] *See* S.C. 1880, c. 28, ss. 99-101, *as amended by* S.C. 1884, c. 27, ss. 16-18 *See also* R.S.C. 1970, c. I-6, ss. 109-111.

[30] Boyd C. was the first to adopt the term "usufruct" judicially, but it had been used with respect to Indian lands before. *See* text accompanying note 9, *supra*. *See also* HODGINS, DOMINION AND PROVINCIAL LEGISLATION, 1867-1895 at 1028 (1896) (memorandum recommending disallowance of British Columbia Crown Lands Act, S.B.C. 1874, No. 2).

[31] Although the federal power to extinguish Indian title has never been questioned, it is, surprisingly, still open to argue that this power is not exclusive. Statements to the contrary, with one exception, are strictly *obiter dicta*. *See, e.g., St. Catherines Milling*, 13 S.C.R. 577, at 615, 617 (1886) (*per* Strong J.); Province of Ontario v. Dominion of Canada, 42 S.C.R. 1 (1909) (*per* Duff J.). The exception seems to be the statement of Lord Loreburton, L.C., in Dominion of Canada v. Province of Ontario, [1910] A.C 637, at 645 (P.C.). This statement is hardly couched in absolute terms and, strictly, the point was not at issue. The case of Calder v. Attorney-General of British Columbia, *supra* note 11, however, seems to hold the question open. Three justices of the Court found that the province had done municipal acts inconsistent with the existence of an Indian title *after* Confederation. *Id.* at 337, 344 (*per* Judson J.). This they recognized as an effective method of extinguishment. *Id.* at 335. The question also arose in Gros-Louis v. La Société de développement de la Baie James, [1974] R.P. 38 (Que. C.S. 1973), where Malouf J. considered the relevant "autorité souveraine" to be the province of Quebec. *Id.* at 76. This however was apparently based upon a statutory delegation of the federal power. *Id. See also sub nom.* La Société de développement de la Baie James v. Kanatewat, [1975] C.A. 166, at 175 (*per* Turgeon J.A.).

[32] *St. Catherines Milling*, *supra* note 19, at 234.

Finally, there is no explanation of how, as had been successfully done in earlier cases, Canada was able to grant letters patent over traditional lands surrendered by the Indians prior to Confederation.[33] In other words, Chancellor Boyd wrote one of the most comprehensive decisions dealing with the administration of Indian affairs that is to be found in our law reports, but his scheme, while more comprehensive than most, was not complete. Even so, it was affirmed by both the Ontario Court of Appeal,[34] and by the Supreme Court of Canada.[35]

Two dissents in the Supreme Court are of interest. The first is that of Strong J. The distinction between traditional lands and reserves, he said, was irrelevant to section 91(24). "I am compelled to prefer the plain meaning of the words in question," he wrote, "according to which lands reserved for the Indians include unsurrendered lands, or, in other words, *all* lands reserved for the Indians, and not merely a particular class of such lands."[36] Nor, he said, was the Royal Proclamation obsolescent; it had the force of a statute and had never been repealed.[37] Looking at the example of Manitoba, he was prepared to recognize the possibility of separating proprietary and political interests between two levels of government,[38] but he seems to assume that the proprietary interest includes legislative powers. He certainly assumes the converse, that legislative powers include proprietary interests.[39] Thus, in his view, Treaty 3 was effective to give Canada the absolute title to all the lands to which it applied.[40]

Strong J. expressly excludes the disputed lands from the ambit of section 109 of the B.N.A. Act. That section reads:

> All Lands, Mines, Minerals and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, *subject to any Trusts* existing in respect thereof, *and to any Interest other than that of the Province* in the same. [Emphasis added].

He based his exclusion of the lands on his finding that the word "trusts" was not an appropriate description of the relationship between the Crown and the Indians regarding them.[41] Chancellor Boyd, however, had applied the section on the basis that the relationship between Crown and Indians constituted not a trust, but "an interest other than that of the

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[33] *See, e.g.*, Church v. Fenton, *supra* note 22.

[34] *St. Catherines Milling*, 13 O.A.R. 148 (1885).

[35] *St. Catherines Milling*, *supra* note 31.

[36] *Id.* at 622.

[37] *Id.* at 623. *See also* The King v. McMaster, [1926] Ex. C.R. 68, at 72.

[38] *St. Catherines Milling*, *supra* note 31, at 619.

[39] *See*, however, his own reasons for judgment in The Queen v. Robertson, 6 S.C.R. 52, at 134 (1882).

[40] *St. Catherines Milling*, *supra* note 31, at 637.

[41] *Id.* at 604.

province''.[42] Still, while their two Lordships disagreed as to the constitutional workings of that relationship and as to nomenclature, they were of one mind as to its essential nature. Strong J. wrote that it was ''analogous to the feudal relationship of lord and tenant, or, in some aspects, to that one, so familiar in Roman law, where the right of property is dismembered and divided between the proprietor and a usufructuary''.[43] The Indians, he said, had a usufructuary title which was not ''susceptible to any accurate legal definition in exact legal terms [but] nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands''.[44]

The second dissent was entered by Gwynne J., himself long a student of Indian affairs.[45] He disputed Boyd C.'s use of his own words in *Church v. Fenton*,[46] which he would have taken to the opposite conclusion. His reasoning seems to be premised on a theory that all lands went into a federal pot at Confederation and were then either allotted by the B.N.A. Act to a province, or they remained under federal control.[47] His theory would have applied here because he had found in *Church*[48] and repeated in *St. Catherines Milling*[49], that unsurrendered Indian lands, and lands surrendered for sale but not yet sold, were never ''public lands'' within provincial control. Section 109, therefore, would not operate to pass them to the province. This unique view of the constitutional arrangement, which he continued to advance throughout his career on the Supreme Court,[50] permitted him to exclude the lands from *both* section 91(24) and section 109, and still find a federal competence to assure to the Indians full compensation for any interest in land they might surrender. Nowhere, however, does he identify the source of this ''further competence''.

Gwynne J. was also unwilling to concede that the Royal Proclamation of 1763 was obsolescent. To the contrary, he described it as the ''Indians' Bill of Rights''.[51] He too, was willing to accord Canada full rights of disposition of the Treaty 3 lands on behalf of the Indians.

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[42] *Supra* note 19, at 230.

[43] *St. Catherines Milling*, *supra* note 31, at 604.

[44] *Id.* at 608.

[45] In 1840, he had conducted an inquiry into the problem of squatters on Indian lands at the Grand River. His report is in the Public Archives of Canada, R.G. 10, vol. 717, pp. 166-85.

[46] *See* text accompanying note 22, *supra*.

[47] *Supra* note 22, at 399.

[48] *Id.* at 389.

[49] *Supra* note 31, at 674.

[50] Indian land cases measure his years of service, 1879-1902. In 1880 he sat on appeal from his own judgment at first instance in Church v. Fenton, *supra* note 22. One of his last judgments was Ontario Mining Co. v. Seybold, 32 S.C.R. 1 (1902), discussed *infra*.

[51] *St. Catherines Milling*, *supra* note 31, at 674.

The case, with Canada joining as a party, then went to the Judicial Committee of the Privy Council. The Board surveyed the divergent holdings in the courts below and handed down, through Lord Watson, an eclectic decision.[52] First, everyone was overruled on the division of property and legislative powers under the B.N.A. Act.

> The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.[53]

The Indian title, as has been seen, was found to be "a personal and usufructuary right, dependent upon the good will of the sovereign".[54] Although the panel had been invited to define "the precise quality of the Indian right," they did not feel it necessary to express an opinion upon the point.[55] Having established the constitutional framework for the relationship between the two levels of government and the Indians, it was necessary only to attribute each of the respective interests to its source. The Indian interest derived *solely* from the Royal Proclamation. "Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown."[56]

The province's interest derived from section 109 of the B.N.A. Act.[57] The disputed lands had been public lands of the province and were, at Confederation, confirmed as provincial lands "subject to an interest other than that of the Province in the same", *viz.* the Indian title.[58] Once the Indians' interest had been surrendered, as it was by Treaty 3, the Indians were left with "no right whatever to the timber growing upon the lands which they gave up, which is now fully vested in the Crown" in right of Ontario.[59]

The federal interest derived from section 91(24). The lands in question were included in "Lands reserved for the Indians" because "the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation".[60] The legislative power of the Dominion extended to the taking of the surrender, but once this was done the power was exhausted; the entire benefit of the surrender inured to the proprietor, the province of Ontario.

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[52] *St. Catherines Milling*, *supra* note 2.
[53] *Id.* at 59.
[54] *Supra* note 2.
[55] *Id.*
[56] *Id.* at 54.
[57] B.N.A. ACT, s. 109, cited at p. 174 *supra*.
[58] *St. Catherines Milling*, *supra* note 2, at 58-59.
[59] *Id.* at 60.
[60] *Id.* at 59.

At this point one might well ask whether or not we actually have a usufruct in our constitution. Clearly, if the Privy Council saw its characterization of the traditional lands in *St. Catherines Milling* as definitive for all lands that might come within section 91(24), then the usufruct is firmly entrenched. But this was not what they said.

> It was suggested in the course of the argument for the Dominion, that *inasmuch as the proclamation recites* that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with *the terms of the instrument, which shew* that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the sovereign.[61]

Thus the Indian title in *St. Catherines Milling* was usufruct because it derived *solely* from the terms of the Royal Proclamation of 1763. Had the Indian title derived from another, or from several other sources, its nature would depend upon whatever "terms and conditions" were imposed at the time the land was reserved for Indian occupation. On this view, Indian title within section 91(24) might be a usufruct, or it might as easily be something else. In the case of reserves, as distinct from traditional lands, the Indian interest arguably *must* be something else since, except in the few Ontario instances of reserves set apart by excluding them from the surrender of larger tracts,[62] that interest will be referrable to some positive act of reservation other than the Royal Proclamation. If the usufruct in our constitution, then, depends solely upon *St. Catherines Milling* for its existence, it is more folklore than law. This statement, however, must be tested against subsequent decisions in order to see whether they broaden the application of the usufruct beyond its narrow usage at its first appearance.

3. *The Ontario Mining Case*

The Ontario Mining case also involved Treaty 3 lands. It raised a problem that Chancellor Boyd did not consider in *St. Catherines Milling*, but which could have been an issue in the case of *Church v. Fenton*.[63] The facts in that earlier case were that Canada had issued letters patent to reserve lands originally surrendered by the Indians to the province of Canada West prior to Confederation. These federal dealings with "provincial lands" passed without exception being taken. On Gwynne J.'s view of the constitutional allocation of resources, such dealings posed no issue; but that view had been repudiated by the Privy Council in *St. Catherines Milling*. The issue arose again in *Ontario Mining*.

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[61] *Id.* at 54. [Emphasis added].

[62] In *St. Catherines Milling*, *supra* note 19, at 213, Boyd C. indicates that where reserves are created by exception from a surrender, the title by occupancy becomes "coupled with the exclusive and legally recognized rights thereto which attach to a reserve". This, of course, is purely *obiter dictum*.

[63] *See* text accompanying note 33, *supra*.

The case was a classic conflict between two parties, each of whom traced title back to separate letters patent. The disputed lands had been part of the Treaty 3 surrender of the Northwest Angle and, pursuant to the terms of that treaty, were set apart by Canada as part of Indian Reserve No. 38B for the use and benefit of the Rat Portage Band of Indians. In 1886, the band surrendered the disputed tract for sale, as provided for in the Indian Act of the day,[64] and in due course letters patent issued to the predecessors in title of the Ontario Mining Company. In 1899, however, the defendant Seybold and others obtained letters patent covering most of the same lands from the Province of Ontario as the result of a decision of the Commissioner of Crown Lands requested by the company. The company then brought an action to have the Commissioner's decision set aside. The action was heard by Chancellor Boyd.

In *St. Catherines Milling*, Boyd C. had distinguished the Indian right of occupancy in traditional lands from the greater interest, the usufruct, which Indians acquired when reserves were set apart for them. *Ontario Mining* afforded him an opportunity to say whether or not that usufruct extended so far as to accord Indians the right to compensation for the value of reserve lands sold for their benefit, and whether the usufruct was so tantamount to ownership that federal letters patent could issue after such a sale. His decision, however, is not couched in these terms. When the Privy Council overruled his distinction between reserves and traditional lands, his need for the usufruct apparently disappeared. Nowhere, at any level, in any of the decisions in *Ontario Mining*, is the term "usufruct" used. Boyd C. was content to use more traditional terminology:

> And as to the scope of "lands reserved for Indians," it is laid down that the phrase is sufficient to include all lands reserved upon any terms or conditions for Indian occupation . . . that is to say, the expression is to be traced back to the Royal Proclamation of 1763, is not to be limited to reserves set apart under the provisions of a treaty, but is of larger scope covering all wild and waste lands in which the Indians continue to enjoy their primitive *right of occupancy* even in the most fugitive manner. But no doubt the phrase does include a treaty reserve such as "38B".[65]

The Chancellor then developed his decision as a corollary of *St. Catherines Milling*:

> The treaty land was, in this case, set apart out of the surrendered territory by the Dominion: that is to say, the Indian title being extinguished for the benefit of the Province, the Dominion assumed to take of the Provincial land to establish a treaty reserve for the Indians. Granted that this might be done, yet when the subsequent surrender of part of this treaty reserve was made in 1886, the effect was again to free the part in litigation from the special treaty privileges of the land and to leave the sole proprietary and present ownership in the Crown as representing the Province of Ontario.[66]

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[64] R.S.C. 1886, c. 43, ss. 39-41.

[65] Ontario Mining Co. v. Seybold, 31 O.R. 386, at 395 (Ch. 1899). [Emphasis added].

[66] *Id.* at 396-97.

But *could* Canada honour the terms of Treaty 3 by setting apart reserves from lands which were freed by the Treaty of the Indian title and which were the sole, unfettered property of the province of Ontario? Boyd C. quoted from the Privy Council decision in the *Fisheries* case: "The Dominion of Canada was called into existence by the British North America Act of 1867. Whatever proprietary rights were at the time of passing that Act possessed by the Provinces, remain vested in them except such as are by any of its express enactments transferred to the Dominion of Canada."[67] Ontario had not participated in the setting apart of reserve 38B, nor had it consented to this use of its land. No statute or enactment justified the issue of letters patent by the Dominion[68]; the terms of the Indian Act applied only to public lands belonging to the Dominion of Canada.[69] Thus the Dominion had no title to convey to its grantees, and their successors, the Ontario Mining Company, held no estate in the lands.

Chancellor Boyd's decision was upheld in the Divisional Court,[70] in the Supreme Court of Canada,[71] and in the Privy Council.[72] The Judicial Committee held that the selection of reserves "could only be effectively made by the joint action of the two Governments".[73] Canada could not appropriate the provincial land for the purpose of creating the reserve, and had no title to convey to its grantees.[74] As to the effect of the second "surrender" of 1886, the Board found it unnecessary to decide the point, but did not dissent from the holding of the Chancellor on that point.[75] Narrowed to its unusual facts, then, *Ontario Mining* stands for one unsophisticated proposition: *nemo dat quod non habet*. No man can give what he does not have.

It is tempting, however, to derive more from the case. Does it mean, for example, that Canada could not, by act of Parliament, expropriate public lands of a province for the sole purpose of creating an Indian reserve? Strong *dicta* in the case suggest that it could not.[76] Could private lands be expropriated for the purpose, however? Would it make any difference if the reserve were being created to satisfy a treaty entitlement to land? These issues, for reasons that are perhaps more political than legal, have never been tested.

Chancellor Boyd's citation from the *Fisheries* case[77] raises another question. Suppose that a province were to set apart the fee of public lands

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[67] *Supra* note 2, at 709-10.
[68] *Supra* note 65, at 397.
[69] *Id.* at 398-99.
[70] 32 O.R. 301 (Div'l Ct. 1900).
[71] *Supra* note 50.
[72] [1903] A.C. 73 (P.C.).
[73] *Id.* at 82-83.
[74] *Id.* at 82.
[75] *Id.* at 84.
[76] *See* LASKIN'S CANADIAN CONSTITUTIONAL LAW 550 (4th ed. A. Abel 1974).
[77] *Supra* notes 66-67.

for the benefit of Indians *without expressly conveying them to Canada*. It follows that such an interest could be sold for the benefit of the Indians. But could Canada issue letters patent? What if such reserves were created prior to Confederation? The position of pre-Confederation reserves was at issue in the next two cases to be discussed.

4. *The Giroux Case*

By a statute of 1851, authorization was given to the Governor in Council to set apart tracts of land in Lower Canada "not exceeding in the whole two hundred and thirty thousand Acres," such lands to be "vested in and managed by the Commissioner of Indian Lands for Lower Canada".[78] The Commissioner had "full power to concede or lease or charge any such land or property as aforesaid, and to receive or recover the rents, issues, and profits thereof as any lawful proprietor, possessor or occupant thereof might do "subject to instructions from the Governor".[79] By order-in-council dated August 9-11, 1853, certain lands were set apart for the Montagnais Indians of Lake St. John and vested in the Commissioner.

After Confederation, the Montagnais surrendered a portion of their reserve, for sale, to the Crown in right of Canada. Half a lot was sold to one David Phillipe, an Indian, who lost it through sheriff's sale to the defendant, Giroux. The Crown alleged that in Phillipe's hands the lands were still reserve lands and that Philippe, as an Indian, could not purchase lands that had been in his reserve. Both these allegations were rejected by the Quebec Court of King's Bench, Appeal Side,[80] and by the Supreme Court of Canada.[81] In the Supreme Court, however, their Lordships differed as to whether the lands had actually vested in the Commissioner. The majority found that they had, and the reasons of Duff J. are of particular interest.

Mr. Justice Duff posed the question, "is the title vested in His Majesty in right of the Dominion of Canada"?[82] The answer, he said, depended upon "the character of the Indian title to this reserve" at the time the B.N.A. Act came into force.[83] Reviewing the authority of the Commissioner, he found as follows: "Looking at the *ensemble* of the rights and powers expressly given I can entertain no doubt that in the sum they amount to ownership."[84] On that basis, section 26 of the Secretary of State Act[85] was fully effective to substitute the Secretary of State of the Dominion for the Commissioner of Indian Lands for Lower Canada.

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[78] S.C. 1851, c. 106.
[79] S.C. 1850, c. 42, s. 3.
[80] *Sub nom*. Doherty v. Giroux, 24 B.R. 433 (1915).
[81] Attorney-General of Canada v. Giroux, 53 S.C.R. 172 (1916).
[82] *Id*. at 190.
[83] *Id*. at 193.
[84] *Id*. at 195.
[85] S.C. 1868, c. 42.

"[T]his ownership", he said, "passed under the legislative jurisdiction of the Dominion as falling within the subject 'Indian lands'."[86] Duff J. had little trouble distinguishing *St. Catherines Milling*. There, he said, the Indian title was a mere usufructuary right "resting on the proclamation of 1873 [*sic*]"; here "the Indian interest amounted to beneficial ownership".[87] Thus it was his view of the matter that the Indian interest in reserve lands might be a usufruct, and might as easily be something else. The relevant line of inquiry was to examine the documents which effected the reservation. He had occasion, however, to change his view of the Lower Canadian statutes the next time he studied them.

5. *The Star Chrome Case*

The disputed land in *Star Chrome*[88] had been set apart, under the same statutes that were questioned in *Giroux*, for the Abenaki Indians of Bécancour. The band surrendered them for sale in 1882 and letters patent were issued by Canada to the predecessor in title of Mrs. Rosalie Thompson.[89] Her interest was purchased by the Star Chrome Mining Company in 1907, but the company then took proceedings against the vendor for rescission and return of the purchase price with damages. The action was founded upon allegations that the lands were public lands of the Province of Quebec, that Canada had no title to the land and could give none to the predecessors of Mrs. Thompson. This argument had a familiar ring to it and was eventually heard by the Privy Council with the Attorneys-General of Quebec and Canada intervening.

Given the prior case law, two lines of reasoning should have commended themselves to the Board. They might have followed the Privy Council's *obiter dictum* in *Ontario Mining* to the effect that a surrender of reserve lands serves, like a surrender of traditional lands, merely to lift the burden on the underlying title of the province.[90] On the other hand, the Board might have taken the eminently rational approach that the Supreme Court of Canada followed in *Giroux*: examined the terms and conditions upon which the initial reservation was made prior to Confederation, and accorded Canada the power to deal with whatever interests had been thus set apart. If the reservation amounted to full beneficial ownership, then a sale by the Dominion on behalf of the Indians and for their benefit would be proper and valid; a disposition for any other purpose, of course, would not be.

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[86] *Supra* note 81, at 195.

[87] *Id.* at 197.

[88] Attorney-General for Quebec v. Attorney-General for Canada (*Star Chrome*), [1921] 1 A.C. 401, 56 D.L.R. 373 (P.C. 1920).

[89] In the interval, there had been a sheriff's sale of the land, but this fact had no effect upon the ultimate decision.

[90] *See* text accompanying notes 66, 75, *supra*.

Predictably, counsel for Quebec argued for the first course, citing *Ontario Mining*. Taking the argument one step further, it was submitted that the Indian interest in such reserves as had been created by the statutes of 1850-51 was, on the basis of *St. Catherines Milling*, composed of purely "usufructuary rights".[91] Counsel for the Dominion, however, did not take the second course. It was urged before the Board that the Commissioner of Indian Lands for Lower Canada had, prior to Confederation, all the rights of ownership, including a power of sale conditional upon the consent of the Indians. The land, it was said, did not vest in the Crown until the Secretary of State Act so provided. Once this had occurred, the full power to regulate the sale of these Indian lands *and to determine the applicaton of proceeds* ripened in the Dominion. Upon the surrender, on this theory, the lands became the unencumbered property of Canada, subject only to the obligation to apply the proceeds in the manner prescribed by the terms of the surrender. This, it will be seen, is a departure from the reasoning of Duff J. in *Giroux*, and argues for a greater federal interest than that reasoning would suggest. Even so, it is surprising to note that, according to the reporter at least, *Giroux* was not cited in argument. Even more remarkable is the fact that the judgment of the Privy Council was rendered by Mr. Justice Duff, the same Mr. Justice Duff who had heard *Giroux* four years earlier. In *Star Chrome*, he not only reversed himself so far as *Giroux* was concerned, but he did so without making a single reference to the earlier case!

In his decision, Duff J. framed the issue as leading to one of two results: either the case was governed by *St. Catherines Milling*, as contended by Quebec, or the Dominion, as it argued, held the full beneficial title, both legal and equitable, in trust for the Indians. The question was one of construing the 1850-51 statutes. This he proceeded to do to precisely the opposite conclusion he had reached in *Giroux*. The interest of the Indians created and recognized by these statutes, he said, "is a usufructuary right only and a personal right in the sense that it is in its nature inalienable except by surrender to the Crown".[92]

Their Lordships did not go behind the Commissioner's powers to "concede," "lease" or "charge" the lands affected by the statutes.[93] Having regard to the recitals in the statutes, to the administrative policy of successive governments, and to the terms of the Royal Proclamation of 1763 as set down in *St. Catherines Milling*, it was said: "[T]heir Lordships think these words ought not to be construed as giving the Commissioner authority to convert the Indian interest into money by sale or to dispose of the land freed from the burden of the Indian interest, except after a surrender of the Indian interest to the Crown."[94] Thus it

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[91] *Supra* note 88, at 402-03. The arguments of counsel do not appear in the Dominion Law Reports.

[92] *Id.* at 408, 56 D.L.R. at 377.

[93] *Id.* at 411, 56 D.L.R. at 379.

[94] *Id.*

was held that the surrender of the reserved lands inured to the sole benefit of Quebec. Did this result apply to all reserve lands?

> The effect of the surrender would have been otherwise if the view, which no doubt was the view upon which the Dominion Government acted, had prevailed—namely, that the beneficial title in the lands was by the Act of 1850 vested in the Commissioner of Indian Lands as trustee for the Indians, with authority, subject to the superintendence of the Crown, to convert the Indian interest into money for the benefit of the Indians. As already indicated, in their Lordships' opinion, that is a view of the Act of 1850 which cannot be sustained.[95]

The salient point here is that the result flowed solely from judicial interpretation of the document which effected the original reservation of the lands for the use of Indians. Had the pre-Confederation statutes enabled the lands to be sold for the benefit of the Indians, their interest to be converted into money, the effect of the surrender would have been otherwise. In other words, the Dominion would have had the power to dispose of the lands for the benefit of the Indians and to give good title to the purchaser. This holding is specific to pre-Confederation Indian reserves in the narrow sense and derogates from the more general rule enunciated by the Privy Council in the *Fisheries* case.[96] No express enactment by the province would be required to convey such an interest to Canada.

C. *The Aftermath*

It is tempting to generalize on the basis of the four decisions discussed above—to say, for example, that the Indian interest in all reserve lands is personal and usufructuary, or to say that the surrender of any reserve, in Ontario and Quebec at least, disencumbers the underlying title of the province. This is a temptation to which Canadian jurists have, almost to a man, succumbed.

As a result of the *Star Chrome* decision, Quebec pressed the federal government to restore to the province the proceeds of all dispositions of surrendered lands since Confederation. In 1933, this was done and the sum of $140,959.37 was paid to the province. Many of these dispositions, it should be noted, were of lands that were reserved otherwise than by the statutes of 1851. Another result of the cases, particularly *Star Chrome*, has been to create a "presumption of usufruct" which weighs so heavily in the Canadian legal psyche that even the strongest words cannot dislodge it. In making this point, Professor La Forest cites the example of the so-called Simcoe Deed to the

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[95] *Id.* at 412, 56 D.L.R. at 380.

[96] *See* text accompanying notes 66, 67, *supra*. *See also* Cardinal v. Attorney-General of Alberta, [1974] S.C.R. 695, at 715-16, 40 D.L.R. (3d) 553, at 568 (*per* Laskin J.).

Six Nations lands on the Grand River which confirmed to the Indians "the full and entire possession, use, benefit and advantage of the said . . . territory".[97] This has been described by our courts as "a personal and usufructuary right".[98] A third result of the Indian lands cases, far more salutary than the first two, has been the passage of concurrent federal and provincial statutes intended to resolve the issue of the Indians' interest in lands reserved for them. Government administrators are fond of saying that such statutes "avoid the *St. Catherines Milling* decision," a statement that is only partly true since almost all of these statutes deal exclusively with reserve, not traditional, lands. All are variations on a common theme, to confirm a federal power to dispose of Indian reserve lands for the benefit of the Indians.

Section 3 of the Agreement with New Brunswick is typical: "New Brunswick hereby transfers to Canada all rights and interests of the Province in reserve lands except lands lying under public highways, and minerals".[99] The recitals to this act, and to its federal counterpart, are of interest. After stating that Canada has taken surrenders of reserve lands for sale and issued patents for such lands, they continue:

> And whereas two decisions of the Judicial Committee of the Privy Council relating to Indian lands in the Provinces of Ontario and Quebec lead to the conclusion that said lands could only have been lawfully conveyed by authority of New Brunswick with the result that the grantees of said lands hold defective titles and are thereby occasioned hardship and inconvenience . . . .[100]

This is a categorical affirmation of federal impotence and of nugatory acts by Canada to the detriment of innocent third parties.[101] It begs the question whether the two Privy Council decisions, undoubtedly *Ontario Mining* and *Star Chrome*, establish the relationship between Canada and New Brunswick that Canada had, for example, with Quebec.

Certainly a restrictive reading of the two cases would say little about the New Brunswick situation. The narrow holding in *Ontario Mining* is that Canada could not appropriate the public lands of a province to *create* Indian reserves. Virtually all reserves existing in New Brunswick today were created unilaterally by the province. Again, the narrow holding in *Star Chrome* is that the statutes of Lower Canada of 1850-51 did not

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[97] LA FOREST, *supra* note 2, at 122-23.

[98] *See* note 4 *supra*.

[99] S.N.B. 1958, c. 4. *See also* S.C. 1959, c. 47.

[100] *Id.*

[101] A similar recital had been pleaded in *Ontario Mining*, and this generated an inconclusive statement as to its legal effect:

> The learned counsel of the appellants, however, says that his clients' titles are not bound by the admissions made therein by the Dominion Government. Assuming this to be so, their Lordships have already expressed their opinion that the view of their relative situation in this matter taken by the two Governments was the correct view.

Supra note 72, at 83.

operate so as to give the Indians the full beneficial interest in the lands reserved for them. These statutes are, naturally enough, irrelevant to New Brunswick. Even a broader reading of the cases must leave some doubt. In its most general sense, *Ontario Mining* stands for the proposition that a surrender of reserve lands for sale gives Canada no power to dispose of those lands if the underlying title was confirmed in the Province by the B.N.A. Act at Confederation. But *Star Chrome* provides an exception to this rule where the province had set apart the full beneficial interest in the land and reserved it for the Indians prior to Confederation.[102]

The *Star Chrome* exception is of some relevance to New Brunswick because of the provisions of its pre-Confederation legislation regarding Indian reserves. Indians could obtain location tickets for tracts on their reserves of not less than five nor more than fifty acres, and had the possibility of an absolute grant after five years' residence and improvement.[103] Lands could be sold or leased by the Commissioners in each county[104] when authorized to do so by the Governor in Council.[105] The proceeds of such sales or leasing were, with expenses deducted, to be applied "to the exclusive benefit of the Indians".[106] However, unlike the situation in Quebec, and contrary to the assumptions of federal authorities,[107] reserve lands were not actually vested in the Commissioners.[108] It is, therefore, a moot point whether *Star Chrome* does not have exactly the opposite effect in New Brunswick to that recited in the federal-provincial Agreement. Similar, though not identical, considerations would apply to the Agreement with Nova Scotia.[109]

This is not to say, however, that these agreements are undesirable. At the very least, they clarify a relationship that would otherwise be fraught with the uncertainties of incomplete and often misleading historical documentation, unsatisfactory surveys and constant litigation. No doubt these problems still exist and will continue to arise in other contexts, but as a result of these Agreements the number and scope of such situations are considerably reduced. Analysis, however, must range farther than the possibilities of litigation, especially in an age of law reform. And the reformer should not acknowledge too readily the generalizations of the past.

In Ontario, the process of federal-provincial agreement had begun even before the dispute arose in *Ontario Mining*. The problems of setting apart Indian reserves in the Treaty 3 area were recognized and an initial

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[102] *See* text accompanying notes 95, 96, *supra*.

[103] S.N.B. 1854, c. 85, s. 10.

[104] S. 3.

[105] S. 2.

[106] S. 7.

[107] *See* S.C. 1868, c. 42, s. 32.

[108] *See* Warman v. Francis, 43 M.P.R. 197, at 212, 20 D.L.R. (2d) 627, at 640 (N.B.Q.B. 1958).

[109] S.N.S. 1959, c. 3. *See also* S.C. 1959, c. 50.

attempt to deal with them was made in 1891.[110] Title to reserves in the Treaty 3 area was transferred to Canada by a provincial statute in 1915.[111] Finally, a blanket agreement was implemented by reciprocal legislation in 1924 which transferred to Canada the administration of all Indian reserves in the province with the express power to lease or sell, upon surrender of the lands for such purposes, and upon the condition that the proceeds of such dispositions would be applied to the benefit of the band concerned. Otherwise, should the band become extinct, or should the Superintendent-General of Indian Affairs declare the lands to be no longer required for its benefit, the administration of the lands would revert to the Province.[112] The recitals in the 1924 Ontario Agreement are of considerable interest.

> Whereas from time to time treaties have been made with the Indians for the surrender for various considerations of their personal and usufructuary rights of territories now included in the Province of Ontario, such considerations including the setting apart for the exclusive use of the Indians of certain defined areas of land known as Indian Reserves;
>
> And whereas, except as to such Reserves, the said territories were by the said treaties freed, for the ultimate benefit of the Province of Ontario, of the burden of the Indian rights, and became subject to be administered by the Government of the said Province for the sole benefit thereof;
>
> And whereas the surrender of the whole or some portion of a Reserve by the band of Indians to whom the same was allotted has, in respect of certain Reserves in the Provinces of Ontario and Quebec, been under consideration in certain appeals to the Judicial Committee of the Privy Council, and the respective rights to the Dominion of Canada and the Province of Ontario, upon such surrenders being made, depend upon the law as declared by the Judicial Committee of the Privy Council and otherwise affecting the Reserve in question, and upon the circumstances under which it was set off;

There are two points of interest here. First is that the term usufruct is applied solely to traditional lands. Secondly, the *Ontario Mining* and *Star Chrome* cases are not seen to be fully determinative of the respective rights and powers of the Dominion and the Province after reserve lands have been surrendered. There are in fact three determinants, the Privy Council decisions constituting only one of these. The second is other law that might affect the reserve in question. The third is the circumstances under which the reserve was set apart. The recitals to the Ontario Agreement are indicative, it is suggested, of a far more careful reading of the Privy Council decisions than the categorical statement in the New Brunswick Agreement.[113]

In British Columbia, the question of title was merely one of many issues related to the selection and setting apart of reserves which plagued federal-provincial relations from Confederation into the early decades of this century. All these issues were intended to be resolved by the McKenna-McBride Agreement entered into in 1912. This agreement was

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[110] S.O. 1891, c. 3. *See also* S.C. 1891, c. 5.

[111] S.O. 1915, c. 12.

[112] S.O. 1924, c. 15. *See also* S.C. 1924, c. 48.

[113] *Supra* note 99.

adopted by reciprocal legislation, that was largely enabling, in 1919.[114] Not until 1936 did the province convey title to Canada by order-in-council. It resolved that

> [t]he lands set out in schedule [*sic*] attached hereto be conveyed to His Majesty the King in the right of the Dominion of Canada *in trust* for the use and benefit of the Indians of the Province of British Columbia, subject however to the right of the Dominion Government to deal with the said lands in such manner as they may deem best suited for the purposes of the Indians including a right to sell the said lands and fund or use the proceeds for the benefit of the Indians . . . .[115]

In British Columbia, then, the language of usufruct is inappropriate; the documents use the language of trusts.[116] The Order-in-Council, however, did not apply to reserve lands in the Railway Belt or in the Peace River Block.[117] These lands had been re-conveyed to the province by statute in 1930, one of the terms of that conveyance being that Indian reserves "shall continue to be vested in Canada *in trust* for the Indians . . . ".[118]

Across the Prairies, there was little need to speak in terms of usufructs. Prior to 1930, all the natural resources of Manitoba, Alberta and Saskatchewan remained under Dominion control. There was no legal problem whatever in taking surrenders, disposing of the lands and securing the proceeds to the Indians. When the provinces gained control over resources after that date, these powers were expressly preserved over lands already set aside as reserves and would largely apply to future reserves.

> All lands included in Indian reserves within the province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendant General of Indian Affairs, set aside out of the occupied Crown lands hereby transferred to its administration, such further areas as the said Superintendant General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfill its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof.[119]

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[114] S.B.C. 1919, c. 32. *See also* S.C. 1919-20, c. 51.

[115] B.C.O.C. 1036, July 29, 1938. [Emphasis added].

[116] *See, e.g.*, the Imperial Order-in-Council admitting British Columbia into the Union, May 16, 1871, *Schedule*, s. 13. "The charge of the Indians, and *the trusteeship* and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union." [Emphasis added].

[117] The history of these lands is briefly set out in C. MARTIN, "DOMINION LANDS" POLICY 39, 46, 204-05 (1973).

[118] S.C. 1930-31, c. 37, *Schedule*, s. 13. [Emphasis added].

[119] B.N.A. Act, 1930; S.C. 1930-31, c. 3, s. 10 (Alta.); S.C. 1930-31, c. 29, s. 10 (Sask.).

Apart from the Territories, in which resources remain under federal control, there are three provinces yet to be accounted for. One is Newfoundland, in which there are no recognized Indian reserves. The second is Prince Edward Island in which there are four reserves, three of them purchased by Canada. Of these three, at least, it can be said that there are no problems of disposal. The situation of the fourth reserve has never been tested. That leaves only Quebec.

To date, Quebec has resisted all federal initiatives to enter into an agreement with Canada to secure to the Indians the benefits of sale of their lands. The only reserves in that province which can safely surrender their lands without running afoul of *Star Chrome* are those which were actually purchased by Canada. As a matter of general policy, no surrenders are accepted in that province at all. If this situation is to be altered, it will likely come about as the result of a test case involving a reserve which does not rely, for its "Indian title", solely on the statutes of 1850-51 but which can show a clear reservation of the full beneficial interest by other documents. Assuming that the reasons in *Star Chrome* do not support the sweeping effect that has been given them, a good case can be made that might break the present impasse.

III. Exit the Usufruct

To this point, an attempt has been made to present the law "as it is". In this section, an argument will be made for the law that ought to be.

The chief objection to the language of usufruct is that it has come to obscure the necessary lines of inquiry into the problems it purports to describe. To take the paradigm case of a band which has surrendered part of its reserve land and wishes Canada to sell that land for its benefit, it is simply not enough to cry "usufruct" and disencumber a provincial title. The recitals to the Ontario Agreement[120] show a more profitable approach that consists of three steps:

1. Look at the documents and statutes that served to reserve the lands for Indian occupation.
2. Study any cases dealing with those or similar lands, and any other area of law that might bear on the problem.
3. Read the Privy Council decisions and see whether they are strictly applicable in the circumstances.

The temptation, of course, is to take the third step first, but this should be resisted. That course would lead back into the problem, not away from it. What is involved, generally, is not a mystical concept at all, but rather a factual inquiry. Doubtless such enquiries will often be challenging, but our courts have a much better record with formidable fact situations than they have had with the usufruct.

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[120] *See* text accompanying notes 112-13, *supra*.

Mysticism is the second objection to the usufruct. Too often when one poses a question that would be instantly answered in the context of property law, the actual answer follows the form, "You must understand that the band's interest here is only a usufruct". This is not only unresponsive but, given the fact that Indian reserves have been a feature of Canadian society for nearly three hundred years, it is also irresponsible. If the interest is a usufruct, then we should be able to go on and say what its features are. This is precisely what we cannot do, although several approaches appear promising.

The usufruct can be explained in terms of analytical jurisprudence, for example, as a "personal servitude". This looks very similar to the Privy Council's usage but the resemblance is purely superficial. A servitude is personal when the grantee holds it in his personal capacity and not in his capacity as owner of a dominant tenement; it attaches to his person, not to his land. The Privy Council, however, used the term personal "in the sense that it is inalienable except by surrender to the Crown".[121] Might Roman law assist? The editors of *Native Rights in Canada* considered this possibility and said that the usufruct was merely an analogy.[122] Could it not be used as it is in the Quebec Civil Code? Mr. Justice Turgeon, of the Quebec Court of Appeal, dismissed this possibility as well: "D'autres y voient un vague droit d'occupation et même un droit personnel d'usufruit, usufruit d'une nature tout à fait spéciale qui n'est pas de la nature de l'usufruit du *Code civil*."[123] The plain fact of the matter is that no one knows what it is, except in the most general and least helpful terms.

The third objection to the usufruct is that it is emotive. While, in relation to traditional lands, it may seem to accurately convey an image of primitive tribesmen having the range of their haunts and eking out a subsistence upon the fruits thereof, this image is surely inappropriate to a modern reserve community with its own political infrastructure, selling its oil or natural gas and thriving on the proceeds. And there are reserves in this position.

The fourth objection, much like the third, is that the usufruct is a pejorative term. Their Lordships of the Privy Council could scarcely invoke it without saying that it was "a mere burden"[124] or a "usufructuary right only".[125] The usufruct itself, however, is not necessarily as diminutive as this phraseology might suggest. In *Amodu*

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[121] *Supra* note 92.

[122] *Supra* note 6.

[123] La Société de Développement de la Baie James v. Kanatewat, *supra* note 31, at 175. MacKeigan C.J. tries a different tack in Regina v. Isaac by describing the usufruct as "an interest in land akin to the *profit à prendre* . . . an incident of the reserve land". 13 N.S.R. (2d) 460, at 469 (C.A. 1975). For a better analogy, *see* McClean, *The Common Law Life Estate and the Civil Law Usufruct: A Comparative Study*, 12 INT'L COMP. L.Q. 649 (1963).

[124] *St. Catherines Milling*, *supra* note 2, at 58.

[125] *Supra* note 88, at 408, 56 D.L.R. at 377.

Tijani v. Secretary, Southern Nigeria, a case decided in the same year as *Star Chrome*, Viscount Haldane, who heard both cases, made these statements: "A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases, the title of the Sovereign is a pure legal estate, to *which beneficial rights may or may not be attached*."[126] This reasoning, that the usufruct might consist of *all* beneficial rights, the title of the Sovereign having bare legal existence, is similar to the reasons for judgment in an earlier Canadian case.[127] Had subsequent cases taken this broader view of the usufruct, a view which necessitates further inquiry rather than obviates it, the theme of this article might have been quite different. Unfortunately, the narrow view, the emotive and pejorative view, has prevailed.

The fifth objection to the usufruct is that it is unnecessary. Chancellor Boyd first adopted it to distinguish reserve lands from traditional lands in which the Indians had a "right of occupancy". The Privy Council adapted it to apply to the interest reserved by the Royal Proclamation of 1763. It should not, therefore, have applied to Indian reserves at all. It should, and would have lapsed with *Ontario Mining*, but it was resurrected in *Star Chrome*. It need not have been since *Star Chrome* could have been decided solely on the authority of *Ontario Mining*. When the unnecessary attracts as many other evils as the usufruct has, it is surely time for a slash of Occam's Razor.

The sixth, and last, objection to the usufruct is that it is spreading. Constitutional conflicts regarding Indian reserve land have fallen into two categories: the conflict of federal and provincial property rights, and the conflict of two legislative powers. In the past, the usufruct has served only to obscure disputes of the proprietary variety. Now the usufruct is spreading to the latter as a buttress to the exclusivity of federal legislative power over "Lands reserved for the Indians". The concept of Indian reserves as "federal enclaves" into which provincial legislation could not enter has been forcefully advanced in recent years by Chief Justice Laskin, and as forcefully rejected by his colleagues.[128] At the present time, it seems to be dormant, but not dead in the Supreme Court of Canada.[129] The high water mark for the enclave theory may have been the decision of the British Columbia Court of Appeal in *Surrey v. Peace Arch Enterprises Ltd.*[130] In that case, reserve land had been surrendered and

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[126] [1921] 2 A.C. 399, at 403 (P.C.). [Emphasis added].

[127] Mowat v. Casgrain, 6 Que. Q.B. 12 (C.A. 1897). The parties to this action were, respectively, the Attorneys-General of Canada and of Quebec.

[128] *See, e.g.*, Cardinal v. Attorney General of Alberta, *supra* note 96; Natural Parents v. Superintendant of Child Welfare, [1976] 2 S.C.R. 751, 60 D.L.R. (3d) 148 (1975); *Re* Four B Mf'g Ltd. v. United Garment Workers of America, 30 N.R. 421, 80 C.L.L.C. 12,019 (S.C.C. 1979).

[129] Kruger v. The Queen, [1978] 1 S.C.R. 104, at 115-16, 75 D.L.R. (3d) 434, at 442 (1977) (*per* Dickson J.).

[130] 74 W.W.R. 380 (B.C.C.A. 1970).

leased to non-Indian entrepreneurs. When charged with public health violations, they responded that such provincial laws did not apply to Indian reserve land. The problem was that the lands, having been surrendered, were no longer "reserves" within the Indian Act.[131] The Court of Appeal looked to the fact that the Indians retained the reversion of the lease and held that the land was still "reserved" within the meaning of section 91(24) of the B.N.A. Act. Federal jurisdiction being exclusive, the provincial legislation could not apply. The enclave theory has been in decline ever since.

In the years ahead, it is undoubtedly the conflicts of legislative power that will generate the bulk of constitutional cases concerning Indian reserve lands. The usufruct is, unfortunately, all too available as an obstruction to proper debate. One need only seize upon the Indian interest in reserve lands as a usufruct, identify the activity in question as an incident of the usufruct, and all provincial legislation relating to that activity is excluded from the reserve. No doubt there are some provincial laws that should be excluded, but there is nothing inherent in the usufruct that will distinguish such laws from those which should be effective. None of the proper questions need be asked; the determining factor becomes the effect of the regulation upon a fiction.

All the problems with the usufruct, and all the objections to it, can be ascribed to the fact that it is a fiction. For no single Indian reserve in the country is it necessary, or even helpful, to describe the Indian interest in the land as a usufruct. No Indian title to traditional lands has been enhanced or diminished by calling it a usufruct. The earlier terminology, "right of occupancy", served the purpose just as well for legal analysis. Unfortunately, it lacked the analogical value of the usufruct. It also lacked the classical and exotic appeal of the usufruct. This should give the "right to occupancy" an appeal of its own.

As noted earlier, one of the effects of the *Star Chrome* decision was to create a "presumption of usufruct" in the Canadian judicial mind. At the very least, this presumption should be reversed. No mention should be made or tolerated of the term unless accompanied by very cogent reasons for its use; for example, an explanation of how the usufruct will assist in understanding or resolving the problem at hand. Such instances will be rare.

What is proposed in the next section is a framework for resolving constitutional conflicts between federal and provincial proprietary rights that entirely precludes any need to refer to the usufruct at all. Such a framework could be used to undo much of the damage already done, to strip the usufruct of its mysticism.

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[131] R.S.C. 1970, c. I-6, s. 2(1).

IV. THE USUFRUCT WITHOUT

A. *A Framework for Decision*

It is suggested that essentially all constitutional conflicts over proprietary rights to Indian reserves can be properly examined and rationally decided by following a line of inquiry consisting of six steps.

First Establish, prima facie, whether the radical title to the land is in Canada or in the province.

Second (a) Establish what proprietary interests in the land continue to adhere to the title, if any. This would involve scrutiny of the documents and legislation which effected the reservation to the Indians in the first instance. Such grants are to be construed strictly against the grantees.

(b) Either: (i) If the radical title is federal, assume, subject to proof to the contrary, that all the beneficial interests adhering to the title have been set apart for the use and benefit of the Indians;

or, (ii) If the radical title is provincial, assume, subject to proof to the contrary, that all beneficial interests that do not adhere to the title are reserved to the Indians.

Third Concede to Canada the broadest possible powers to deal with beneficial interests actually set apart for Indians. This concession operates as a counter-poise to the strict construction of the grant against the grantee.

Fourth Examine Canadian case law for precedents that bear on the instant case, and all relevant statutes.

Fifth Give a strict reading of the Indian lands cases of the Privy Council to determine whether they either suggest or require a particular result.

Sixth Decide the case.

Dealt with in this way, Indian lands cases become no more difficult than the construction of a badly-drafted will. Certainly there will be fine points not encountered in other areas of law; certainly there will arise issues of public policy that are unique to Indian lands; surely there will be hard cases, and some bad law. But once the usufruct is set aside, the bad law attaches to a single tract of land; it is not engrafted to a metaphysical concept that will arise helter-skelter across the country. It must be remembered that Indian land cases do not deal with a single, monolithic usufruct; they deal with multiple combinations of beneficial interests. If the monolith must be pushed aside in order to perceive these different combinations, the sooner done the better.

B. *A Test Case*

The purpose of this section is to demonstrate the suggested approach to resolution of proprietary rights conflicts. The facts set out below are fictitious, and the "reasons for judgment" that are briefly stated do not purport to be exhaustive of the legal issues that might arise in an actual case involving the same facts.

The reserve in question was set apart, under the Quebec statute of 1851, prior to Confederation. In 1975, a portion of the reserve was surrendered for the sole purpose of leasing the land to neighbouring farmers. One of these farmers, who can no longer afford the rent, attempts to throw up the lease as not conveying a valid interest in the land to him. The province joins with the farmer to contest Canada's powers to lease the land in accordance with the terms of the surrender. Assuming that this is the sole issue in the case, the decision would be taken in the following manner:

First Prima facie, the radical title is in the Province pursuant to section 109 of the B.N.A. Act. There has been no express conveyance of the provincial title to Canada and none is implied by the court.

Second (a) Adhering to the radical title is a reversion of all beneficial interests in the land when the Indian interests are extinguished. The title carries with it the sole power to dispose of the land and the sole right to the proceeds of such disposition.

(b) The title being in the province, all beneficial interests not adhering to the title are assumed to be reserved to the Indians, including the power to lease. Sustaining this assumption are the express powers of the pre-Confederation Commissioner to lease the land, collect the rents, and apply these to the benefit of the Indians.

Third It is conceded that Canada, at Confederation, assumed broad powers to deal with all beneficial interests actually reserved for Indians. Thus, Canada has full power to lease, to collect rents, and to apply these for the benefit of the Indians.

Fourth Case Law: The case of *Mowat v. Casgrain*[132] confirms the federal power to collect rents from Indian lands, the radical title to which is in the Province of Quebec, and to apply these for the benefit of the Indians.

Statutes: The full power of Canada to lease the land is qualified by the self-imposed requirement for a surrender by the band.[133] A lease in accordance with the terms of such a surrender is expressly authorized.[134]

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[132] *Supra* note 127.

[133] Indian Act, R.S.C. 1970, c. I-6, s. 37.

[134] S. 53(1).

Fifth Neither *Ontario Mining* nor *Star Chrome* deals with the effect of a surrender for lease. *Dicta* in the latter case, however, suggest that powers vested in the Commissioner prior to Confederation might properly be exercised by Canada after Confederation without an express grant of those powers to the Dominion by the province.

Sixth Findings: (a) The Commissioner had the express power to lease the land.
(b) The Indians were entitled to the rents.
(c) Based on *Mowat* and *Star Chrome*, the federal power does extend to the leasing of such lands, the collection of rents, and their application to the benefit of the Indians.

Decision: The lease is valid and binding.

This example, which is intended to be descriptive, not predictive, clearly shows how little statements such as, "The Indians have a personal and usufructuary right", add to an analysis of the problem. Generally, they detract from it. They lead the jurist astray into a discussion of *St. Catherines Milling* and the Royal Proclamation, all of which is largely, if not entirely, irrelevant to Indian reserve lands. This alone should be sufficient reason to purge our legal vocabulary of the usufruct as it is applied to Indian reserves.

V. Farewell to the Usufruct

The sins that have been ascribed to the usufruct in the preceding sections should weigh sufficiently upon it to cause its collapse. The term is unnecessary, hopelessly uncertain and positively misleading. Its use suggests an integrated conception of the Indian interest in reserve lands that belies the facts. One such fact is that there are extreme variations in the numbers of beneficial interests that might properly be claimed by Indians to attach to individual reserves. Another is that the modes of creating reserves, while they must share certain features, are not restricted to any "estates," real or imagined, so long as some form of occupation is reserved for Indians. A third is that there are variations, some considerable, some subtle, between provinces and even within provinces upon Canada's powers to deal with Indian proprietary interests. The usufruct, however, tells us nothing about these variations; rather, it tends to obscure their existence. It follows from these considerations that whatever function the usufruct might once have served, it has long since been out-lived. We should, therefore, grave it from our rules.