SURVEY OF CANADIAN LAW

INDIAN AND NATIVE LAW

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This is the inaugural annual survey of Indian, Inuit and Native Law. It was accordingly necessary to determine the period of time which would be the subject of review. It was determined, somewhat arbitrarily, that generally only developments and cases decided between January 1980 and the fall of 1982 would be considered. It was hoped that such a limit would keep the study within manageable proportions.

Judicial and legislative developments in the period under study have been numerous.[1] In large part, they have entailed the detailing of the application of established principle or the establishment of principle that was previously only surmised. The exception to such description is the Canada Act.[2]

I. HUNTING, TRAPPING AND FISHING RIGHTS

Judicial consideration of Indian and Inuit hunting, trapping and fishing rights is invariably pre-occupied with the determination of whether an assertion of such rights affords a defence to an alleged violation of federal or provincial legislation. It is uncommon for the courts to be required to consider the prosecution of a person who is alleged to have violated those Indian or Inuit rights. In any such consideration, the courts will be required to address the resolution of competing land uses removed from the primary emphasis upon the rights of the aboriginal peoples, and attempt to define the ambit of the rights of those who might interfere with the exercise of aboriginal rights.

The case of *R. v. Gonder*[3] illustrates this indirect context. The accused, a mining prospector, was charged with interfering with traps contrary to the Game Ordinance of the Yukon Territory. He had taken a cat train carrying mining equipment along a wilderness road and thereby interfered with and damaged several traps. Prior to doing so he had notified the trappers of his intention to use the road. While the accused held a land use permit authorizing such use of the road, a trapper's licence authorized a trapper to set his traps anywhere within the trapping area including wilderness roads. As Chief Judge Stuart of the Yukon Territorial Court observed, "In this case, trappers' interests clash with the interest of miners in the use of wilderness roads."[4] The context for resolution was considered to be a strict liability offence in respect to which the defence of reasonable care might be asserted. With this perspective the Court offered an assessment of the rights of the trappers:

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[1] The author would like to thank the Native Law Centre, University of Saskatchewan, and the Editor of the Canadian Native Law Reporter, Zandra MacEachern, for their assistance in locating very recent judicial decisions.

[2] U.K. 1982, c. 11.

[3] 62 C.C.C. (2d) 326 (Y.T. Terr. Ct. 1981).

[4] *Id.* at 327.

> Trappers cannot appropriate wilderness road use to the exclusion of use by others. They must anticipate reasonable use of the road by others and accordingly take steps to protect their interests against the impact of other public uses of the road. Armed with notice of the cat train, the trappers were in the best position to avoid any damage. If trappers set traps on or near public roads they must do so at the risk of other users of the road might interfere with their traps.[5]

With respect to the rights of cat train operators, Stuart C.J. declared:

> The Government through land use permits licenses cat train operators to use wilderness roads; the necessary incidental impacts of such use must be expected. A cat train is unavoidably certain to adversely affect the use of roads by others. Cat train operators armed with a land use permit are not required to ensure they avoid all adverse effects on the rights of other road users; they are only required to act reasonably and within permit requirements.[6]

The Court dismissed the charge against the accused. A refusal to accord absolute protection to trapping rights even when suggested by the "plain meaning" of the Ordinance is, of course, reflective of the pattern which historically developed in Canada with respect to Indian and Inuit hunting, fishing and trapping rights and which is followed in the mass of cases described below.

The great number of such cases arose from prosecutions under provincial and federal legislation of persons of Indian and Inuit ancestry. Judicial declarations in the 1960's and 1970's denied any protection from federal regulation to Indian and Inuit hunting, trapping and fishing rights. Provincial controls were limited only to the extent that they were constrained by treaty assurances or constitutional provision.

A. *Provincial Legislation and Controls*

1. *The Prairie Provinces*

A principal condition of the cession of Indian title in the Prairies by treaty was the Indian "right to pursue their avocations of hunting, trapping and fishing throughout the tract surrendered" subject to Dominion regulation and excepting "such tracts as were taken up for settlement, mining or other purposes".[7]

The Constitution Act, 1930, gave effect to the Natural Resources Transfer Agreements between Canada and Alberta, Manitoba and Saskatchewan.[8] Each Agreement contains a clause which provides:

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that

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[5] *Id.* at 337.
[6] *Id.* at 338.
[7] *E.g.*, Treaty No. 4.
[8] 20 & 21 Geo. 5, c. 26 (U.K.).

> the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.[9]

The Supreme Court of Canada has previously declared that a purpose of the clause was "to re-state and reassure to the treaty Indians the continued enjoyment of the right to hunt and fish for food".[10] In *R. v. Sutherland*[11] the Court affirmed such understanding and after reciting the terms of Treaty No. 4 declared that the proviso respecting the Indian right to hunt, trap and fish for food "should be given a broad and liberal construction. History supports such an interpretation as do the plain words of the proviso."[12] The Court also declared for the first time, in accordance with decisions of the Courts of Appeal in Manitoba[13] and Saskatchewan,[14] that the provinces could not unilaterally amend the provisions of the Natural Resources Agreement by legislation expressly deeming lands to be outside the scope of the proviso. Mr. Justice Dickson declared:

> A provincial legislature may not pass laws to determine the scope of the protection afforded by the *Natural Resources Transfer Agreement*. If the laws have the effect of altering the agreement, they are constitutionally invalid; if not, they are mere surplusage.[15]

The Court further determined that legislation, the sole purpose of which was "to limit or obliterate a right Indians would otherwise enjoy", was clearly *ultra vires* the province.[16] The Court applied such analysis in *Moosehunter v. The Queen*[17] one year later and restated the significance of the treaty undertakings:

> The Government of Canada can alter the rights of Indians granted under treaties. . . . *Provinces cannot*. Through the Natural Resources Agreement, the federal government attempted to fulfil their treaty obligations to the Indians. The Province could not unilaterally affect the right of Indians to hunt for food on unoccupied Crown lands or lands to which they had a right of access.[18]

One month prior to the decision in *Sutherland* the Supreme Court also offered the first general indication of the meaning it would give to the phrase "lands to which the said Indians may have a right of access". Conflicting *dicta* of the Saskatchewan Court of Appeal had not clarified

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[9] 20 & 21 Geo. 5, c. 26 (U.K.), Sched. 1, s. 13 (Man.); Sched. 2, s. 12 (Alta.); Sched. 3, s. 12 (Sask.).

[10] Frank v. The Queen, [1978] 1 S.C.R. 95, at 100, 75 D.L.R. (3d) 481, at 484 (1977) (Dickson J.).

[11] [1980] 2 S.C.R. 451, [1980] 3 C.N.L.R. 71, 113 D.L.R. (3d) 374.

[12] *Id.* at 461, [1980] 3 C.N.L.R. at 77, 113 D.L.R. (3d) at 383.

[13] R. v. Sutherland, [1979] 2 W.W.R. 552, 45 C.C.C. (2d) 538.

[14] R. v. Strongquill, 8 W.W.R. (N.S.) 247, [1953] 2 D.L.R. 264.

[15] R. v. Sutherland, *supra* note 11, at 456, [1980] 3 C.N.L.R. at 74, 113 D.L.R. (3d) at 379.

[16] *Id.* at 455, [1980] 3 C.N.L.R. at 73, 113 D.L.R. (3d) at 378.

[17] [1981] 1 S.C.R. 282, [1981] 1 C.N.L.R. 61, 123 D.L.R. (3d) 95.

[18] *Id.* at 293, [1981] 1 C.N.L.R. at 68, 123 D.L.R. (3d) at 104 (emphasis added).

whether a right of access would only exist if conditions attached to that right, such as that barring hunting at certain times, were complied with. In *R. v. Mousseau*[19] the respondent, a treaty Indian, shot a deer from his car on a provincial highway. The deer was standing in the ditch beside the road. The respondant argued that Indians in Manitoba have a right of access to public roads and accordingly were protected by the proviso when hunting thereon. Mr. Justice Dickson rejected the argument as "untenable".[20] His Lordship declared that the proviso could not be read as meaning that "whenever an Indian can enter unto land for a purpose unrelated to hunting, say unto for employment or recreation, he can also hunt. Respondent's argument would give the Indians hunting rights at all seasons of the year, and by any means, in all places to which the public has access, such as highways, parks, community pastures, public golf courses, recreation areas, [and] picnic grounds".[21] Mr. Justice Dickson declared:

> The meaning given to the word "access" in the proviso must be limited to the subject matter of the whole paragraph in which the proviso appears, namely, hunting by Indians. In my opinion, the Indians have the right to hunt, trap, and fish, game and fish, for food at all seasons of the year on: (a) all unoccupied Crown lands; (b) any occupied Crown lands to which the Indians, or other persons, have right of access, by virtue of statute or common law or otherwise, for the purpose of hunting, trapping or fishing; (c) any occupied private lands to which the Indians have right of access by custom, usage, or consent of the owner or occupier, for the purpose of hunting, trapping, or fishing. . . . Where a right of access to hunt is recognized in respect of any lands, that right is general for Indians and cannot be restricted by provincial legislation imposing seasonal restrictions, bag limits, licensing requirements, or other such considerations: the important criterion is hunting for food.[22]

In *Mousseau*, Dickson J. declined to extend the protection of the proviso to the respondent. The learned judge considered that the public road was occupied Crown land to which Indians did not have a right of access for the purpose of hunting. After referring to the absence of evidence of contrary usage, and to common law rights with respect to roads, he concluded that "hunting is not one of the purposes for which roads are made available and accessible for the use of the public".[23] His Lordship supported his conclusion by commenting on the "impracticability" of restricting Indian hunting by reference to whether it was "dangerous" to hunt on a particular stretch of road.[24] The conviction of the respondent under the Wildlife Act of Manitoba was accordingly restored.

A short time after being rendered, the Supreme Court decision in *Mousseau* was distinguished by the Saskatchewan Provincial Court in *R. v. Fiddler*.[25] Judge Seniuk concluded that "a statutory right of access

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[19] [1980] 2 S.C.R. 89, [1980] 3 C.N.L.R. 63, 111 D.L.R. (3d) 443.
[20] *Id.* at 97, [1980] 3 C.N.L.R. at 69, 111 D.L.R. (3d) at 449.
[21] *Id.*
[22] *Id.*
[23] *Id.* at 98, [1980] 3 C.N.L.R. at 70, 111 D.L.R. (3d) at 450.
[24] *Id.* at 99, [1980] 3 C.N.L.R. at 70, 111 D.L.R. (3d) at 450.
[25] [1981] 2 C.N.L.R. 104 (1980).

for hunting on roadways is granted the public" under the Saskatchewan Wildlife Act.[26] This followed from the restrictions upon shooting along or across a provincial highway or grid road. The accused was considered to have a right of access for hunting on the dirt road concerned. It was neither a provincial highway nor grid road.

The reasoning in *Fiddler* was rejected by other Saskatchewan Provincial Court justices in *R. v. Desjarlais*[27] (road allowance) and *R. v. Little Chief*[28] (municipal road) and by District Court Judge Gerein in *R. v. Standingwater*[29] (grid road). The Courts considered that no statutory right of access for hunting purposes could be inferred from the Wildlife Act.

In February, 1981 the Saskatchewan Court of Appeal allowed the appeal and quashed the conviction in *R. v. Desjarlais*,[30] answering "yes" to the question arising by way of stated case: "Did the Court err in law in holding that Joey J. Desjarlais, a treaty Indian, could have no right of access to a road allowance for the purpose of hunting wildlife for food?"[31] The Court of Appeal did not explain upon what basis Desjarlais might assert a right of access. The Manitoba Court of Appeal offered clearer guidance in *R. v. Bruyere*.[32] The accused treaty Indians were charged with nightlighting on a fireguard road in a forest reserve. The Court considered that there was a "significant factual distinction"[33] between such a case and *Mousseau*. Mr. Justice Hall observed:

> In *Mousseau*, the appeal courts seem to have accepted as a fact that the provincial road in question was wholly designed, constructed and maintained solely for use by the public for the passage of vehicles. Fireguard 31 is used for vehicular traffic but is also used by hunters and bush workers and was primarily constructed as a fireguard. There is no evidence that hunters, including Indians, are prohibited from hunting on and from fireguard 31. Indeed, what evidence there is establishes implied, if not express, permission to hunt on and from the fireguard. In my view, the present case is distinguishable from *Mousseau* on the facts.[34]

The Court founded the right of access upon usage and inferred consent. The approach is consistent with possible reasoning of the Saskatchewan Court of Appeal in *Desjarlais* and suggests the possibility of a right of access within the proviso with respect to roads of lesser status than provincial highways.

The existence of a right of access of Indians to hunt for food upon private land not posted against hunting has received considerable judicial

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[26] *Id.* at 112.

[27] [1980] 3 C.N.L.R. 89.

[28] [1981] 3 C.N.L.R. 106 (1980), *upheld on another ground*, R. v. Bigstone, [1981] 3 C.N.L.R. 103 (Sask. C.A.).

[29] [1981] 1 C.N.L.R. 109.

[30] [1981] 3 C.N.L.R. 105.

[31] *Id.* at 105.

[32] 66 C.C.C. (2d) 509, [1982] 2 C.N.L.R. 166.

[33] *Id.* at 511, [1982] 2 C.N.L.R. at 169.

[34] *Id.*

and legislative attention. In 1976 in *Myran v. The Queen*,[35] Dickson J., for the Supreme Court, suggested that game legislation which created the offence of hunting on posted private land did not thereby imply a right of access to hunt on unposted private land.[36] The *dicta* was followed by the Alberta Court of Appeal in *R. v. Cardinal*[37] and declared by the Supreme Court of Canada to be a "correct statement of the law" in affirming the decision of the Manitoba Court of Appeal in *McKinney v. The Queen*.[38]

The Saskatchewan Court of Appeal, on the other hand, has refused to follow the decision in *McKinney*. In *R. v. Tobacco*[39] the Court concluded that a statutory right of access for the purpose of hunting was created by game legislation which expressly provided that no offence was commited where a hunter proved that the land which he entered was unposted. Manitoba legislation was distinguished as having specifically provided for the maintenance of common law rights with respect to trespass and for the offence of petty trespass.[40] Chief Justice Culliton concluded by relying upon the words of Dickson J. in *R. v. Sutherland*[41] that the proviso "should be given a broad and liberal construction".[42]

The Saskatchewan legislation was amended to provide specifically that failure to post land should not "for the purposes of determining liability", be construed as affording implicit consent to entry upon the land.[43] In *R. v. Desjarlais*,[44] a Saskatchewan Provincial Court judge concluded that "the new legislation has put hunters in Saskatchewan in the same position as those in Manitoba with respect to a right of access to private, unposted lands".[45] A contrary conclusion was arrived at by another Provincial Court judge who declared "that for purposes other than liability" failure to post land affords "consent by implication".[46]

The Saskatchewan Court of Appeal appears to have adopted the latter approach. In *R. v. Desjarlais*[47] the Court allowed the appeal from the conviction and answered "yes" to the question raised by way of stated case: "Did the Court err in law in holding that by virtue of subsection 38(6) and section 39 of the Wildlife Act [the accused] could have no right of access to unposted private land for the purpose of hunting wildlife for food?"[48]

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[35] [1976] 2 S.C.R. 137, 58 D.L.R. (3d) 1.

[36] *Id.* at 145-46, 58 D.L.R. (3d) at 7-8.

[37] 4 A.R. 1, 36 C.C.C. (2d) 369 (1977).

[38] [1980] 1 S.C.R. 401, [1981] 2 C.N.L.R. 113, 106 D.L.R. (3d) 494 (1980).

[39] 4 Sask. R. 380, [1980] 3 C.N.L.R. 81. *Followed and applied in* R. v. Mooswa, [1981] 3 C.N.L.R. 112 (Sask. C.A. 1980).

[40] *Id.* at 386-87, [1980] 3 C.N.L.R. at 87.

[41] *Supra* note 11.

[42] R. v. Tobacco, *supra* note 39, at 387, [1980] 3 C.N.L.R. at 88.

[43] The Wildlife Act, S.S. 1979, c. W-13.1, sub. 38(6).

[44] *Supra* note 27.

[45] *Id.* at 99.

[46] R. v. Maple, [1982] 2 C.N.L.R. 181, at 183 (Sask. Prov. Ct. 1980).

[47] *Supra* note 30.

[48] *Id.*

In July, 1982 the newly elected Progressive Conservative Government of Saskatchewan amended the game legislation to provide, after referring to common law remedies, that the fact of a failure to post land "is not to be deemed to imply consent by him to entry upon his land or to imply a right of access to his land for the purpose of hunting".[49] It remains to be seen if the Saskatchewan Court of Appeal will limit the operation of such a provision to the determination of common law liability and refuse to regard it as controlling the right of access to hunters for other purposes. A "broad and liberal construction" of the Indian hunting proviso can readily deny the application of the new subsection to such circumstances.

Lands over which hunting of only certain animals is allowed were declared subject to a right of access within the meaning of the proviso in *R. v. Sutherland.*[50] Mr. Justice Dickson, for the Supreme Court of Canada, applied the principles developed in *Mousseau* and followed the decision of the Saskatchewan Court of Appeal in *R. v. Strongquill*,[51] which His Lordship construed as holding that "once *any* hunting is allowed, then under para. 13 *all* hunting by Indians is permissible, if hunting for food".[52] The learned judge recited the comment of Gordon J.A. in *Strongquill* that "the Indians should be preserved before moose"[53] and after asserting the need for a "broad and liberal construction" to be given to the proviso concluded:

> If there is any ambiguity in the phrase "right of access" in para. 13 of the Memorandum of Agreement, the phrase should be interpreted so as to resolve any doubts in favour of the Indians, the beneficiaries of the rights assured by the paragraph. Any attempt to construe "access" in limited terms as, for example, to hunt the particular type of game which non-Indians could legally hunt at the time would, it seems to me, run counter to the authorities to which I have referred and so dilute the word "access" as to make meaningless the assurance embodied in the proviso to para. 13.[54]

Mr. Justice Dickson declared that the "true meaning and intent" of paragraph 13 required that if "limited hunting is allowed, then under para. 13, non-dangerous. . . hunting for food is permitted to the Indians, regardless of provincial curbs on season, method or limit".[55]

The decision in *R. v. Sutherland* was applied by the Court in full force a year later in *Moosehunter v. The Queen.*[56] The land in question was subject to hunting for six days in the year, but not at the time when the accused Indian was alleged to have shot a moose. The Court declared

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[49] The Wildlife Amendment Act 1982, Revised Copy of Bills, 1982 (Sask.), c. 20 (assented to 9 July 1982).

[50] *Supra* note 11.

[51] *Supra* note 14.

[52] R. v. Sutherland, *supra* note 11, at 463, [1980] 3 C.N.L.R. at 79, 113 D.L.R. (3d) at 384 (emphasis in original).

[53] *Id.* at 463, [1980] 3 C.N.L.R. at 79, 113 D.L.R. (3d) at 385.

[54] *Id.* at 464, [1980] 3 C.N.L.R. at 80, 113 D.L.R. (3d) at 385.

[55] *Id.* at 460, [1980] 3 C.N.L.R. at 76, 113 D.L.R. (3d) at 382.

[56] *Supra* note 17.

that *Sutherland* would recognize a right of access for the purpose of hunting within the meaning of the proviso, and drew further support from the assurances offered in the relevant treaty and in the language of the proviso which specifically referred to the Indian right to hunt "at all seasons of the year".[57]

The analysis developed by Dickson J. in *Mousseau*, *Sutherland* and *Moosehunter* was applied to the circumstances of a provincial park by the Manitoba Court of Appeal in *R. v. Hudson*.[58] The Court held that the accused could not be convicted of possession of a firearm in a provincial park in which hunting was permitted, albeit restricted to a time other than the day in question. The conclusion was expressly reached on the understanding that there was no evidence of any danger to other persons arising from the accused's activities.[59] Such an approach was termed "impracticable" by Dickson J. in *Mousseau* when considering the existence of a right of access to a provincial highway.[60]

The requirement that the Indian right to hunt for food "be exercised in a manner so as not to endanger the lives of others" was established in *Myran v. The Queen*.[61] In *R. v. Bigstone*,[62] the Saskatchewan Court of Appeal declared that this requirement denied the protection of the proviso to an Indian accused charged with carrying a loaded firearm in a vehicle. The Court cited *Myran* and observed that the restriction "is primarily for the protection of people and is one with which Indians must comply in exercising their established rights to hunt for food".[63]

If the meaning of the expression "lands to which the said Indians may have a right of access" was clarified in the early 1980's, the same cannot be said for the expression "unoccupied Crown lands". A conflict of authority in the Saskatchewan Court of Appeal remains to be resolved.[64] In *Mousseau*[65] the argument was not made, and in *Sutherland*[66] and *Moosehunter*[67] the Supreme Court expressly declared it unnecessary to consider the question. The decisions in those cases will further reduce the likelihood of Supreme Court consideration of the expression's meaning in the circumstances of hunting, trapping or fishing. It may be determined first in the context of the other area where it assumes significance; that of outstanding treaty land entitlement on the Prairies.

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[57] *Id.* at 292, [1981] 1 C.N.L.R. at 67-68, 123 D.L.R. (3d) at 103 (Dickson J.).

[58] 17 Man. R. (2d) 40 (1982).

[59] *Id.* at 42-43.

[60] *Supra* note 19, at 99, [1980] 3 C.N.L.R. at 70, 111 D.L.R. (3d) at 450.

[61] *Supra* note 35, at 141-42, 58 D.L.R. (3d) at 4-5 (Dickson J.).

[62] *Supra* note 28.

[63] *Id.* at 104.

[64] Bartlett, *Indian and Native Rights in Uranium Development in Northern Saskatchewan*, 45 SASK. L. REV. 13, at 26-27 (1980).

[65] *Supra* note 19.

[66] *Supra* note 11, at 458, [1980] 3 C.N.L.R. at 75, 113 D.L.R. (3d) at 381.

[67] *Supra* note 17, at 292, [1981] 1 C.N.L.R. at 68, 123 D.L.R. (3d) at 103.

2. *Subject to Treaty — Ontario, The Maritimes and British Columbia*

In the absence of a constitutional provision like that found in the Constitution Act, 1930 with respect to the Prairie provinces, the application of provincial controls upon Indian hunting, trapping and fishing is governed by section 88 of the Indian Act.[68] Section 88, *inter alia*, declares that such controls are only applicable "[s]ubject to the terms of any treaty". In *Cheecho v. The Queen*,[69] the Ontario District Court applied established principles to set aside the conviction of a Treaty No. 9 Indian under the Ontario Game and Fish Act.[70] The Court rejected the argument that the provision in the Treaty, which subjected the Indian right to hunt, trap and fish to "such regulations as may from time to time be made by the government of the country", could refer to the provincial government.[71] The case concerned the conviction of one Treaty No. 9 Indian who had trapped on a trap-line conferred by the provincial enactment upon another Treaty No. 9 Indian.

Of greater significance in the affirmation of treaty rights in the context of hunting, trapping and fishing is the decision of the Ontario Court of Appeal in *R. v. Taylor*.[72] The respondent Indians were charged and convicted of taking bull-frogs during the closed season established under the provincial Game and Fish Act. They claimed that they were not subject to the provincial legislation under the terms of Articles of Provisional Agreement, otherwise known as Treaty No. 20, entered into in 1818 between the Crown and Chiefs of the Chippewa Nation. The written text of the Agreement referred only to the surrender of the land inhabited by the Chippewa and to the provision of monetary consideration. In oral discussions that immediately preceded the signing of the Agreement, the Head Chief asked:

> We hope that we shall not be prevented from the right of fishing, the use of the Water, and Hunting where we can find game.

The Deputy Superintendent General of Indian Affairs replied:

> The Rivers are open to all and you have an equal right to fish and hunt on them.[73]

The Ontario Divisional Court had held that the minutes of these discussions constituted part of the terms of the treaty within the meaning of section 88.[74] Counsel before the Court of Appeal agreed that the minutes "recorded the oral portion of the 1818 treaty and are as much a

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[68] R.S.C. 1970, c. I-6.

[69] [1981] 3 C.N.L.R. 45 (1980).

[70] R.S.O. 1970, c. 186. *See* R. v. George, [1966] S.C.R. 267, 55 D.L.R. (2d) 386, Kruger v. The Queen, [1978] 1 S.C.R. 104, 34 C.C.C. (2d) 377, 75 D.L.R. (3d) 434 (1977).

[71] Cheecho v. The Queen, *supra* note 69, at 49-50.

[72] 62 C.C.C. (2d) 227, [1981] 3 C.N.L.R. 114.

[73] *See* R. v. Taylor, 55 C.C.C. (2d) 172, at 177-78, [1980] 1 C.N.L.R. 83, at 88-89 (Ont. Div. Ct. 1979).

[74] *Id.* at 178, [1980] 1 C.N.L.R. at 89-90.

part of that treaty as the written articles of the provisional agreement".[75] The Court of Appeal approved the agreement and thereby offered the first authoritative judicial declaration that oral discussions may constitute part of a treaty and are not merely explanatory of written terms.[76] The Crown was left to argue that the surrender of the aboriginal lands included a surrender of their aboriginal hunting and fishing rights and that the oral discussions provided no assurance of any special rights.[77]

The Court of Appeal outlined the principles it would apply to the interpretation of the terms of the treaty. It acknowledged the need to consider the history of the tribes and the surrounding circumstances at the time of the treaty. It emphasized that in order to maintain the honour of the Crown "no appearance of 'sharp dealing' should be sanctioned", and "if there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible".[78] Such a declaration provides a bolstering of sporadically declared principles of Indian treaty interpretation.[79] Finally, the Court declared the unexceptional principle that "if there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms".[80]

The Court concluded that the terms of the treaty preserved the right of the respondents to hunt and fish on Crown lands such that the provincial Game and Fish Act was inapplicable under section 88 of the Indian Act. The Court emphasized the "disparity in the positions of the two parties to the treaty" and concluded that the language of the Deputy Superintendent General was not intended to limit the rights of the Indians but rather to assure the Indians of their continuance.[81] While such an interpretation is not that which a "plain meaning" approach[82] would demand, the Court of Appeal drew support for its conclusion by reference to the "understanding of the treaty [that] has been accepted and acted on for some 160 years without interruption".[83]

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[75] *Supra* note 72, at 230, [1981] 3 C.N.L.R. at 117.

[76] As they were considered, with differing results in Dreaver v. The King (unreported, Ex. 10 Apr. 1935); R. v. Johnston, 56 W.W.R. 565, 56 D.L.R. (2d) 749 (Sask. C.A. 1966); and *Re* Paulette, [1973] 6 W.W.R. 97, 39 D.L.R. (3d) 45 (N.W.T.S.C.), *rev'd on other grounds*, [1977] 2 S.C.R. 628, 72 D.L.R. (3d) 161 (1976).

[77] R. v. Taylor, *supra* note 72, at 236, [1981] 3 C.N.L.R. at 124.

[78] *Id.* at 235-36, [1981] 3 C.N.L.R. at 125.

[79] R. v. George, *supra* note 70, at 279, 55 D.L.R. (2d) at 396-97 (Cartwright J. in dissent); R. v. White, 52 W.W.R. 193, at 236, 50 D.L.R. (2d) 613, at 652 (B.C.C.A. 1964) (Norris J.A.), *aff'd* [1965] S.C.R. vi, 52 D.L.R. (2d) 481; R. v. Cooper, 1 D.L.R. (3d) 113 (B.C.S.C. 1968).

[80] R. v. Taylor, *supra* note 72, at 236, [1981] 3 C.N.L.R. at 123.

[81] *Id.* at 236, [1981] 3 C.N.L.R. at 124.

[82] *See* R. v. Johnston, *supra* note 76.

[83] R. v. Taylor, *supra* note 72, at 237, [1981] 3 C.N.L.R. at 124.

The judicial approach to the interpretation of Indian treaties in the Maritime provinces has differed considerably from that evident in *R. v. Taylor*. Principal treaties with the Indians of the Maritime provinces were directed to the cessation of hostilities between the Indians and the Crown and were signed in 1725, 1752 and 1779. The courts of Nova Scotia and New Brunswick have consistently sought to question the validity and legal force of the treaties and to limit their application. The decisions of those courts in the early 1980's afford only slight distinctions from that pattern. In *R. v. Paul*[84] the New Brunswick Court of Appeal was required to consider the applicability of the provincial Game Act to a descendant of the Miramichi tribe of Micmac Indians claiming the protection of the treaties of 1725, 1752 and 1779. The majority of the Court, in a single sentence of reasoning and conclusion, determined that the treaty of 1725 applied only to the Indians in the province of Massachusetts Bay.[85] The majority affirmed the previous conclusions of the Nova Scotia County Court in *R. v. Syliboy*[86] and the New Brunswick Court of Appeal in *Simon v. The Queen*[87] that the treaty of 1752 "was not made with the Micmac Nation or Tribe as a whole but only with a small group of Micmac Indians inhabiting the eastern part of what is now the Province of Nova Scotia with their habitat in or about the Shubenacadie area".[88] The majority were of the opinion that the appellant had failed to adduce sufficient evidence to show that he was a descendant of the Indians with whom the treaties of 1725 and 1752 were made.[89]

Mr. Justice Ryan appeared to reject the analysis of the majority with respect to the 1752 treaty. His Lordship distinguished *Simon v. The Queen* because "counsel have agreed that the appellant is a descendant of a tribe of Micmac Indians"[90] and thereby implicity rejected the conclusion that the treaty of 1752 was not made with the Micmac Tribe as a whole. He concluded that the appellant was protected by the assurance in the treaty of 1752 of the "free liberty of hunting and fishing as usual" from the application of the provincial Games Act.[91]

The majority recognized the appellant as a beneficiary of the treaty of 1779, which contained the assurance that the Indians would not be molested in their hunting and fishing in the "Districts beforementioned". They, in the absence of "evidence" as to what land constituted "the Districts", confined the ambit of the assurance to the reserves.[92] It is suggested that the text of the treaty could readily be construed as contemplating the entire coast between Cape Tormentire and the Bay de

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[84] 30 N.B.R. (2d) 545, [1981] 2 C.N.L.R. 83, 54 C.C.C. (2d) 506 (1980).
[85] *Id.* at 550, [1981] 2 C.N.L.R. at 87, 54 C.C.C. (2d) at 510.
[86] 50 C.C.C. 389, [1929] 1 D.L.R. 307 (1928).
[87] 43 M.P.R. 101, at 104, 124 C.C.C. 110, at 113 (1958)(McNair C.J.N.B.).
[88] R. v. Paul, *supra* note 84, at 551, [1981] 2 C.N.L.R. at 87, 54 C.C.C. (2d) at 510.
[89] *Id.* at 552, [1981] 2 C.N.L.R. at 88, 54 C.C.C. (2d) at 511.
[90] *Id.* at 560, [1981] 2 C.N.L.R. at 95, 54 C.C.C. (2d) at 517.
[91] *Id.* at 563, [1981] 2 C.N.L.R. at 98, 54 C.C.C. (2d) at 519.
[92] *Id.* at 553-54, [1981] 2 C.N.L.R. at 89-90, 54 C.C.C. (2d) at 511-13.

Chaleun. The conclusion of the majority is consistent with the restrictive approach to the interpretation of Indian treaties adopted by the courts in the Maritime provinces. In the result, the majority held that the appellant was entitled to the protection of the 1779 treaty and the conviction was set aside. All members of the Court recognized that mere treaty assurances affirming pre-existing rights, as opposed to creating new ones, did not deny the limitation upon the application of provincial legislation declared in section 88 of the Indian Act.[93]

Subsequent decisions of the New Brunswick Provincial Court have adopted remarkably divergent approaches; approaches which have been adopted with limited regard for authority. In *R. v. Polchies*,[94] Harper J. concluded:

> The paramount right of survival supercedes both the *B.N.A. Act* and section 88 of the *Indian Act* so as to render most provisions of provincial legislation with relation to hunting game inoperative as against all Indians within the Province of New Brunswick.[95]

Judge Harper construed understandings reached on 24 September 1778, whereby chiefs of the Maliseet and the Micmac promised to make good damage done, refrain from rebelling, and "to follow my hunting and fishing in a peaceable and quiet manner", as a treaty within section 88.[96] His Honour determined that the arrangement rendered inapplicable to the Maliseet and Micmacs most of the provisions of the provincial Fish and Wildlife Act because it "occasioned a guarantee by the British that the Indians could continue to have the right to hunt and fish in the future as they had in the past".[97]

Judge Tomlinson, of the same court, some five weeks later in *R. v. Perley*,[98] offered a yet more remarkable analysis, or lack thereof, and reached very different conclusions. The magistrate offered this view of the need for Indians to hunt or fish for food:

> When the Federal Parliament assumed responsibility for Indians and lands reserved for Indians under section 91(24) of the *B.N.A. Act*, it effectively removed the need for Indians to hunt or fish for food purposes. In fact, the Indian peoples have, through the passage of time, in effect abandoned their ancient life style of hunting and fishing for food purposes and, except for a limited few, do not to any degree pursue this as their lifestyle or for their livelihood. If a usufructuary right existed over 200 years ago, it has effectively been abandoned.[99]

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[93] Such conclusion was applied to confer the protection of the 1752 treaty upon an accused who was recognized as being a descendant of the signatories to the treaty in R. v. Atwin, [1981] 2 C.N.L.R. 99 (N.B. Prov. Ct. 1980).

[94] 37 N.B.R. (2d) 546, 97 A.P.R. 546 (N.B. Prov. Ct. 1981).

[95] *Id.* at 587, 97 A.P.R. at 587.

[96] *Id.* at 582, 586, 97 A.P.R. at 582, 586.

[97] *Id.* at 586, 97 A.P.R. at 586.

[98] 37 N.B.R. (2d) 591, 97 A.P.R. 591 (N.B. Prov. Ct. 1982).

[99] *Id.* at 597, 97 A.P.R. at 597.

In support of such view, Tomlinson J. suggested:

> To uphold the continuance of this right for Indians in addition to rights that have been extended to them since confederation, such a freedom from payment of taxes, the right to vote, the right to purchase, have and consume alcoholic beverages, the rights of mobility, etc. would be tantamount to granting them an additional status not enjoyed by any other citizens.[100]

The magistrate concluded:

> I am of the opinion that the unfettered rights based on aboriginal treaties have been abrogated by the provisions of the *B.N.A. Act* and generally abandoned by the aboriginal peoples as a way of life, particularly in New Brunswick.[101]

The accused were convicted of violations of the provincial Fish and Wildlife Act and the defence founded on "aboriginal treaty rights" rejected.

The judicial reluctance of the courts of the Maritime provinces to accord vitality to the treaties with the Indians was maintained in Nova Scotia in the Court of Appeal in *R. v. Cope*[102] and *R. v. Simon.*[103]

In *R. v. Cope*, four members of the Court declared, *obiter*, that the treaty of 1752 was "a mere acknowledgement of aboriginal rights indistinguishable from the many other temporary Indian peace 'treaties' of that period" and rejected any suggestion that it was a special grant or franchise.[104] The Court also affirmed the conclusion that the treaty was confined to only "a small group of Micmac".[105]

In *R. v. Simon*, the majority of the Court suggested that "[i]t is extremely doubtful whether the *Treaty of 1752* is one within the meaning of s. 88 of the *Indian Act*",[106] apparently because the Indians were not regarded as a sovereign power, the Governor was not authorized to enter into a treaty recognized in international law,[107] and the treaty was a mere "general affirmation of the aboriginal right".[108] This reasoning is inconsistent with the decision of the Supreme Court of Canada in *R. v. White*[109] and of the New Brunswick Court of Appeal in *R. v. Paul.*[110] The majority further concluded that the treaty "terminated automatically and for all time any and all obligations" upon the resumption of hostilities by the Indians of Nova Scotia,[111] because the maintenance of peace was an express condition of the continuance of the obligations. It is to

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[100] *Id.* at 598, 97 A.P.R. at 598.

[101] *Id.* at 600, 97 A.P.R. at 600.

[102] 49 N.S.R. (2d) 555, [1982] 1 C.N.L.R. 23 (1981).

[103] 49 N.S.R. (2d) 566, [1982] 1 C.N.L.R. 118.

[104] *Supra* note 102, at 560, 564, [1982] 1 C.N.L.R. at 27, 30.

[105] *Id.* at 564, [1982] 1 C.N.L.R. at 30.

[106] R. v. Simon, *supra* note 103, at 577, [1982] 1 C.N.L.R. at 128.

[107] *Id.* at 571-72, [1982] 1 C.N.L.R. at 122; and *see* R. v. Syliboy, *supra* note 86, at 395-96, [1929] 1 D.L.R. at 313-14.

[108] *Id.* at 574, [1982] 1 C.N.L.R. at 124.

[109] *Supra* note 79.

[110] *Supra* note 84.

[111] R. v. Simon, *supra* note 103, at 577, [1982] 1 C.N.L.R. at 127.

be observed that it is by no means clear that the text of the treaty can bear such construction and that the borrowing of convenient concepts from international law seems both inappropriate and contrary to the usual Canadian judicial understanding of the treaties with the Indians.[112] The majority finally concluded that the appellant could not claim the protection of the treaty of 1752 because "he has not established any connection by descent or otherwise with the original group of Indians with whom the treaty was made".[113] This conclusion was reached in the face of the admission that the accused was a member of the band descended from those who were parties to the treaty and the assumption, accordingly, of the Provincial Court judge that the accused was "a direct descendant of the parties to the Treaty".[114] Not surprisingly the Supreme Court of Canada granted leave to appeal on 10 May 1982.

In two decisions of British Columbia inferior courts, approaches to treaty interpretation different than those adopted in New Brunswick and Nova Scotia are evident. In *R. v. Bartleman*, the County Court asserted that "any ambiguity. . . should be interpreted in a manner favourable to the Indian people".[115] The Court, however, found that no ambiguity existed, in that it would require an "unnatural straining" of the language of the treaty to conclude that the hunting and fishing rights could extend to lands not surrendered by the treaty but which formed part of their traditional hunting lands.[116] In *R. v. Napoleon*, the Court recited with apparent approval the proposition that "[t]he language used in treaties with Indians should never be used to their prejudice", and referred to the oral assurances the Indians were offered "that they would be as free to hunt and fish after the treaty as they would be if they never entered into it".[117] The Court concluded that a "no-shooting area" one quarter mile wide on each side of a provincial highway was not within the tracts excepted from the guarantee of hunting and fishing rights in Treaty No. 8 as being "required or taken up from time to time for settlement, mining, lumbering, trading or other purposes".[118] The accused was not shown to be hunting on the highway.

In *R. v. August* (argued with *R. v. Bartleman*), the Court had rejected a suggestion that correspondence passing between the provincial government and the members of the Indian Reserve Commission in 1876 and 1877 could constitute a treaty within the meaning of section 88 of the Indian Act.[119]

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[112] Logan v. Styres, [1959] O.W.N. 361, 20 D.L.R. (2d) 416 (H.C.).
[113] R. v. Simon, *supra* note 103, at 578, [1982] 1 C.N.L.R. at 128.
[114] *Id.* at 570, [1982] 1 C.N.L.R. at 120.
[115] [1981] 1 C.N.L.R. 83, at 85.
[116] *Id.* at 86.
[117] [1982] 3 C.N.L.R. 116, at 120, 121 (B.C. Prov. Ct.)(emphasis deleted).
[118] *Id.* at 118, 120-21.
[119] [1980] 1 C.N.L.R. 68, at 77.

3. *In the Absence of Treaty*

The Supreme Court in *Kruger v. The Queen*[120] established that in the absence of a treaty traditional Indian hunting and fishing rights were subject, pursuant to section 88 of the Indian Act, to game legislation that constituted laws of general application in the province. This rule was applied by the Ontario Supreme Court in *R. v. Tennisco* to a member of the Algonquin tribe which had not surrendered its aboriginal rights to hunt and fish.[121] A conviction was entered against the accused under the provincial Game and Fish Act.[122] Counsel for the accused also sought to rely upon the acceptance of the Royal Proclamation 1763 by the Algonquin as constituting a treaty within section 88. Mr. Justice Griffiths applied the reasoning of the British Columbia Court of Appeal in *R. v. Kruger*[123] and rejected the argument, asserting that "[t]he Proclamation remained a unilateral act of the Crown, offering rights and protections to the Indians dependent upon the goodwill of the Crown".[124]

Aboriginal hunting and fishing rights not ceded or regulated by treaty were asserted by the Ontario Divisional Court in *R. v. Taylor*[125] to have an existence "independent of section 88" in areas subject to the Royal Proclamation 1763. Mr. Justice Mackinnon for the Ontario Court of Appeal commented that:

> I have serious reservations as to the correctness of their view of the Royal Proclamation and its relationship to s. 88 of the *Indian Act* and I am not to be taken as agreeing with the members of the Divisional Court on this particular point.[126]

A reason why provincial game laws might not apply to infringe traditional hunting and fishing rights in the absence of a treaty was suggested by Dickson J. in *Kruger v. The Queen*:

> If, of course, it can be shown in future litigation that the Province has acted in such a way as to oppose conservation and Indian claims to the detriment of the latter — to "preserve moose before Indians" in the words of Gordon J.A. in *R. v. Strongquill* — it might very well be concluded that the effect of the legislation is to cross the line demarking laws of general application from other enactments. It would have to be shown that the policy of such an Act was to impair the status and capacities of Indians. Were that so, s. 88 would not operate to make the Act applicable to Indians. But that has not been done here and in the absence of clear evidence the Court cannot so presume.[127]

In *R. v. Haines*[128] the accused was charged with having killed a moose during the closed season contrary to the Wildlife Act[129] of British

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[120] *Supra* note 70.
[121] 64 C.C.C. (2d) 315, [1981] 4 C.N.L.R. 138.
[122] R.S.O. 1970, c. 186.
[123] [1975] 5 W.W.R. 167, 60 D.L.R. (3d) 144.
[124] R. v. Tennisco, *supra* note 121, at 324, [1981] 4 C.N.L.R. at 148.
[125] *Supra* note 73, at 179, [1980] 1 C.N.L.R. at 91.
[126] *Supra* note 72, at 237, [1981] 3 C.N.L.R. at 125.
[127] *Supra* note 70, at 112, 34 C.C.C. (2d) at 382, 75 D.L.R. (3d) at 439-40.
[128] 8 B.C.L.R. 211, [1978] 4 C.N.L.B. 135 (Prov. Ct.).
[129] S.B.C. 1966, c. 55.

Columbia. Regulations made under the Act provided for the issuance of permits to hunt in the closed season to residents "when in actual need for sustenance". The Provincial Court judge found that the regional policy adopted in the issuance of such permits was "designed to 'virtually eliminate all sustenance permits' and it specifically ignores any special rights of native Indians".[130] The learned judge concluded that the traditional hunting rights of the Indians were still extant and accordingly that the provincial officials "have purported to 'impair the status and capacities of Indians'."[131] The accused was acquitted.

On appeal, the County Court[132] rejected the finding of unextinguished aboriginal hunting rights because the evidence of band members was "too frail" and because the Provincial Court judge had relied upon his own private research amongst published and unpublished works. The Court was "unable to say that there was no evidence on which the learned judge could reach" his conclusion as to the policy pursued under the Act.[133] But County Court Judge Perry determined that "such guidelines or 'policy' have no constitutional force in determining the validity of legislation". His Honour concluded that in any event the evidence had not shown "that to restrict the respondent's hunting activities to the open season (with an added right to apply for an out-of-season permit) has impaired his status as an Indian".[134] He suggested that the necessary proof of what constituted an incident of Indian status should be as detailed and extensive as the establishment of aboriginal title to land. The Court thus allowed the Crown appeal.

The British Columbia Court of Appeal[135] dismissed a further appeal holding that the Offence Act[136] required that any appeal involve a question of law alone, and that the findings of the County Court which were being challenged were primarily matters of fact. The Court of Appeal did not comment upon what would need to be shown to establish that traditional hunting was an incident of the status of an Indian, but its approach effectively affirmed the restrictive understanding of the County Court.

It is suggested that Dickson J. in *Kruger v. The Queen*[137] assumed that traditional hunting rights were an incident of Indian status and that the problem of proof faced by an Indian accused would be the degree of impairment, *not* the relationship of such rights to Indian status. The Provincial Court judge had found that the provincial officials were seeking to "preserve moose before Indians", a finding which the reviewing courts did not overturn. It is suggested that, on the basis of *Kruger v. The Queen*, the Court of Appeal should have considered that this finding

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[130] R. v. Haines, *supra* note 128, at 216, [1978] 4 C.N.L.B. at 140.
[131] *Id.* at 225, [1978] 4 C.N.L.B. at 149.
[132] 20 B.C.L.R. 260, [1981] 1 C.N.L.R. 87 (1980).
[133] *Id.* at 266, 272, [1981] 1 C.N.L.R. at 92, 101.
[134] *Id.* at 273, 274, [1981] 1 C.N.L.R. at 102, 103.
[135] 34 B.C.L.R. 148, [1982] 2 C.N.L.R. 135 (1981).
[136] R.S.B.C. 1979, c. 305, s. 114.
[137] *Supra* note 70.

required an examination of the degree of incapacity which might render the legislation inapplicable pursuant to section 88 of the Indian Act. Further, the policy pursued by officials under the regulations should have been contrasted with the "policy" of an enabling Act.

The decision of the County Court in *Haines* was followed in *R. v. Tenale.*[138] Judge Andrews recognized the "graver consequence" to the Indian accused than to others arising from the enforcement of provincial game legislation, and that the policy of such legislation was having a greater impact upon the accused than at the time of the *Kruger* and *Haines* cases. The learned judge observed, however, that the policy of the legislation remained the same as when those decisions were reached and dismissed the appeal against conviction.

The principles examined in *R. v. Haines* required the attention of the British Columbia Court of Appeal most recently in *R. v. Jack.*[139] The appellants were convicted of shooting a deer out of season. They had shot the deer as part of, and for use in, a religious ceremony practised by the Coast Salish people. The majority of the Court of Appeal rejected the argument that the application of the Wildlife Act in such circumstances impaired the capacity of the appellants as members of the Salish tribe. Mr. Justice Craig would not even grant leave to appeal upon such argument because "it depends on evidence and therefore is not a question of law alone".[140] Mr. Justice Taggart would grant leave but dismissed the argument because "there is no evidence before us of a legislative policy to impair the capacity of Indians in the manner contended".[141] The majority also rejected the argument that the legislation could not be applied so as to deny the right of the appellants to practise their religious beliefs. Messrs. Justice Taggart and Craig held that freedom of religion must be exercised in accordance with the general law. Mr. Justice Hutcheson dissented and declared that "the Wildlife Act ought to be read so as to acknowledge the right of Jack and Charlie on these facts to practise their religion". Relying upon *Gay Alliance Toward Equality v. Vancouver Sun,*[142] the learned judge observed that "[t]he ritual is not harmful to society, is not opposed to the common good and is not in violation of the rights of any other individual".[143] It may be observed that the application of the Canadian Charter of Rights and Freedoms in such circumstances suggests a different result from that arrived at by the Court of Appeal.[144]

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[138] 66 C.C.C. (2d) 180, [1982] 3 C.N.L.R. 167 (B.C. Cty. Ct.).

[139] 37 B.C.L.R. 238, [1982] 4 C.N.L.R. 99.

[140] *Id.* at 250, [1982] 4 C.N.L.R. at 112.

[141] *Id.* at 246, [1982] 4 C.N.L.R. at 107.

[142] [1979] 2 S.C.R. 435, 97 D.L.R. (3d) 577.

[143] R. v. Jack, *supra* note 139, at 250, 253, [1982] 4 C.N.L.R. at 112, 115.

[144] *See* People v. Woody, 394 P.2d 813 (Cal. S.C. 1964); Sherbert v. Verner, 374 U.S. 398 (1963).

B. *Federal Legislation and Controls*

1. *The Prairie Provinces*

Since the 5-4 majority decision of the Supreme Court in *Daniels v. White*,[145] it has been established that the protection afforded Indians whilst hunting for food does not extend to federal regulation. In that case, a conviction under the Migratory Birds Convention Act of an Indian hunting for food in Manitoba was upheld. In *R. v. Settee* the Saskatchewan Court of Appeal followed the decision "with reluctance" and chose to comment that the judgement in *Daniels v. White* "could be altered only if reconsidered by the Supreme Court".[146]

The Supreme Court showed no desire to reconsider the decision in *Daniels v. White* in *Elk v. The Queen*.[147] The Court denied the protection of the proviso protecting Indians hunting for food to an Indian fishing for food in Manitoba who was charged under the federal Fisheries Act.

2. *In Spite of Treaty*

In *R. v. George* the Supreme Court of Canada declared that "it was not the purpose of s. [88 of the Indian Act] to make any legislation of the Parliament of Canada subject to the terms of any treaty".[148] In *R. v. Cope* the Nova Scotia Court of Appeal applied this principle to rule that the appeal from a conviction under the federal Fisheries Act must be dismissed despite the appellant's reliance on the treaty of 1752 "[e]ven if the so-called treaty had conferred the special rights which counsel for the appellant claims".[149] Similar conclusions were reached by the New Brunswick Queen's Bench in *R. v. Sacobie*,[150] *R. v. Saulis*,[151] and *R. v. Perley*,[152] in accordance with the New Brunswick Court of Appeal decision in *R. v. Nicholas*.[153]

3. *In the Absence of Treaty*

If treaty rights to hunt and fish do not avail an accused charged under federal legislation, *a fortiori*, the assertion of traditional rights to hunt and fish, whether supported by aboriginal title or not, does not afford a defence.[154] In *R. v. Curley*,[155] the Territorial Court of the North

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[145] [1968] S.C.R. 517, 2 D.L.R. (3d) 1.
[146] [1981] 4 W.W.R. 377, at 378, [1981] 4 C.N.L.R. 136, at 137 (Culliton C.J.S.).
[147] [1980] 2 S.C.R. 166, 114 D.L.R. (3d) 137.
[148] *Supra* note 70, at 280, 55 D.L.R. (2d) at 397.
[149] *Supra* note 102, at 560, [1982] 1 C.N.L.R. at 27.
[150] 30 N.B.R. (2d) 70, [1981] 2 C.N.L.R. 115 (1980).
[151] 30 N.B.R. (2d) 146, [1981] 2 C.N.L.R. 121 (1980).
[152] 34 N.B.R. (2d) 632, [1982] 2 C.N.L.R. 185 (1981).
[153] 26 N.B.R. (2d) 54, [1981] 2 C.N.L.R. 114 (1979).
[154] Derriksan v. The Queen, [1976] 2 S.C.R. v, [1976] 6 W.W.R. 480, 71 D.L.R. (3d) 159.
[155] [1982] 2 C.N.L.R. 171.

West Territories convicted an Inuit hunter of failing to notify a wildlife officer of the wounding of a polar bear under the Territories Wildlife Ordinance. Mr. Justice Ayotte asserted that:

> I take it to be undisputed that, while on the present state of the authorities the aboriginal right and title of the Inuit to hunt and fish on the lands in question has not been extinguished, it is still within the competence of the Parliament of Canada, again acting either directly or indirectly by means of validly delegated legislation, to abridge those rights.[156]

His Lordship cited *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*[157] to support his conclusions.

4. *The Indian Act is No Bar*

Paragraph 73(1)(*a*) of the Indian Act provides that the Governor in Council may make regulations "for the protection and preservation of fur-bearing animals, fish and other game on reserves". Paragraph 81(*o*) provides that a band council, subject to the Act and regulations made thereunder, may make by-laws for "the preservation, protection and management of furbearing animals, fish and other game on the reserve".[158]

In *Cardinal v. Attorney General of Alberta*, the Supreme Court of Canada held that the Constitution Act, 1930 applied provincial game legislation to Indians on reserves in the Prairie provinces "notwithstanding anything contained in. . . any Federal statute".[159]

In 1977 it was argued that the enabling provisions of the Indian Act, paragraphs 73(1)(*a*) and 81(*o*), barred the application of the federal Fisheries Act[160] and Regulations to Indians fishing on Indian reserves. The British Columbia Court of Appeal rejected the argument in *R. v. Billy*,[161] relying upon *Sikyea v. The Queen*,[162] *R. v. George*[163] and *Derriksan v. The Queen*,[164] and asserted that the language of the Fisheries Regulations admitted of no exceptions whether in favour of Indians or not and whether the offence was committed on or off a reserve. The Court also suggested that a "complete answer" was that there was no inconsistency between the Fisheries Act and Regulations and the Indian Act because no regulations or by-laws had been made under the latter Act.[165]

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[156] *Id.* at 174.
[157] [1980] 1 F.C. 518, [1979] 3 C.N.L.R. 17 (Trial D. 1979).
[158] R.S.C. 1970, c. I-6.
[159] [1974] S.C.R. 695, at 710, 40 D.L.R. (3d) 553, at 564 (1973).
[160] R.S.C. 1970, c. F-14.
[161] [1982] 1 C.N.L.R. 99 (1977).
[162] [1964] S.C.R. 642, [1965] 2 C.C.C. 129 (1964).
[163] *Supra* note 70.
[164] *Supra* note 154.
[165] R. v. Billy, *supra* note 161, at 101.

The decision in *Billy* was followed by the New Brunswick Queen's Bench in *R. v. Sacobie*,[166] *R. v. Saulis*[167] and *R. v. Perley*,[168] the latter case concerning fishing on a reserve. The Court in *R. v. Sacobie* relied upon *R. v. George* in particular and commented that although the argument "does not in the *George* case appear to have been explicitly considered, the court must be considered as having had within its contemplation all relevant legislative provisions".[169] In none of those cases had any regulations or by-laws been made under the Indian Act.

In *R. v. Sands*[170] the accused was charged with taking and having migratory birds out of season in violation of the Migratory Birds Regulations promulgated under the Migratory Birds Convention Act.[171] The accused was a member of the Walpole Island Indian band and was hunting on the reserve. The band had enacted a by-law under paragraph 81(*a*) providing for the protection and management of fish and game of the reserve. The by-law stated that except as otherwise provided, open season, possession limits and all other matters pertaining to ducks shall be as set out in the provincial regulations made pursuant to the Migratory Birds Convention Act. The accused argued that he should have been charged under the by-law, which superseded the Migratory Birds Regulations on the reserve. He suggested that the by-law in force distinguished his case from *R. v. George*. The Provincial Court judge rejected the argument upon a confused understanding of Martland J.'s remarks in *R. v. George* with respect to section 88 of the Indian Act. He concluded that "it is only provincial laws which are affected by the powers given in the Indian Act, to pass bylaws which are inconsistent to such provincial laws and would allow such inconsistencies to prevail over the provincial law". The accused was convicted.

5. *The Terms of Union of British Columbia with Canada*

Article 13 of the Terms of Union provides:

> 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.[172]

In *Jack v. The Queen*, Chief Justice Laskin, with whom seven members of the Supreme Court concurred, declared that he could "see nothing in art. 13 that could possibly operate as an inhibition on federal legislative power in relation to fisheries".[173] The Chief Justice concluded that "the

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[166] *Supra* note 150.
[167] *Supra* note 151.
[168] *Supra* note 152.
[169] R. v. Sacobie, *supra* note 150, at 75, [1981] 2 C.N.L.R. at 119.
[170] Unreported, Ont. Prov. Ct., 1 Sep. 1981.
[171] R.S.C. 1970, c. M-12.
[172] R.S.C. 1970 Appendix, Const. Acts and Amendments No. 10.
[173] [1980] 1 S.C.R. 294, at 299, 100 D.L.R. (3d) 193, at 196 (1979).

claim of fishing rights made here cannot be found" in the references to the "charge of the Indians" or "the trusteeship and management of the lands reserved for their use and benefit", and the reference to "a policy as liberal" was "connected" to such references.[174] In *R. v. Adolph*,[175] the Provincial Court judge founded an acquittal upon the notion that the Chief Justice's remarks were *obiter*, and purported to rely on the guidelines suggested for constitutional review by Dickson J. in the only other judgment delivered in *Jack*. Mr. Justice Dickson had construed the word "policy" as referable to "a broad general policy. . . affecting Indians and lands reserved for their use", and that "Indian fishing was an essential element of both 'the charge of Indians' and 'the trusteeship and management of the lands reserved for their use and benefit'."[176] The British Columbia County Court[177] allowed the Crown appeal in *Adolph* and expressly rejected the lower court's analysis of *Jack*.

6. *The Validity of the Fisheries Regulations*

Challenges to the validity of the federal Fisheries Regulations have been successful when founded upon arguments other than especial Indian rights. In *R. v. Starr*[178] a British Columbia Provincial Court judge ruled that the failure to publish the British Columbia Nontidal Water Sports Fishing Order in the Canada Gazette, being a statutory instrument, was fatal to a charge of a violation thereof. Such conclusion was, in *obiter dicta*, approved by the County Court in *R. v. Tenale*.[179] The Court in that decision ruled that the regulation under which the Order was made was invalid inter-delegation representing "a total divesting and abdication of jurisdiction by the federal authorities over inland fisheries" and invalid sub-delegation as being beyond the authority conferred by the enabling Fisheries Act.[180]

A case where the Northwest Territories Fisheries Regulations were asserted to be contrary to the Canadian Bill of Rights on account of the right accorded native people to fish for food was *R. v. Rocher*.[181] Mr. Justice Ayotte ruled that the Regulation did "not create an offence one of the essential elements of which is membership in a certain race. The fact that an exemption is available *some* of the time to *some* members of *some* racial groups in *some* circumstances is not, in my view, sufficient reason to hold that the Regulations therefore discriminate by reason of race".[182]

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[174] *Id.* at 298-99, 100 D.L.R. (3d) at 196-97.
[175] [1982] 2 C.N.L.R. 149 (B.C. Prov. Ct. 1980).
[176] Jack v. The Queen, *supra* note 173, at 302, 308, 100 D.L.R. (3d) at 199, 203.
[177] 64 C.C.C. (2d) 134, [1982] 3 C.N.L.R. 63 (1981).
[178] [1982] 3 C.N.L.R. 135 (1981).
[179] *Supra* note 138.
[180] *Id.* at 185, [1982] 3 C.N.L.R. at 171.
[181] [1982] 3 C.N.L.R. 122 (N.W.T. Terr. Ct.).
[182] *Id.* at 128 (emphasis added).

II. THE TREATIES

Recent judicial approaches to the nature and interpreation of the treaties with the Indians are to some extent indicated in the hunting, fishing and trapping cases described above. In *R. v. Taylor*[183] the Ontario Court of Appeal determined that oral discussions preceding the signing of a treaty may constitute part of the terms of a treaty and resolved that ambiguities should be construed in favour of the Indians. In *R. v. Paul*[184] the New Brunswick Court of Appeal, and in *R. v. Simon*[185] and *R. v. Cope*,[186] the Nova Scotia Court of Appeal maintained traditional restrictive approaches to the legal effect of the Maritime treaties. Other cases significant to the nature and interpretation of the treaties also arose outside the context of hunting, fishing and trapping.

A. *The Patriation Cases*

The cases associated with the "repatriation" of the Canadian Constitution are of particular interest. In *The Queen v. Secretary of State for Foreign and Commonwealth Affairs*,[187] the applicant Indian organizations sought a declaration in the English Court of Justice, Queen's Bench Division "that treaty and other obligations entered into by the Crown to the Indian peoples of Canada are still owed by Her Majesty in right of Her Government in the United Kingdom". The application was refused and the applicants appealed to the Court of Appeal. The Court of Appeal[188] dismissed the appeal ruling that, at the latest, by the time of the Statute of Westminster, 1931, the obligations of the Crown under the treaties were solely the responsibility of the Crown in right of Canada.

The reasons offered by the Court were varied and not entirely clear. Lord Denning M.R. declared that the treaties entered into up to the end of the nineteenth century were entered into by "the single and indivisible Crown — which was at that time the Crown of the United Kingdom" and that the obligations up to that time were the obligations of the Crown of the United Kingdom. The Master of the Rolls considered that in the first quarter of the twentieth century the Crown "became separate and divisible" by "constitutional usage and practice". The learned judge concluded that the "obligations under the [Royal] Proclamation and the treaties are obligations of the Crown in respect of Canada". Since the Crown Proceedings Act of the United Kingdom permits actions only with respect to liabilities of the Crown in right of the United Kingdom, "[i]t is. . . not permissible for the Indian peoples to bring an action in

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[183] *Supra* note 72.

[184] *Supra* note 84.

[185] *Supra* note 103.

[186] *Supra* note 102.

[187] [1982] 2 W.L.R. 641, [1981] 4 C.N.L.R. 86 (C.A. 1982) (hereafter referred to as the *Alberta* case).

[188] *Id.*

this country to enforce these obligations. Their only recourse is in the courts of Canada".[189] Lord Justice Kerr declared that "it is clear that right and obligations of the Crown will arise exclusively in right or respect of any government outside the bounds of the United Kingdom as soon as it can be seen that there is an established government of the Crown in the overseas territory in question". The learned judge concluded that "[i]n relation to Canada this had clearly happened by 1867". Lord Justice Kerr thus considered that the "numbered" treaties of the Prairies were not entered into by the Crown in right of the United Kingdom, but the Crown in right of Canada. He incidentally observed that "although the relevant agreements with the Indian peoples are known as 'treaties', they are not treaties in the sense of public international law. They were not treaties between sovereign states".[190]

Lord Justice May used the same authorities as Kerr L.J. but more cautiously concluded "that any treaty or other obligations which the Crown had entered into with the Indian peoples of Canada in right of the United Kingdom had become the responsibility of the Government of Canada with the attainment of independence, at the latest with the Statute of Westminster, 1931".[191] His Lordship went on to consider if the treaty obligations were ever owed by the Crown in right of the United Kingdom, and concluded with respect to Treaty No. 6, as representative of the numbered treaties, that the rights were granted by the Crown in right of Canada; not the Crown in right of the United Kingdom. He relied on the terms of the treaty that provided for cession of Indian title and the administration of the reserves by the Government of Canada, and the fact that at the time of the treaties the lands were vested in the Dominion.

Two members of the Court considered the status of the Maritime treaties. Lord Denning M.R. appeared to consider that the treaty of 1752 was superseded by the Royal Proclamation 1763. Lord Justice May considered that he could not "agree" that the Indian peoples obtained rights against the English Crown under the Maritime treaties as "they were merely articles of submission". His Lordship did acknowledge that the treaties of 1752 and 1794 might be said to have granted something to the Indians, but concluded "that it is impossible to say to what, if anything, they relate in a context 200 years after they were made".[192]

Leave to appeal to the House of Lords was refused, and a further application to the Appeal Committee of the House of Lords for leave to appeal was also refused. Five members of the Appeal Committee sat. Lord Diplock declared for the Committee that: "[F]or the accumulated reasons given in the judgment of the Court of Appeal, it simply is not arguable that any obligations of the Crown in respect of the Indian

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[189] *Id.* at 650-53, [1981] 4 C.N.L.R. at 96-98.
[190] *Id.* at 655, 661, [1981] 4 C.N.L.R. at 101, 108.
[191] *Id.* at 667, [1981] 4 C.N.L.R. at 115.
[192] *Id.*

peoples of Canada are still the responsibility of Her Majesty's government in the United Kingdom. They are the responsibility of Her Majesty's government in Canada, and it is the Canadian courts and not the English courts that alone have jurisdiction to determine what those obligations are."[193]

On 18 February 1982 the Indian Chiefs of Saskatchewan, upon behalf of themselves and all members of Indian bands in Saskatchewan, served a statement of claim upon the Crown in right of the United Kingdom seeking declarations that the treaties remained in full force and effect and binding upon the Crown in right of the United Kingdom, that trusts were created thereby, that the treaties constituted "Treaties properly so-called", and that the Crown in right of the United Kingdom was in wrongful repudiation of the treaties. It was sought to distinguish the *Alberta* case by asserting that the Treaty Commissioner offered assurances that they were acting solely upon behalf of the Crown in right of the United Kingdom and that the treaties would remain binding upon the Crown in right of the United Kingdom until assigned or abrogated with the consent of the Indians. On 7 May 1982 Vice Chancellor Megarry struck out the statement of claim as disclosing no reasonable cause of action.[194] Megarry V.C. described the words of Lord Diplock as "singularly emphatic" and rejected the suggested distinctions from the *Alberta* case, asserting that the alleged assurances could not preclude sovereignty and associated obligations being transferred from the Crown in right of the United Kingdom to the Crown in right of Canada.

B. *Interpretation*

The only case that arose with respect to the interpretation of a treaty outside of the context of hunting, trapping and fishing was *R. v. Blackfoot Band of Indians.*[195] The Federal Court was required by agreement amongst five Indian bands to determine if the $2,000 *per annum* promised for expenditure upon ammunition in Treaty No. 7 should be distributed upon a *per capita* or *per stirpes* (the bands) basis. Mr. Justice Mahoney commented upon the view of Chief Nelson Small Legs Sr. that the parties should not have had recourse to lawyers and the courts, observing that "[h]e made the point, and it is not a bad one, that the chiefs have to live with their people, while their lawyers do not".[196] His Lordship considered himself, however, bound to determine the method of distribution and did so by reference only to the purpose and language of the ammunition clause and the remaining clauses of Treaty No. 7. He concluded that the language of the treaty indicated that it was made between the Crown and all "Indian inhabitants" of the area, whether members of the five bands or not. Mahoney J. referred to the cash

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[193] *Alberta* case, [1982] 2 W.L.R. 670, at 671, [1982] 3 C.N.L.R. 195, at 195.
[194] Manuel v. A.G., [1982] 3 W.L.R. 821, [1982] 3 C.N.L.R. 13 (Ch.).
[195] [1982] 4 W.W.R. 230, [1982] 3 C.N.L.R. 53 (F.C. Trial D.).
[196] *Id.* at 236, [1982] 3 C.N.L.R. at 59-60.

settlements, the right to hunt and the treaty money as all being owed to individual Indians, not bands. He commented that "[i]t was Indians, not bands, who ceded the territory to Her Majesty", a conclusion that may be consistent with the language of the treaty but is not necessarily in accord with the communal interest in aboriginal title which was ceded. With respect to the ammunition clause itself, he observed that "[r]eason dictates that the ammunition would have been allocated among the hunters of different bands on a more or less per capita basis". Mr. Justice Mahoney concluded that the "standard of the treaty is consistent in treating individual Indians equally and bands in proportion to their populations" and accordingly held that distribution should be on a *per capita* basis.[197]

C. *The James Bay and North Eastern Quebec Agreements*

The James Bay Agreement was approved by federal and provincial legislation,[198] which provided that it would prevail over any other Act applicable to the territory described in the Agreement to the extent necessary to resolve the conflict or inconsistency. The North Eastern Quebec Agreement was approved by federal order in council, in accordance with the federal legislation respecting the James Bay Agreement, and by provincial legislation.[199]

The assumption of provincial authority in the implementation of the Agreements has been attended by some opposition. On 3 June 1981 the Federal Court of Appeal[200] rejected an application for injunctive relief against the Crown in right of Canada arising from the cessation of the supply of social services by the Government of Canada. The Court maintained the traditional immunity of the Crown from such a form of relief. Court challenges have been successful with respect to Quebec regulations and orders which were alleged to be inconsistent with the Agreements and the implementing legislation. The hunting, trapping and fishing conditions of the James Bay and North Eastern Quebec Agreements were enacted in a provincial statute entitled "An Act respecting hunting and fishing rights in the James Bay and New Quebec territories".[201] The Agreements and the Act conferred a right of first refusal upon the Indian and Inuit people with respect to the operation and establishment of outfitting facilities. By way of limitation this right was not exercisable with respect to three non-native applications out of every ten applications made by all persons. Regulations made under the Act conferred upon the Minister of Hunting and Fishing the right to

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[197] *Id.* at 238-39, [1982] 3 C.N.L.R. at 61-62.

[198] S.C. 1976-77, c. 32; S.Q. 1976, c. 46.

[199] S.Q. 1978, c. 98; P.C. 1978-502, 23 Feb. 1978.

[200] Grand Council of the Crees v. The Queen, [1982] 1 F.C. 599, [1982] 2 C.N.L.R. 81, 124 D.L.R. (3d) 574 (App. D. 1981).

[201] S.Q. 1978, c. 92 *as amended.*

designate which three applications should not be subject to the right of first refusal. The Quebec Superior Court declared regulations so made to be "illegal, null and ultra vires" in *Naskapis de Schefferville Band v. Procureur General du Quebec*.[202] Mr. Justice Savoie held that the right to decide when the right of first refusal shall be exercised belongs under the Act exclusively to the Indian and Inuit peoples.

In *Commission Scolaire Kativik v. Procureur General du Quebec*,[203] an order issued under provincial legislation authorizing the operation of schools by the Province was declared "illegal, null, void, invalid and of no effect" as being contrary to legislation which sought to implement the James Bay Agreement. Mr. Justice Hannan of the Quebec Superior Court observed:

> Throughout the Baie James Agreement and the consequential legislation adopting and enforcing its terms there is to be found the intention of the legislature to ensure the survival of the cultural heritage of the indigenous peoples who are contractants to the Agreement ratified and confirmed by the Legislature.[204]

His Lordship adopted a "fair, large and liberal construction" of the implementing legislation and concluded that the Province was not empowered to operate nursery, elementary or secondary schools in the region. The petitioner had urged that the James Bay Agreement was of its essence, a "treaty" and as such that in case of doubt it should be construed in favour of the indigenous citizens, and against government and its representatives. Mr. Justice Hannan observed that he did not consider it necessary to decide such issues.

III. Reserve Lands

A. *Establishment*

Upon the establishment of an Indian reserve, statutory protections from alienation and abuse arise. The requirements for the establishment of a reserve are accordingly of considerable significance in claims for parts alienation of reserve lands which are now being pressed. It has been suggested that a reserve was set apart on the Prairies by survey and selection of the lands following such consultation as was required by treaty.[205] In the absence of treaties providing for the establishment of reserves, recent decisions have suggested the requirement of more formal procedures in the Maritimes. In *R. v. Smith*[206] the Federal Court of Appeal referred to a reserve, which had been *de facto* recognized in

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[202] [1982] 4 C.N.L.R. 82 (1981).

[203] [1982] 4 C.N.L.R. 54 (Que. S.C.).

[204] *Id.* at 76.

[205] *See* Bartlett, *The Establishment of Indian Reserves on the Prairies*, [1980] 3 C.N.L.R. 3.

[206] [1981] 1 F.C. 346, [1980] 4 C.N.L.R. 29, 113 D.L.R. (3d) 522 (1980).

1783, as not having been "formally established" until the Executive Council of New Brunswick approved the issuance of a licence of occupation to the Indians in 1808 upon the basis of a survey in 1804.[207] In *Canadian Pacific Ltd. v. Paul*[208] the plaintiff sought an injunction to restrain members and the council of the Woodstock Indian Band from interfering with its use of a railway right-of-way crossing the Woodstock Reserve in New Brunswick. The defendants asserted that the lands subject to the alleged right-of-way were part of the reserve and had never been surrendered. The reserve lands were purchased by the Crown in right of New Brunswick in 1851 by a deed which recited that the purchase was for "public uses: that is to say, for the use of the Melicette Tribe of Indians". The habendum clause included the words "unto Her Majesty. . . for the uses and purposes set forth and explained in the above recital. . . or for such other Public uses and purposes as to Her Majesty. . . may be graciously pleased to apply the same".[209] The lands were thereupon *de facto* allotted to the Indian tribe. The New Brunswick Queen's Bench determined that such acts were ineffective to appropriate the lands and concluded that the lands were not "formally allocated" prior to Confederation. The recitals and statements in the 1851 deed were discounted because of the reference to "other public uses and purposes". Mr. Justice Dickson also relied on the suggested "practice of the Crown in New Brunswick by formal act to appropriate lands as reserves, where such was intended".[210] In the result, since the learned judge held that the right-of-way had been allocated by legislation in 1864 and 1865, an injunction was issued.

It is suggested that *de facto* occupation and recognition of the establishment of a reserve, where supported by such documentary evidence, should not be so readily rejected. The reliance on suggested Crown practice must be misplaced where no real evidence of such is provided and contrary *dicta*[211] are available. The difficulty with the analysis of the Court in *Canadian Pacific Ltd. v. Paul* is made manifest by the absence in the case of the Woodstock Reserve of *any* formal act setting apart the lands, and clearly the denial of the acquisition of such status to the lands at any time is untenable.

As an alternative ground for the decision, Dickson J. determined that the 1864 and 1865 legislation providing for the right-of-way applied "within reserves as to any other lands". The learned judge considered that the provisions of the provincial Indian Reserves Acts[212] were not intended to bar such allocation. Mr. Justice Dickson observed that the

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[207] *Id.* at 355, [1980] 4 C.N.L.R. at 35, 113 D.L.R. (3d) at 529.

[208] 34 N.B.R. (2d) 382, [1981] 4 C.N.L.R. 39 (Q.B.).

[209] *Id.* at 387, [1981] 4 C.N.L.R. at 43.

[210] *Id.* at 403, [1981] 4 C.N.L.R. at 56.

[211] *See* Warman v. Francis, 43 M.P.R. 197, at 202 (N.B.Q.B. 1958).

[212] An Act to Regulate the Management and Disposal of the Indian Reserves, S.N.B. 1844, c. 47, *repealed by* Of the Promulgation and Repeal of Statutes, R.S.N.B. 1854, c. 162.

"tenor" of legislation "indicates that the right of the Crown to deal with reserves was in effect unfettered, particularly where the development of the colony was concerned" and that it was accordingly "inconceivable that the Legislature should not have intended" the railway companies to acquire the disputed right-of-way.[213]

B. *Title to and Interests in Reserve Lands*

The courts have traditionally chosen in *obiter* remarks to characterize the nature of the Indian band interest in reserve lands in the manner of Indian title at common law, and accordingly to describe it as a "personal and usufructuary right".[214] Recent decisions have affirmed such approach. In *R. v. Smith*, the Federal Court of Appeal described the Indian interests as "personal and usufructuary in nature".[215] And in the *Alberta* case, Lord Denning M.R. *en passant* described the Indian peoples as having retained in the reserves "their 'personal and usufructuary right' to the fruits and produce of the lands".[216]

Such *obiter* remarks are misleading and fail to take account of the provisions of the Indian Act, the federal-provincial agreements with most provinces and the manner of establishment of particular reserves. It is accordingly with some appreciation that it is noted that the Alberta Court of Appeal, when considering the "nature of a reserve" in *Re Stony Plain Indian Reserve No. 135*,[217] refrained from describing the Indian interest in a reserve in Alberta as other than "Indian title" or "Indian interest". The Court of Appeal did offer a suggestion as to whether the underlying title to reserve lands in the Prairie provinces vests in the Crown in right of the province or in right of the Dominion. The somewhat theoretical problem had not previously received judicial consideration. The Court concluded that the effect of clause 1 of the Natural Resources Transfer Agreements, which refers to the provinces being "in the same position as the original Provinces of Confederation", was to transfer the underlying title to the provinces. The interest "vested" in Canada under clause 10 was considered to be merely a "limited interest held by the Crown in order to enable the government of Canada to exercise its authority to administer reserve lands for the benefit of the Indians".[218] The *dicta* of the Court indicates that no transfer of title to land to Canada is required by the Prairie provinces in the establishment of reserves after 1930, and the absence of such transfer cannot of itself preclude a reserve coming into being.

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[213] Canadian Pacific Ltd. v. Paul, *supra* note 208, at 402, [1981] 4 C.N.L.R. at 56.

[214] *See* A.G. Que. v. A.G. Can., [1921] 1 A.C. 401, 56 D.L.R. 373 (P.C. 1920); Isaac v. Davey, 5 O.R. (2d) 610, at 620, 51 D.L.R. (3d) 170, at 180 (C.A. 1974); R. v. Isaac, 13 N.S.R. (2d) 460, at 477, 9 A.P.R. 460, at 477 (C.A. 1975).

[215] *Supra* note 206, at 373, [1980] 4 C.N.L.R. at 51, 113 D.L.R. (3d) at 544.

[216] *Supra* note 187, at 650, [1981] 4 C.N.L.R. at 96.

[217] [1982] 1 W.W.R. 302, [1982] 1 C.N.L.R. 133 (1981).

[218] *Id.* at 316, [1982] 1 C.N.L.R. at 146.

Of passing interest is the United States District Court decision in *St. Regis Band of Mohawk Indians v. Reynolds Metals Co.*,[219] which held that the band had a sufficient "possessory title" to reserve land to maintain an action in nuisance in New York state.

C. *Trusteeship of Reserve Lands*

It has often been asserted that reserve lands are held upon an express trust by the Crown for the benefit of the Indians.[220] Such affords the basis for an action for breach of trust. In *Kruger v. The Queen*,[221] the Penticton band asserted that the Crown "failed to exercise the degree of care, stewardship and prudent management required of a trustee in the management of trust assets" upon the expropriation of reserve lands for the construction of the Penticton airport. The lands were expropriated in 1940 and 1943 under what is now section 35 of the Indian Act against the wishes of the band members. The compensation paid was so low as to be described as "ridiculous" from the "vantage point of 1981" by Mahoney J. of the Federal Court.[222] Section 35 provides for expropriation of reserve lands for public works upon the consent of the Governor in Council. His Lordship held that such power to expropriate is not subject to the surrender provisions of the Indian Act. He offered a definitive statement of the trusteeship of the Crown:

> I accept that the defendant held title to the Reserve in trust and that the Band was beneficiary of that trust. I further accept that the trust was a legally enforceable trust, or "true trust", not a "political trust", whatever that may be, nor a trust to be executed by the defendant in an uncontrolled exercise of the royal prerogative. The defendant was required to execute the trust with the high degree of honour, care, prudence and business efficiency required of any trustee, subject to the terms of the trust.[223]

The learned judge determined, however, that the Governor in Council could not have been intended under what is now section 35 to act as trustee in the expropriation of reserve lands. Mr. Justice Mahoney concluded that the officials of the Indian Affairs Department had not acted in breach of trust because they had sought additional compensation and to avoid expropriation. The decision of the Governor in Council to consent to the expropriation defeated their efforts but was not in breach of trust nor did it cause their actions to be so.

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[219] [1981] 3 C.N.L.R. 33.

[220] D. Sanders, The Friendly Care and Directing Hand of the Government: A Study of Government Trusteeship of Indians in Canada, 1971 (unpublished paper in Native Law Centre Library, University of Saskatchewan); R. Bartlett, The Existence of an Express Trust Derived from the Indian Act in Respect of Reserve Lands, 1979 (unpublished paper in Native Law Centre Library, University of Saskatchewan); D. Brans, The Trusteeship Role of the Government of Canada, 1971 (unpublished paper in Native Law Centre Library, University of Saskatchewan); D. Lowry, The Position of the Government of Canada as Trustee for Indians (unpublished paper in Native Law Centre Library, University of Saskatchewan).

[221] [1982] 1 C.N.L.R. 50, 125 D.L.R. (3d) 513 (F.C. Trial D. 1981).

[222] *Id.* at 58, 125 D.L.R. (3d) at 519.

[223] *Id.* at 57, 125 D.L.R. (3d) at 518.

D. *Possession of Reserve Lands*

1. *Indian Possession of Reserve Lands*

Individual Indian possession of reserve lands is regulated by sections 20 to 27 of the Indian Act. An authoritative statement of the rights to possession of a band and band members with respect to land unallotted under those sections was provided by the British Columbia Court of Appeal in *Joe v. Findlay*.[224] The members of the Squamish band council, joined by the Attorney General of Canada, brought a representative action seeking, *inter alia*, a mandatory injunction requiring a band member to remove himself from the unallotted reserve lands. Mr. Justice Wallace in the Supreme Court[225] concluded that a band has sufficient interest in unallotted land "to maintain an action in trespass, against a person unlawfully claiming possession or a right of occupation thereof". His Lordship relied upon the application of subsection 31(1) of the Indian Act by the Supreme Court of Canada in *R. v. Devereux*,[226] where the Crown was held to have been authorized to bring an action in the Exchequer Court "on behalf of" the band. The Supreme Court was seen to recognize "thereby. . . the interest of the band as. . . sufficient to base a claim".[227] Mr. Justice Wallace did not consider that the provision of such authority prevented the band from maintaining an action for trespass.

The British Columbia Court of Appeal did not consider this question and dismissed the appeal, thereby appearing to affirm Wallace J.'s conclusions. The Court of Appeal directed its attention to whether or not the defendant band member was engaged in trespass upon the reserve lands. Mr. Justice Carrothers for the Court declared that the band interest in reserve lands was "a collective right in common conferred upon and accruing to the band members as a body and not to the band members individually". His Lordship concluded that with respect to unallotted reserve lands the "right to squat exercised individually and unilaterally by a band member cannot be sustained by authority". The Court then determined that the defendant was engaged in an "obvious trespass".[228] The decision affirms the band and band council control of the development of reserve lands as against individual band members.

The decision in *Leonard v. Gottfriedson* however, affirmed that the requirement of Ministerial approval demanded by sections 20 to 27 of the Indian Act cannot be circumvented by "contracts" between the band and band members. Mr. Justice Rae considered that such would violate

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[224] [1981] 3 W.W.R. 60, [1981] 3 C.N.L.R. 58.
[225] [1981] 2 C.N.L.R. 58, 109 D.L.R. (3d) 747.
[226] [1965] S.C.R. 567, 51 D.L.R. (2d) 546.
[227] Joe v. Findlay, *supra* note 225, at 71, 109 D.L.R. (2d) at 759.
[228] Joe v. Findlay, *supra* note 224, at 62, 64, [1981] 3 C.N.L.R. at 60, 61.

the intent of the Indian Act with respect to the "benefit and protection of the Indians".[229]

2. *Non-Indian Possession of Reserve Lands*

The conclusion that a band has a sufficient interest to maintain an action for trespass with respect to Indian occupation of reserve lands would seem to dictate a similar conclusion with respect to non-Indian occupation. In *Johnson v. British Columbia Hydro*,[230] Murray J. of the British Columbia Supreme Court applied the reasoning expressed in *Joe v. Findlay* to conclude that a representative action might properly be brought on behalf of the Mowachtaht band against a Crown corporation with respect to an alleged trespass arising from the erection of a power transmission line on reserve lands. The Court did not consider that the action need be brought by the Attorney General of Canada. A similar conclusion was reached in *Canadian Pacific Ltd. v. Paul*[231] where the defendant members of the band and band council counterclaimed against a railway company seeking a declaration as to alleged trespass on the reserve and damages. Mr. Justice Dickson in the New Brunswick Queen's Bench declared that subsection 31(3) of the Indian Act "makes clear, in my view, that the right of an Indian or of a band to seek relief by way of action or suit under subs. (1) is complementary only to whatever other avenues may be open for seeking relief, and I am aware of no restriction upon an Indian or a band in such a circumstance as this of proceeding in the normal way in this court just as any other person might do where the subject-matter of the suit is land within this Province".[232]

A decision in remarkable contrast to the above authorities was arrived at in the Saskatchewan Queen's Bench in *Custer v. Hudson's Bay Developments Ltd.*.[233] The plaintiffs brought a representative action on behalf of the members of the Peter Ballantyne Band alleging trespass in the establishment of a store on reserve lands and requesting an injunction to restrain such occupation. Mr. Justice Walker declared that "free of authority" he would have "little difficulty in concluding that s. 31(1) has the effect of precluding the right of an Indian or a band to sue for trespass or possession where it is alleged that a *non-Indian* is unlawfully in occupation of reserve lands, and that s. 31(1) provides the only procedure in present circumstances".[234] Mr. Justice Walker apparently based this conclusion upon his understanding that the Governor in Council and the Minister "have much to do with" the uses to which reserve lands may be put, "the smooth working of the system which the Indian Act provides and regulates" and the fact that "forum shopping" was not

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229 21 B.C.L.R. 326, at 337, [1982] 1 C.N.L.R. 60, at 71 (B.C.S.C. 1980).
230 27 B.C.L.R. 50, [1981] 3 C.N.L.R. 63.
231 *Supra* note 208.
232 *Id.* at 400, [1981] 4 C.N.L.R. at 54.
233 [1982] 4 W.W.R. 139.
234 *Id.* at 145.

permitted.[235] In addition, subsection 31(1) of the Indian act provides that the Attorney General of Canada "may" bring an action in the Federal Court where a non-Indian is alleged to be trespassing on reserve lands.

Mr. Justice Walker suggested that his conclusion was supported by decisions of the Quebec Superior Court[236] and the Ontario High Court.[237] Both decisions were founded upon provisions of the Indian Act of 1906 as amended in 1910 and 1911[238] which *required* the Superintendent General upon complaint to direct the removal of trespassers and to issue warrants for arrest. These provisions were considered to exclude the ordinary jurisdiction of the courts. Yet they had been removed in 1951.

Mr. Justice Walker also sought support from decisions[239] concerning actions brought under subsection 31(1), none of which in any way suggested that the effect of the subsection was to preclude an action by a band. Upon such slight authority, Walker J. distinguished general *dicta* in the British Columbia Supreme Court in *Joe v. Findlay*[240] and in the Manitoba Court of Appeal in *Mintuck v. Valley River Band*,[241] and declared that *Johnson v. British Columbia Hydro* was wrongly decided.

It still remained to Walker J. to explain subsection 31(3) of the Indian Act which provides that:

> Nothing in this section shall be construed to impair, abridge or otherwise affect any right or remedy that, but for this section, would be available to Her Majesty or to an Indian or a band.[242]

The learned judge apparently considered that the effect of subsection 31(3) was to preserve existing "rights and remedies", not "procedures", and that subsection 31(1) merely varied a "procedure".[243] This analysis appears jurisprudentially unsound and in any event is difficult to reconcile with the broad ambit of the language employed in subsection 31(3).

In the result, it is suggested that the decision of the Saskatchewan Queen's Bench in *Custer v. Hudson's Bay Developments Ltd.* is wrongly decided. It is founded upon outdated authority, is contrary to current judicial decisions from several jurisdictions, fails to recognize the relationship between the interests in Indian reserve bands and the Indian Act, and fails to explain adequately subsection 31(3). It also represents a highly regrettable denial of control to the band over the occupation of reserve lands. The effect of the decision is to preclude the band from acting without the concurrence of the Crown.

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[235] *Id.* at 151.

[236] D'Ailleboust v. Bellefleur, 25 R.L.N.S. 50 (Que. S.C. 1918).

[237] Point v. Dibblee Const. Co., [1934] O.R. 142, [1934] 2 D.L.R. 785 (H.C.).

[238] R.S.C. 1906, c. 81, ss. 33-37 (*as amended by* S.C. 1910, c. 28; S.C. 1911, c. 14).

[239] R. v. Devereux, *supra* note 226; R. v. Smith, *supra* note 206.

[240] *Supra* note 224.

[241] [1977] 2 W.W.R. 309, 75 D.L.R. (3d) 589.

[242] R.S.C. 1970, c. I-6.

[243] *Custer*, *supra* note 233, at 54.

The decision was appealed in the Court of Appeal of Saskatchewan and was heard in Saskatoon on 22 October 1982.[244] The Court, composed of Bayda C.J.S., Cameron and Hall JJ.A., allowed the appeal after a recess of forty minutes. Mr. Justice Cameron delivered an oral judgment in which he asserted that section 31 does not prevent a band from bringing an action, independently of the Crown, for trespass to reserve lands. The learned justice stated that this was "made quite clear by section 31(3)". His Lordship also pointed out that since possession is enjoyed by the band, section 31 was necessary to enable the Crown in right of Canada to bring an action for the recovery of reserve lands. The decision offers an authoritative pronouncement upon the ability of a band to bring an action independently of the Crown to recover reserve lands subject to trespass.

The British Columbia Court of Appeal in *Joe v. Findlay*[245] determined that a band might bring an action for trespass in the provincial courts. In *Piche v. Cold Lake Transmission Ltd.*,[246] the Federal Court refused jurisdiction where an action was brought by a band, pointing out that the band and not the Crown was in possession of the reserve lands. The Federal Court also declined jurisdiction over land claims brought with respect to reserve and non-reserve lands in Alberta against several oil companies by the Lubicon Lake Band. The action could only be maintained against Her Majesty in right of Canada.[247]

3. *Defences to Indian Band Actions for Possession*

Indian band claims to possession of reserve lands are often likely to meet defences founded upon adverse possession or statutes of limitations. In *R. v. Smith*,[248] the Crown in right of Canada brought an action to recover possession of reserve lands which had been surrendered in trust for sale in 1895. The defendant claimed a right of adverse possession under the provincial legislation with respect to limitation of actions dating back to 1838. The Federal Court Trial Division dismissed the action on that ground. Mr. Justice Le Dain for the Federal Court of Appeal concluded that:

> [T]he provincial law respecting the limitation of actions for the recovery of land could not constitutionally apply so as to give the respondent or his predecessors in occupation a possessory title good against either the Indian right of occupation or the right of the federal Crown to claim possession for the protection of the Indian interest.

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[244] Custer v. Hudson's Bay Co. Developments Ltd., [1983] 1 C.N.L.R. 1 (1982).

[245] *Supra* note 224.

[246] [1980] 2 F.C. 369, [1981] 3 C.N.L.R. 78 (Trial D. 1979).

[247] Lubicon Lake Band v. The Queen, [1981] 3 C.N.L.R. 72, 117 D.L.R. (3d) 247 (F.C. Trial D. 1980).

[248] *Supra* note 206.

His Lordship explained that:

> If provincial legislation of general application cannot constitutionally apply to restrict the use of land reserved for the Indians within the meaning of section 91(24) of the *B.N.A. Act*, as was held in the *Peace Arch* case (a conclusion that appears to have been impliedly approved by the Supreme Court of Canada in the *Cardinal* case), then *a fortiori* must this be true of legislation that would have the effect of extinguishing the right to possession of such land.[249]

Mr. Justice Le Dain also considered that the "successive versions of the *Indian Act*" had exhibited "a special regime for the protection of the Indian interest from the impact of the ordinary law of contract and property" which precluded the application of the provincial legislation respecting the limitation of actions.[250] The learned judge cited *Fahey v. Roberts*[251] in support and considered that the protection afforded the Indian interest extended to that interest in reserve land surrendered in trust for sale. He went on to consider whether the defendant had established adverse possession in fact, and determined that upon the evidence he had not.

Mr. Justice Dickson of the New Brunswick Queen's Bench indicated in *Canadian Pacific Ltd. v. Paul*[252] that "with all deference" he would be inclined to reach a different conclusion as regards the acquisition of title by adverse possession upon reserve lands. He afforded "limited" consideration to the question and his remarks were clearly *obiter*.[253] A contrary *obiter* conclusion was arrived at by Murray J. in *Johnson v. British Columbia Hydro*, who declared that he had "grave doubts that the limitations invoked by the defendant would run against the Attorney General of Canada".[254] Mr. Justice Murray, in any event, held that the defendants were estopped by their conduct, in encouraging negotiations, from relying on the statutory period of limitations.

The defence in *Johnson v. British Columbia Hydro* also sought to assert that the band had acquiesced in the defendant's occupation of the land and had thereby granted a licence which denied any possibility of trespass. Reliance was placed on *Canadian Pacific Railway Co. v. The King*.[255] Mr. Justice Murray distinguished the case, pointing to the absence of knowledge by the band of its legal rights, and observing:

> To compare a contest between the C.P.R. and the federal government to a contest between British Columbia Hydro and Power Authority and the Mowachaht Indian Band seems to me to be an attempt to equate a contest

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[249] *Id.* at 405, [1980] 4 C.N.L.R. at 78-79, 113 D.L.R. (3d) at 571-72.

[250] *Id.* at 406, [1980] 4 C.N.L.R. at 79, 113 D.L.R. (3d) at 572.

[251] (Unreported, N.B.Q.B., 1 Dec. 1916).

[252] *Supra* note 208. *See also* Wallace v. Fraser Cos., 8 N.B.R. (2d) 455 (Q.B. 1973).

[253] *Id.* at 406, [1981] 4 C.N.L.R. at 59.

[254] *Supra* note 230, at 57, [1981] 3 C.N.L.R. at 69.

[255] [1931] A.C. 414, 145 L.J. 129 (P.C.).

> between two great white sharks with a contest between a great white shark and a minnow.[256]

Mr. Justice Murray awarded exemplary damages in the amount of $15,000 describing the conduct of the defendant as "arrogant, callous and indifferent". The defendant had erected a transmission line in full knowledge that it constituted a trespass and in spite of negotiations towards settlement of compensation with respect thereto.

Acquiescence was relied upon by the defence in *R. v. Smith*[257] as a basis to assert a claim for the value of improvements made to the land. Mr. Justice Le Dain determined that the doctrine of estoppel by acquiescence applies to the Crown and was "applicable in proper circumstances to a claim for the value of improvements to land in an Indian reserve". His Lordship recorded that the defendant believed himself to be the owner of the land and was not aware of any claim to the land by the Indians. He did not consider that a failure to search the title should disentitle the defendant to relief for improvements. In considering the Crown's conduct, the learned judge observed:

> In my opinion, this is a case in which the Crown must be held, as a result of its long inaction, particularly from 1919, with knowledge that the Land was being occupied by non-Indians, to have stood by and acquiesced in the improvements made by the respondent and his predecessor in occupation. The Crown. . . knew of the occupation of the Land by non-Indians from 1838 but never took positive steps to regularize the situation one way or the other. In view of the Crown's conduct, it would be unconscionable to permit it to recover vacant posssession of the Land without compensation for the improvements.[258]

The conclusions of Le Dain J.A. as to compensation for improvements will be of increasing significance as claims to reserve lands are pressed and succeed.

IV. Surrendered Lands

A. *Validity of Surrender*

Legislation regulating Indian reserves has, since the Royal Proclamation 1763, required that lands could not be disposed of except upon surrender to the Crown. The "numbered" treaties with the Indians of the Prairies stipulated that reserve lands might only be disposed of by the Crown with "their [the Indians'] consent first had and obtained". Many grievances and claims with respect to reserve lands assert a failure to comply with the requirements of a valid surrender. The requirement that a surrender "be assented to by a majority of the male members of

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[256] Johnson v. British Columbia Hydro, *supra* note 230, at 54, [1981] 3 C.N.L.R. at 65.

[257] *Supra* note 206.

[258] *Id.* at 418, [1980] 4 C.N.L.R. at 90, 113 D.L.R. (3d) at 583.

the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose" under section 49 of the Indian Act 1906[259] was considered in *Cardinal v. The Queen*.[260] The provision was introduced in 1868[261] and, apart from the substitution of "electors" for "male members" has remained substantially unchanged to the present.[262] In *Cardinal*, a majority of those present at a meeting and who voted, cast their vote in favour of the surrender but the number so giving their assent did not represent a majority of all the male members of the band at that time. The surrender was with respect to lands near the city of Edmonton, Alberta.

Mr. Justice Mahoney in the Trial Division of the Federal Court[263] concluded that the section required a meeting of the band, "not a council or meeting of the adult males *per se*", at which the band could give its assent by the vote of the majority attending the meeting. The adult males comprised the enfranchised members of the band. His Lordship relied upon the common law regarding the majorities demanded of unincorporated bodies composed of an indefinite number of persons. His rationale was that "[t]he consent required under subsection 49(1) was the consent of the Enoch Band, not the consent of the adult males, *per se*".[264]

The majority of the Federal Court of Appeal affirmed the decision of Mahoney J. declaring that the words of the section were "clear and unambiguous".[265] They construed the language of the section as merely requiring a meeting of a majority of the adult male members of the band, Urie J. declaring that the comma after "years" was irrelevant. The majority then looked to the common law to determine what form of majority was required to constitute "assent" within the meaning of the section.

Mr. Justice Heald dissented and asserted that the "literal" and "clear and unambiguous" construction of the section required the assent of a majority of the adult male members of the band. His Lordship also referred to the protection accorded reserve lands and suggested that if the words of subsection 49(1) could be said to be ambiguous "they should be read restrictively so as to protect the majority of band members from irresponsible actions by a minority which could result in an entire reserve being surrendered".[266] He suggested that in other sections of the Indian Act Parliament had had no difficulty in indicating when a simple majority of those voting would suffice.

The Supreme Court of Canada unanimously affirmed the decision and adopted the reasoning of the majority of the Federal Court of

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259 R.S.C. 1906, c. 81.
260 [1982] 1 S.C.R. 508, [1982] 3 W.W.R. 673.
261 Department of Secretary of State Act, S.C. 1868, c. 42, s. 8.
262 Indian Act, R.S.C. 1970, c. I-6, sub. 39(1).
263 [1980] 1 F.C. 149, 97 D.L.R. (3d) 402.
264 *Id.* at 160, 97 D.L.R. (3d) at 411.
265 [1980] 2 F.C. 400, at 413, 109 D.L.R. (3d) 366, at 377.
266 *Id.* at 408, 109 D.L.R. (3d) at 373.

Appeal. Mr. Justice Estey asserted that the words of subsection 49(1) were "clear and unambiguous" and accordingly rejected any suggested "restrictive. . . interpretation". His Lordship echoed the opinion of Urie J. that "[t]o require otherwise, that is to say more than a mere majority of the prescribed quorum of eligible band members present to assent to the proposition, would put an undue power in the hands of those members who, while eligible, do not trouble themselves to attend, or if in attendance, to vote".[267] He rejected the suggestion that the interpretation was contrary to the spirit of protection of reserve lands contemplated by the Indian Act and referred to the other "precautions" stipulated with respect to the meeting at which the vote is taken and the requirement that a surrender be accepted by the Governor in Council.

The result of the decision of the Supreme Court of Canada is that reserve lands held by a band, in which there were 100 adult male members could be validly surrendered at a meeting attended by fifty-one, of which only twenty-six voted in favour. Such a result is suggested to be contrary to the notion of community title to reserve lands vested in a band. In the context of assenting to the surrender of an interest in land, analogies to forms of decision making in church conferences, labour unions and other bodies at common law seem inappropriate. Mr. Justice Estey appeared not to recognize that the decision entailed a much more significant dilution of the protection accorded reserve lands than was ever provided or could be provided by the other "precautions" to which the learned judge referred. It must finally be observed that the construction adopted by the Supreme Court is not that which the language and grammar would ordinarily dictate, and certainly cannot be said to bear a "clear and unambiguous" meaning.

In *Kruger v. The Queen*[268] Mahoney J., in *obiter*, followed his decision in *Cardinal* as affirmed by the Federal Court of Appeal.

B. *Compliance with Terms of Surrender*

The great majority of surrenders of Indian reserves took place in an era when the Department of Indian Affairs exercised both protection and control with respect to the lands; an era when, to quote Collier J. in *Guerin v. The Queen*,[269] "a great number of Indian Affairs personnel, vis-à-vis Indian bands, and Indians, took a paternalistic, albeit well-meaning attitude: the Indians were children or wards, father knew best".[270]

It was the disposition of surrendered lands under such administration that was the subject of litigation in *Guerin*. In 1957 the Musqueam band surrendered 162 acres of prime land in Vancouver,

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[267] Cardinal v. The Queen, *supra* note 260, at 517, [1982] 3 W.W.R. at 680-81, 683.
[268] [1982] 1 C.N.L.R. 50, 125 D.L.R. (3d) 513 (F.C. Trial D. 1981).
[269] [1982] 2 C.N.L.R. 83 (F.C. Trial D. 1981).
[270] *Id.* at 103.

> in trust to lease the same to such person or persons, and upon such terms as the Government of Canada may deem most conducive to our welfare and that of our people.

The band brought an action in 1975 asserting a breach of trust in the eventual leasing of the lands in January, 1958.

Under the Indian Act, a surrender may be absolute or qualified, conditional or unconditional. Upon surrender the Department of Indian Affairs is empowered to dispose of the lands in accordance with the Act "and the terms of surrender".

Mr. Justice Collier concluded that the Crown was the trustee of the surrendered lands for the benefit of the band. It was not a mere "political trust" or "governmental" responsibility.[271] He determined that the Crown acted in breach of trust when it entered into a seventy-five year lease upon terms and conditions substantially different from those discussed with the band prior to and contemporaneously with the surrender. The terms of the lease were not discussed with the band after the surrender. The Department did not attempt to secure a lease from interested parties other than those originally contemplated, and the evidence did not explain why a rent lower than that suggested by outside advisers to the Department was accepted. Mr. Justice Collier expressly asserted that there was a *duty* on the Crown as trustee to lease in accordance with the terms discussed with and contemplated by the band and to secure band approval with respect to any changes to such terms.[272]

Mr. Justice Collier rejected a defence founded on the provincial statute of limitations because of "concealment amounting to equitable fraud" by the Department in failing to indicate that the terms of the lease were different than those originally contemplated by the band, the conclusion that there was no lack of reasonable diligence by the band in ascertaining the terms of the lease, and the finding that the "band and its members were not aware of the actual terms of the lease, and therefore of the breach of trust until March of 1970". The learned judge, therefore, concluded that there was "no inequity in permitting the plaintiff's claim to be enforced" and rejected the plea of laches.[273]

Actual damages were assessed at ten million dollars. Mr. Justice Collier rejected a claim for exemplary damages because, whatever the nature of the paternalistic conduct of the officials of the Department of Indian Affairs, it could not be described as "oppressive or arbitrary".

An appeal of the decision in *Guerin* in the Federal Court of Appeal was argued in the summer of 1982. A decision is pending.

The decision of the Trial Division has awarded the largest amount of damages ever recovered by an Indian band in litigation against the Crown with respect to the administration of Indian affairs or property. It was founded upon a finding of an enforceable trust duty owed to the

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[271] *Id.* at 105-08. Collier J. considered Tito v. Waddell (No. 2), [1977] 1 Ch. 106, [1977] 3 All E.R. 129 (1976) in that regard.

[272] *Id.* at 109.

[273] *Id.* at 116, 120.

band by the Crown with respect to the disposition of surrendered lands. Previous decisions of the Exchequer Court[274] had acknowledged a trust arising from the terms of surrender with respect to *monies* arising upon the disposition of surrendered lands, but not with respect to the surrendered lands themselves. Indeed the decision in *Re Henry and The King* had suggested some doubt as to whether the managerial responsibilities of the Department did not preclude an action to enforce the trust. The decision in *Guerin* defined the duty as trustee owed by the Crown by reference to the discussions with, and understandings of, the band. The appellate courts may be reluctant to uphold such an approach in the face of the discretion declared in the language of the surrender and the administrative powers conferred upon the Department by the Indian Act.

C. *The Effect of a Surrender*

Some uncertainty has attached to the effect of a surrender upon the status of reserve lands. It has not yet been decided whether surrendered lands might retain the status of a "reserve" within the meaning of the Indian Act or remain within federal jurisdiction as "lands reserved for Indians" within subsection 91(24) of the Constitution Act, 1867. Decisions of the Federal Court of Appeal in *R. v. Smith*[275] and the Alberta Court of Appeal in *Re Stony Plain Indian Reserve No. 135*[276] have, however, provided some authoritative guidance.

In *R. v. Smith* the Crown brought action to recover possession of reserve lands surrendered in trust for sale in 1895. The land had never been sold but had been occupied by non-Indians. Mr. Justice Le Dain in the Federal Court of Appeal determined that such a surrender extinguished the Indian title to the lands, relying upon the decisions of the Privy Council in *St. Catherine's Milling and Lumber Co. v. The Queen*[277] and *Attorney General of Quebec v. Attorney General of Canada.*[278] Accordingly, the action could not be sustained insofar as it was founded upon the band's right to possession.

The action had been brought under section 31 of the Indian Act providing for the recovery of reserve lands. Mr. Justice Le Dain concluded that "surrendered lands" were not reserve lands within the meaning of the Indian Act and accordingly the action could not be maintained under that section. His Lordship based his conclusion upon a construction of the other provisions of the Indian Act. He observed that the provisions referred to both "reserves" and "surrendered lands" and provided separately for administrative authority with respect to "reserves"

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[274] *Re* Henry and The King, 9 Ex. C.R. 417 (1905); Dreaver v. The King, *supra* note 76.

[275] *Supra* note 206.

[276] *Supra* note 217.

[277] 14 A.C. 46, 60 L.T. 197 (P.C. 1888).

[278] *Supra* note 214.

and "surrendered lands", including the establishment of a Reserve Land Register and a Surrendered Lands Register. The learned judge declared: "I find the conclusion unavoidable that when the Act uses the word 'reserve' in section 31 it does not include surrendered lands."[279]

It is suggested that the Court's conclusion is in accord with the language and object of the provisions of the Indian Act. It does, however, run counter to the opinion of a leading commentator who suggested that such a ruling "would create a jurisdictional vacuum and would detract from the ability of Indians to manage their own assets".[280]

In 1958, Canada and New Brunswick entered into an agreement[281] providing for the transfer by the province to Canada of the provincial interest in "reserve lands" and providing a right of purchase to the province in the event of surrender. Canada and Nova Scotia entered into an identical agreement.[282] Mr. Justice Le Dain in *R. v. Smith* concluded that such agreement did not transfer the provincial interest in surrendered but unsold lands to Canada, apparently because he did not consider the two governments would have been "concerned" about such lands. His Lordship accordingly concluded that the action could not be founded upon title in the Crown in right of Canada.[283]

It is tentatively suggested that this conclusion was erroneous and that title to surrendered but unsold lands did pass to Canada under the Agreement. "Reserve lands" within the meaning of the Agreement may readily be construed to entail a broader understanding than the Indian Act, and the expressed intention of the parties "to settle all outstanding problems relating to Indian reserves" would seem to demand it.

Mr. Justice Le Dain did give such broader understanding to the ambit of "lands reserved for Indians" in subsection 91(24) of the Constitution Act, 1867. He concluded that surrendered but unsold lands were within federal jurisdiction under subsection 91(24), albeit they were not "reserves" within the meaning of the Indian Act. He observed:

> Because of the federal government's continuing responsibility for the control and management of such land until its final disposition in accordance with the terms of a surrender, surrendered land must remain within federal legislative and administrative jurisdiction. It is land that is still held for the benefit of the Indians, although they have agreed to accept the proceeds of sale of it in place of their right of occupation.[284]

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[279] R. v. Smith, *supra* note 206, at 390-91, [1980] 4 C.N.L.R. at 65-66, 113 D.L.R. (3d) at 559-60.

[280] D. Sanders, Legal Aspects of Economic Development on Indian Reserve Lands, at 16 (Dept. of Indian and Northern Affairs 1976).

[281] An Act to confirm an Agreement between the Government of Canada and the Government of the Province of New Brunswick respecting Indian Reserves, S.C. 1959, c. 47; S.N.B. 1958, c. 4.

[282] An Act to confirm an Agreement between the Government of Canada and the Government of the Province of Nova Scotia respecting Indian Reserves, S.C. 1959, c. 50; S.N.S. 1959, c.3.

[283] *Supra* note 206, at 394-95, [1980] 4 C.N.L.R. at 68-69, 113 D.L.R. (3d) at 562-63.

[284] *Id.* at 395, [1980] 4 C.N.L.R. at 69, 113 D.L.R. (3d) at 563.

Mr. Justice Le Dain concluded that an incident of the power to control the management of surrendered lands was the right to bring an action to recover possession. He relied on decisions[285] that had maintained this right with respect to "reserves" within the meaning of the Indian Act.

The Alberta Court of Appeal in *Re Stony Plain Indian Reserve No. 135*[286] relied upon *R. v. Smith* in answering the constitutional questions referred to it. The questions related to the ambit of provincial jurisdiction with respect to surrendered lands in Alberta. The Court initially determined that, upon the authority of *Surrey v. Peace Arch Enterprises Ltd.*,[287] *R. v. Smith*, [288] and *Western Int'l Contractors Ltd. v. Sarcee Developments Ltd.*,[289] "an absolute surrender followed by a disposition of the reserved lands frees the land from the Indian burden" but "that if the band retains the reversion the burden remains, at least insofar as the reversionary interest is concerned".[290] Lands which are the subject of an absolute surrender but not yet finally disposed and lands in which the band retains the reversion remain "lands reserved for Indians" within subsection 91(24). The Court accordingly accepted that provincial legislation relating to land use would generally be inapplicable to surrendered lands in which the Indians retained a reversionary interest or in which the Crown retained its power of management and disposition. The Court, by way of answer to the constitutional questions, declared:

1. Once land is surrendered and granted in fee simple to a grantee, it ceases to constitute "land reserved for Indians" within section 91(24) of the Constitution Act, 1867.

If the land was granted in fee simple in trust, in perpetuity, for the benefit of the band and members, it would constitute a "special reserve" within the meaning of section 36 of the Indian Act. The Court observed "[t]he change in title of the land from Her Majesty to the grantee cannot affect the scope and operation of the trust".[291]

2. Land surrendered in trust to the Crown to lease and leased in accordance therewith, either in perpetuity or for a term of years, does not cease to be "land reserved for Indians" within subsection 91(24). The Court declared "the rights and interests of the band therein have not been wholly surrendered" and considered that the band thereby retained a reversionary interest.[292]

R. v. Smith and *Re Stony Plain Indian Reserve No. 135* offer consistent interpretations of the administration and jurisdiction respecting lands surrendered for lease or for sale. They provide a certainty in matters which previously could only be surmised and thus greatly assist the planning and development of reserve lands by means of surrender.

[285] Mowat v. Casgrain, 6 Que. Q.B. 12 (C.A. 1897); R. v. Lady McMaster, [1926] Ex. C.R. 68.

[286] *Supra* note 217.

[287] 74 W.W.R. 380 (B.C.C.A. 1970).

[288] *Supra* note 206.

[289] [1979] 3 W.W.R. 631, 98 D.L.R. (3d) 424 (Alta. C.A.).

[290] *Re Stony Plain, supra* note 217, at 321, [1982] 1 C.N.L.R. at 150.

[291] *Id.* at 326, [1982] 1 C.N.L.R. at 155.

[292] *Id.* at 328, [1982] 1 C.N.L.R. at 157.

V. Governance and Jurisdiction with Respect to Indian Reserves and Persons of Indian and Inuit Ancestry

The degree of self-government and self-management which persons of Indian and Inuit ancestry possess depends upon the extent to which jurisdiction is conferred upon and exercised by the federal and provincial governments.

A. *The Ambit of Federal Jurisdiction*

The constitutional position of the Metis had judicially been previously explored only in decisions[293] which denied the status of "Indian" to them under the Natural Resource Transfer Agreements with the Prairie provinces under the Constitution Act, 1930. Recent decisions by administrative tribunals have considered whether the Metis are "Indians" within the meaning of subsection 91(24) of the Constitution Act, 1867, wherein the exclusive jurisdiction of the Canadian Parliament with respect to "Indians and lands reserved for Indians" is declared. The Ontario Labour Relations Board in *Ontario Public Service Employees Union and Ontario Metis and Non-Status Indian Association* concluded:

> In view of the definition of "Indian" in the Indian Act and the long-standing historical distinction between "Indians" and "Metis" or persons of mixed blood; and in the absence of any historical evidence to demonstrate that the Imperial Parliament in 1867 regarded Metis or "half-breeds" as "Indians", the Board cannot conclude that the respondent's members or beneficiaries are "Indians" within the meaning of section 91(24) of the B.N.A. Act.[294]

The Board referred to the Supreme Court decision in *Re Eskimos*[295] as illustrating "the method by which the meaning of the term 'Indian' should be ascertained" and commented that:

> It is interesting to note however that almost all of the documents to which the Court referred distinguished between "Indians" or "Aborigines", and "half Indians", "half-breeds", or persons of "mixed race" or "mixed blood" who were not apparently regarded as Indians. The 1857 Hudson's Bay Company census, upon which both Duff C.J.C. and Kerwin J. relied, placed both whites and "half-breeds" in the same category, and excluded them from the list of the Indian races.[296]

The Board considered that *Re Eskimos* "raises some doubt whether Metis or other persons of mixed blood should automatically be regarded as Indians — at least in the absence of affirmative evidence that they were so regarded by the Imperial Parliament in 1867".[297]

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[293] R. v. Budd; R. v. Crane, [1979] 6 W.W.R. 450, [1981] 4 C.N.L.R. 120 (Sask. Q.B. 1979); R. v. Laprise, [1978] 6 W.W.R. 85, [1978] 4 C.N.L.B. 118 (Sask. C.A.); R. v. Pritchard, 9 C.C.C. (2d) 488 (Sask. Dist. C. 1972).

[294] [1980] 3 Can. L.R.B.R. 328, at 333, [1982] 1 C.N.L.R. 83, at 90 (1980).

[295] [1939] S.C.R. 104, [1939] 2 D.L.R. 417.

[296] *Ontario Public Service Employees Union*, *supra* note 294, at 332, [1982] 1 C.N.L.R. at 89.

[297] *Id.*

The same conclusion upon similar analysis was reached by the Saskatchewan Provincial Court in *R. v. Genereaux*[298] with respect to a person of mixed blood descent but whose family had "lived on the reserve and adhered to the same lifestyle as the treaty Indians resident there for three generations". Judge Ferris rejected the arguments founded upon historical documents advanced in Chartier's article[299] suggesting that "Metis" were Indians within subsection 91(24). The Provincial Court judge asserted that the documents suggested the "opposite inference" to that drawn by Chartier because in "almost every example he recites, a distinction is made between 'Indians' and 'half-breeds' or 'Metis'."[300]

A contrary opinion was expressed by the Northwest Territories Territorial Court in *R. v. Rocher*.[301] Judge Ayotte declared that the Fisheries Regulations of the Territory were, insofar as they especially provided for persons of mixed blood, legislation in respect of "Indians" within subsection 91(24). The Territorial Court judge concluded that persons of mixed blood were "Indians" within subsection 91(24) and expressly relied upon the analysis and conclusions contained in the Chartier article.[302] The differing judicial opinions indicate the absence of an authoritative determination of the constitutional position of the Metis with respect to subsection 91(24).

Subsection 35(2) of the Constitution Act, 1982[303] declares that "in this Act, aboriginal peoples of Canada includes the. . . Metis. . .". The provisions in section 25, respecting the construction of the Charter, subsection 35(1), respecting the "recognition" of the aboriginal rights of the aboriginal peoples, and subsection 37(2), respecting the participation of their representatives in a constitutional conference, extend an acknowledgement of the special rights and relationship of the Metis which had previously not been judicially declared. The significance of such acknowledgement is examined below in the context of a consideration of the provisions of the Constitution Act.

Authoritative pronouncements with respect to the ambit of federal jurisdiction regarding the activities of Indian band councils have recently been made. In 1979 the Supreme Court in *Four B Manufacturing Ltd. v. United Garment Workers of America*[304] upheld the jurisdiction of the Ontario Labour Relations Board to certify a bargaining unit consisting of employees of a shoe factory located on an Indian reserve. The factory was owned by a company whose shareholders were members of the Indian band. The Supreme Court characterized the enterprise as an "ordinary industrial activity" and not a federal work, business or undertaking. Mr. Justice Beetz commented that:

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298 [1982] 3 C.N.L.R. 95 (1981).

299 *"Indian": An Analysis of the Term as used in Section 91(24) of the British North America Act, 1867*, 43 SASK. L. REV. 37 (1979).

300 R. v. Genereaux, *supra* note 298, at 107.

301 *Supra* note 181.

302 *Id.* at 131.

303 *Enacted by* Canada Act, 1982, U.K. 1982, c. 11.

304 [1980] 1 S.C.R. 1031, 102 D.L.R. (3d) 385.

> Neither Indian status is at state nor rights so closely connected with Indian status that they should be regarded as necessary incidents of status such for instance as registerability, membership in a band, the right to participate in the election of Chiefs and Band Councils, reserve privileges, etc.[305]

Accordingly, Beetz J. determined that the labour relations in issue did not form an integral part of primary federal jurisdiction within subsection 91(24). In *Francis v. Canada Labour Relations Board*,[306] the Federal Court of Appeal applied the principles set out by Beetz J. to the consideration of the jurisdiction of the Canada Labour Relations Board with respect to the employees of a band council. The Court characterized the function of the band council and its employers as "being almost entirely concerned with the administration of the St. Regis Band of Indians. . . . [I]ts entire function is governmental in nature and comes under the jurisdiction of the *Indian Act*". Mr. Justice Heald, for the Court, reviewed the powers of the band council under the Indian Act and concluded that the "unit of employees is very directly involved in activities closely related to Indian status" and instanced, *inter alia*, elections, rights to reserve lands, and education in reserve schools. The learned judge concluded that "I am thus firmly of the opinion that the labour relations in issue here are 'an integral part of primary federal jurisdiction over Indians or Lands reserved for the Indians'," and determined that the undertaking in issue was a "federal" work, business or undertaking within the Canada Labour Code.[307]

Francis was followed by the Saskatchewan Court of Appeal in *Whitebear Band Council v. Carpenters Provincial Council of Saskatchewan*.[308] There the Court quashed a certification order issued by the Saskatchewan Labour Relations Board with respect to the carpenter employees of a band council engaged to construct houses on the reserve. The construction was undertaken pursuant to an agreement between the band council and the Department of Indian Affairs whereby the band council undertook to manage the program according to certain guidelines and subject to Department review. The employees were band members, resident on the reserve, hired by the Chief and a band council member, and paid from the band budget account. Mr. Justice Cameron, for the Court, described the functions of a band council:

> In summary, an Indian band council is an elected public authority, dependent on parliament for its existence, powers and responsibilities, whose essential function it is to exercise municipal and government power — delegated to it by parliament — in relation to the Indian reserve whose inhabitants have elected it; as such it is to act from time to time as the agent of the minister and the representative of the band with respect to the administration and delivery of certain federal programs for the benefit of Indians on Indian reserves, and to perform an advisory, and in some cases a decisive role in relation to the exercise by the minister of certain of his statutory authority relative to the reserve.[309]

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[305] *Id.* at 1047-48, 102 D.L.R. (3d) at 397.
[306] [1981] 1 F.C. 225, [1981] 2 C.N.L.R. 126 (1980).
[307] *Id.* at 237, 240-41, [1981] 2 C.N.L.R. at 137, 139.
[308] 15 Sask. R. 37, [1982] 3 C.N.L.R. 181.
[309] *Id.* at 44, [1982] 3 C.N.L.R. at 186.

His Lordship considered such functions to be "federal" and concluded that "the power generally to regulate the labour relations of a band council and its employees, engaged in those activities contemplated by the *Indian Act*, forms an integral part of primary federal jurisdiction" within subsection 91(24) of the Constitution Act, 1867. The learned judge refused to distinguish the construction of houses from other functions of the band council, and declared that such "is part and parcel of the general operation as a whole of the band council and cannot properly be removed from that whole and viewed as an ordinary industrial activity".[310] The operations of the band council were "a federal work, undertaking or business" subject to the Canada Labour Code.

The potential ambit of federal jurisdiction with respect to the activities of band councils suggested by the decisions in *Francis* and *Whitebear* was questioned in *R. v. Paul Band Indian Reserve No. 133*.[311] Judge Hughson declared the "*Whitebear* case to be too broad in making all activities of the Indian council a federal undertaking".[312] The decision held the Alberta Labour Act applicable to the Paul Band in the employment of non-Indian special constables on the reserve appointed under the Alberta Police Act by the Alberta Solicitor General. The facts of *Paul* appear readily distinguishable from *Francis* and *Whitebear* insofar as the employees were not Indian and the function they performed was authorized under provincial legislation.

The limits of federal jurisdiction declared in *Four B Manufacturing*[313] were applied in *Ontario Public Service Employees Union and Ontario Metis and Non-Status Indian Association*.[314] The Board issued a certification order with respect to the employees of the Association and rejected the argument that the labour relations in issue were subject to federal jurisdiction. For the consideration of the argument the Board assumed that Metis and non-status Indians were "Indians" within subsection 91(24). The Board declared:

> [W]e have concluded that the respondent's operation cannot be considered a "federal undertaking or business" even if many of its members, employees, and "customers" are Indians. Economic advancement, housing, and recreation, are not exclusively Indian concerns nor is the respondent the only organization supplying such services to an Indian or Native clientele. There is no connection with Indian lands, the administration of reserves, or the exercise of rights or responsibilities under the Indian Act. The most that can be said is that the respondent's members seek some of the benefits of "full Indian status" for themselves and for other people of native ancestry resident in the Province of Ontario. We do not think such aspirations are sufficient to remove the respondent's operations from provincial jurisdiction.[315]

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[310] *Id.* at 49, 50, [1982] 3 C.N.L.R. at 190, 191.
[311] [1982] 4 C.N.L.R. 120 (Alta. Prov. Ct. 1981).
[312] *Id.* at 131.
[313] *Supra* note 304.
[314] *Supra* note 294.
[315] *Id.* at 338-39, [1982] 1 C.N.L.R. at 98.

The Board concluded that jurisdiction over the labour relations of the employer did not form an integral part of primary federal jurisdiction over Indians and Indian land.

B. *The Application of Provincial Legislation*

Section 88 of the Indian Act declares provincial laws of general application in the province applicable to "Indians", subject to the terms of any treaty, Act of Parliament, and inconsistency with the Indian Act and regulations and by-laws made thereunder.[316] The section has been suggested to be declaratory of the constitutional principles that might otherwise apply.[317] Such principles must be called in aid when examining the application of provincial legislation to "Indian lands" since there is no provision in the Indian Act relating to the applicability of such legislation to such lands.

1. *Social Services*

Provincial jurisdiction with respect to the provision of social services with respect to Indians on and off reserves, in the absence of federal legislation, has been authoritatively established for some time.[318] In recent years courts have expressly denounced the failure of the provinces to provide such services[319] but have expressed support for arrangements whereby an Indian band could act as a social service delivery agency. In *Tom v. Children's Aid Society of Winnipeg*[320] the Child Welfare Act of the province was applied in the consideration of the apprehension and guardianship of an Indian child. Judge Harris stated that he was "sympathetic" to such legislation as the United States Indian Child Welfare Act but observed that "the federal government only has authority to enact similar legislation".[321] In the Manitoba Court of Appeal, O'Sullivan J.A. described the result arising from the application of the provincial legislation as "regrettable".[322] The Canada-Manitoba-Four Nations Confederacy Agreement on Child Welfare, signed on 22 February 1982, described its object as providing "increased Indian band participation and responsibility over Indian child welfare and related family services and juvenile probation programs and services". The Child Welfare Act of the province remains applicable but the province has undertaken to ensure that "the special needs of Indian band(s) and Indian

316 R.S.O. 1970, c. I-6.

317 *See* Natural Parents v. Superintendent of Child Welfare, [1976] 2 S.C.R. 751, 60 D.L.R. (3d) 148 (1975).

318 *Id.*; Nelson v. Children's Aid Soc'y of Eastern Manitoba, [1975] 5 W.W.R. 45, 56 D.L.R. (3d) 567 (Man. C.A.).

319 *See* Director of Child Welfare of Manitoba v. B., [1979] 6 W.W.R. 229, [1981] 4 C.N.L.R. 62 (Man. Prov. Ct. 1979).

320 [1982] 1 C.N.L.R. 160 (Man. Prov. Ct. 1981).

321 *Id.* at 169.

322 [1982] 2 W.W.R. 212, [1982] 1 C.N.L.R. 170.

people, with emphasis on programs or services which recognize, encourage and support the desire of Indian people to ensure their children retain their Indian identity and their traditional customs, culture and way of life" are met.

The Agreement will presumably prevent circumstances such as were described in *Tom v. Children's Aid Society of Winnipeg*, where the Society refused to entrust the child to a special program established for Indian children because it allowed children to be nurtured by an extended family on reserves. The Winnipeg Society would only place children on reserves if there was a couple willing and able to meet the Society's standards.

The provincial legislation has not been applied entirely without regard to the circumstances and culture of people of Indian ancestry. In *Re Eliza*[323] an order was made committing a child of Indian ancestry from a northern community to the Minister of Northern Saskatchewan under the provincial Family Services Act. Judge Moxley declared that in order for a child to be found in need of protection there must be significant departure from the expected standard of care, a standard which must consider the community and parental circumstances. He suggested that the following circumstances ought to be considered in the instant case:

> 1. Cultural differences: There are several basic cultural characteristics recognized by sociologists in persons descended from generalist societies such as Cree and Chipewayan. Four of these are:
>
> (a) an imprecise concept of time;
>
> (b) patience toward the solving of problems and tendency to let the problems solve themselves;
>
> (c) an extended family concept rather than a nuclear family concept;
>
> (d) the ethic of non-intervention, which extends even to the disciplining of children.
>
> 2. Acquired community habits: Some native northern communities have acquired habits and customs which, though not directly related to the native ancestry, make them quite different from other communities elsewhere. Two of the most relevant to *Family Services Act* applications are:
>
> (a) acceptance of widespread drinking and even drunkenness;
>
> (b) tolerance to violence while drunk.
>
> 3. Conditions forced on the community: In northern native communities two of the most significant of these are:
>
> (a) a high level of unemployment;
>
> (b) dependence upon government assistance.[324]

In *Deer v. Opkik*[325] the Quebec Superior Court followed established authority[326] in granting custody of an Inuit child having regard to Inuit customs and culture and the circumstances of the North.

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[323] [1982] 2 C.N.L.R. 53 (Sask. Prov. Ct. 1980).

[324] *Id.* at 54.

[325] [1980] 4 C.N.L.R. 93.

[326] *E.g.*, *Re* Kakfwi (unreported, N.W.T. Terr. Ct., 19 Jan. 1970).

The application of provincial legislation governing the division of matrimonial property was considered by the Ontario Court of Appeal in *Sandy v. Sandy*.[327] The Court declared the Ontario Family Law Reform Act "inoperative to the extent only that it affects lands occupied on a reserve by an Indian with the approval of the band and the approval of the Department of Indian Affairs", and accordingly, a spouse was "not entitled to an award of a share of the interest of her husband in the real property".[328] In *Re Hopkins*[329] the Ontario County Court issued an order for exclusive possession of the matrimonial home on a reserve at the request of the Indian spouse. Judge Clements observed that the Indian Act "does not deal with the problems arising from the breakdown of a marriage" and that such an order did not infringe upon the concept of possession, subject to the approval of the Minister of Indian Affairs, under the Indian Act.[330] The decision adopts a fine distinction from the circumstances of *Sandy v. Sandy*. It must be observed, as Clements J. failed to do, that an order for exclusive possession could not take effect unless possession had also been allotted to the applicant by the band council under subsection 20(1) of the Indian Act. Such provision for band council allotment of possession might well be regarded as precluding the application of the provincial legislation.

2. *Criminal Justice*

It has been sought to challenge the jurisdiction of provincial courts with respect to offences under the Criminal Code and the Indian Act. In *Re Stacey and The Queen*,[331] it was argued that the Quebec Court of Sessions of the Peace had no jurisdiction with respect to a charge of aggravated assault by an Indian on another Indian committed on an Indian reserve. The Quebec Court of Appeal pointed out that the jurisdiction of the Court was derived from the Criminal Code and was clearly applicable. The Court rejected a suggestion that the Iroquois of Coughnawaga were a "sovereign nation".[332]

Offences under the Indian Act, and the regulations and by-laws made thereunder, are punishable upon "summary conviction". In *R. v. Crosby*,[333] the Ontario Court of Appeal declared that the Act thereby confers jurisdiction upon provincial justices or magistrates, being so described in section 720 of the Criminal Code. Mr. Justice Weatherston, for the Court, rejected the argument founded on section 106 of the Indian Act conferring expanded territorial jurisdiction with respect to matters under the Act upon police and stipendiary magistrates, and section 107 which provides for Governor in Council appointment of

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[327] 27 O.R. (2d) 248, [1980] 2 C.N.L.R. 101, 107 D.L.R. (3d) 659 (1979).
[328] *Id.* at 249-50, [1980] 2 C.N.L.R. at 102, 107 D.L.R. (3d) at 660.
[329] 29 O.R. (2d) 24, [1981] 3 C.N.L.R. 51, 111 D.L.R. (3d) 722 (1980).
[330] *Id.* at 30, [1981] 3 C.N.L.R. at 57, 111, D.L.R. (3d) at 728.
[331] 63 C.C.C. (2d) 61 (Que. C.A. 1981).
[332] *Id.* at 66.
[333] 54 C.C.C. (2d) 497, [1982] 1 C.N.L.R. 102 (1980).

justices of the peace. His Lordship observed that section 106 was intended "merely to confirm and broaden an existing jurisdiction" and section 107 "does not detract from the general assumption that offences under the Act are to be tried in the ordinary Courts of the Province in which the reserve is situate".[334]

Band constables have been appointed by the provinces to enforce provincial statutes, the Criminal Code, and the Indian Act. In *R. v. Whiskeyjack*,[335] the accused were charged with assaulting a peace officer in the execution of his duty under section 246 of the Criminal Code. The defence argued that at the time of the alleged offence the band constable involved was enforcing the liquor provisions of the Indian Act, the province had "no power to appoint a special constable for the purpose of enforcing a federal statute on a reserve", and accordingly, the band constable was not then "engaged in the execution of his duty". Mr. Justice McDonald upheld the contention. His Lordship relied upon Pigeon J.'s approval in *R. v. Hauser* of the proposition that the provinces do not have "any constitutional power to subject the enforcement of federal statutes to their executive authority except in what may properly be considered as 'criminal law'."[336] Mr. Justice McDonald concluded "that the Province of Alberta does not have the legislative power to enable the appointment of persons as special constables to enforce the provisions of s. 97 of the *Indian Act*". His Lordship further held that the band constable was not a "peace officer" within the meaning of the Criminal Code because his employment for the enforcement of section 97 did not involve "the preservation and maintenance of the public peace". He observed that the object of section 97 "is not to preserve the peace but to protect Indians living on a reserve from the consequences, in a sense which is broader than the maintenance of the peace, of the excessive use of alcoholic beverages".[337]

The decision in *Whiskeyjack* may be criticized as entailing a narrow view of the "administration of justice", of "the preservation of public peace" and of the band constables' duties and objects. Such comment could not however be directed to circumstances entailing the enforcement of section 30 of the Indian Act; the trespass provision. The decision accordingly indicates that the federal government may be required to act to authorize the appointment of band constables, a step which would necessarily entail greater band involvement than that which has arisen under provincial appointments.

Indian and Inuit customs and culture have been previously considered by the courts in sentencing. In *R. v. Malboeuf*,[338] the Saskatchewan Court of Appeal examined the appropriateness of a condition of a probation order that imposed banishment of the offender from his home

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[334] *Id.* at 501-02, [1982] 1 C.N.L.R. at 107.
[335] [1982] 3 C.N.L.R. 141 (Alta. Q.B.).
[336] [1979] 1 S.C.R. 984, at 996, 98 D.L.R. (3d) 193, at 206.
[337] R. v. Whiskeyjack, *supra* note 335, at 148-49.
[338] 16 Sask. R. 77, [1982] 4 C.N.L.R. 116.

community in Northern Saskatchewan for one year. Chief Justice Bayda declared that "[b]roadly speaking, judicial banishment decrees should not be encouraged" and referred to "a lack of civic responsibility" where a community thinks "in terms of unburdening itself of an undesirable individual by saddling a neighbouring community". The Chief Justice went on to suggest, however:

> Communities in the northern part of the province,. . . where. . . a cultural background exists for a form of punishment through banishment, may be able indeed to enter, successfully, into mutual arrangements sanctioning or providing for an exchange of undesirable individuals in lieu of conventional imprisonment. The courts could then feel free to impose banishment orders within the confines of those mutual arrangements.[339]

The Court deleted the condition from the probation order, but the decision does allow for the development of arrangements between northern communities whereby such forms of punishment could be imposed.

3. *Indian Lands*

In *Surrey v. Peace Arch Enterprises Ltd.*, the British Columbia Court of Appeal held that zoning regulations and regulations made under the Health Act were not applicable to surrendered lands under lease because they were "directed to the use of the land".[340] The courts have been reluctant to employ similar analysis with respect to legislation that otherwise appeared to be of general application. An order to provide amenities under the provincial Residential Tenancies Act was quashed by the Nova Scotia Court of Appeal[341] because of inconsistency with the Indian Act, not because it was directed to the use of Indian lands. Rent control legislation was declared not to be legislation in relation to Indian land or the use of Indian land by the British Columbia Court of Appeal in *Re Park Mobile Homes Sales Ltd.*[342] Most recently, the British Columbia Supreme Court[343] distinguished *Surrey v. Peace Arch Enterprises Ltd.* with respect to shopping hours legislation because it was directed to the activities of the user of the land, not its use. The decision adds to the body of judicial doubt as to the correctness of the analysis employed in the *Peace Arch* case.

4. *Creditor's Rights*

Professor D. Sanders has observed that "Indians living on reserves are subject to the processes of provincial laws so long as there is no

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[339] *Id.* at 80, [1982] 4 C.N.L.R. at 119.

[340] *Supra* note 287, at 383.

[341] Millbrook Indian Band v. Northern Counties Residential Tenancies Bd., 28 N.S.R. (2d) 268, 93 D.L.R. (3d) 230 (1978).

[342] 85 D.L.R. (3d) 618 (1978).

[343] R. v. Duncan Supermarket Ltd., [1982] 4 W.W.R. 181.

conflict with the provisions of the Indian Act".[344] In *Chrysler Credit Corp. v. Penagin*,[345] the Ontario District Court adopted a restrictive understanding of the ambit of the protection from seizure conferred by the Indian Act. The plaintiff, a finance company, was the assignee of a conditional sales contract whereby a truck was sold to an Indian living on a reserve. The plaintiff sought to repossess the truck, which was now situated on the reserve. Section 89 of the Indian Act provides:

> (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian.
>
> (2) A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller, may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.[346]

It was argued that the assignee of a conditional sales agreement not being "a person who sells" was barred by subsection 89(1) from seizing the truck on the reserve.

Judge Fitzgerald declared with respect to sections 88 and 89 of the Indian Act:

> the obvious intent of Parliament is to make Indian citizens subject to the same sanctions as other citizens and in particular that if you make a conditional sales agreement to pay and do not pay, the person having title may repossess the goods. The Government of Canada has not entrenched [*sic*] on the right of the province to legislate generally on property and civil rights in this instance. And the Indian citizens must obey the general law like any other citizen. To hold otherwise would be to extend to Indians a remedy never contemplated by the framers of the *Indian Act* and not justified by logic, history or necessity.[347]

His Honour considered that subsection 89(1) "quite obviously does not apply to property where the title has not passed to an Indian or to an Indian band" and that accordingly subsection 89(2) was merely "declaratory" making "it clear that section 89, subsection 1 was never intended to apply to a conditional sales agreement".[348] Judge Fitzgerald did not explain the justifications of "logic, history or necessity" behind this conclusion, a conclusion which is contrary to that demanded by ordinary approaches to statutory interpretation.

The "history" of section 89 may be provided in part by reference to section 66 of the "first" Indian Act 1876.[349] Section 66 provided:

> No person shall take any security or otherwise obtain any lien or charge, whether by mortgage, judgment or otherwise, upon real or personal property

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[344] Sanders, *supra* note 280, at 11.
[345] [1982] 1 C.N.L.R. 19 (1981).
[346] R.S.O. 1970, c. I-6.
[347] *Chrysler Credit Corp.*, *supra* note 345, at 22.
[348] *Id.* at 20-21.
[349] The Indian Act, 1876, S.C. 1876, c. 18.

> of any Indian or non-treaty Indian within Canada. . . . Provided always, that any person selling any article to an Indian or non-treaty Indian may, notwithstanding this section, take security on such article for any part of the price thereof which may be unpaid.

The section remained in effect until 1951, when section 89 of the present Indian Act was enacted. Sections 66 of the 1876 Indian Act and 89 of the 1951 Indian Act implemented an element of the policy of protection from "use and imposition" authoritatively declared in the Royal Proclamation of 1763. The policy has been maintained throughout the entire history of Indian administration in Canada and the great majority of the provisions of the Indian Act are directed to its implementation. The Indian Act has always contained a general prohibition upon the exercise of legal processes against personal property of an Indian situate on a reserve. The proviso to section 66 was clearly not "declaratory", and "history" would accordingly suggest that neither is subsection 89(2). The "logic" of Indian protection, the "history" of the particular provisions and of the Indian Act, and ordinary approaches to statutory interpretation suggest the rejection of the analysis and conclusion of Judge Fitzgerald.

In the alternative, the learned judge declared that "it is consistent with the intent and purpose of section 89(2) that a 'person who sells' includes the assignee of the conditional vendor".[350] It is suggested that the history of the provision does not suggest any such purpose, and in the absence thereof that the courts should give effect to the policy securing the protection of Indians from "abuse and imposition".

C. *Powers of Band Government*

The supremacy of Parliament has long entailed the denial of Indian self-government, customs and culture. A recent illustration was the decision of the Federal Court of Appeal in *Canatonquin v. Gabriel*[351] wherein the plaintiffs sought a declaration that the customary "election of the band council and its members as hereditary chiefs with lifelong tenure on the council is illegal, null and void" as being contrary to the Indian Act. The Court rejected the contention of the defendants that the Federal Court lacked jurisdiction "because the only issue raised by the action, namely the validity of the election of the defendants to the Council of the Band, is governed by customary Indian law and not by a federal statute".[352]

The manner in which a band council may exercise its power was considered in *Leonard v. Gottfriedson*.[353] The plaintiffs sought a declaration that the defendant was unlawfully in posession of land in a reserve. It was asserted that a purported allotment of land to the defendant by

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[350] *Chrysler Credit Corp.*, supra note 345, at 22.
[351] [1980] 2 F.C. 792, [1981] 4 C.N.L.R. 61 (1980).
[352] *Id.* at 793, [1981] 4 C.N.L.R. at 61.
[353] *Supra* note 229.

the band council was invalid because the council acted without an actual meeting and that the defendant and his father, as members of the council, acted improperly in participating in the decision. Subsection 2(3) of the Indian Act declares that a band council may only exercise a power under the Act "pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened". Mr. Justice Rae of the British Columbia Supreme Court declared that the band council must actually meet in order to exercise a power under the Act. His Lordship stated that the object of the Act was to "benefit and protect the Indian bands and their individual members", and with respect to a quasi-municipal body such as the council, its powers must be "exercised strictly in accord with the Act in the interests of the benefit and protection of the Indians".[354] He pointed out that the standard form of Band Council Resolutions did not refer to the holding of a meeting and accordingly suggested that the use of the form was a "very questionable practice". The resolution purporting to allot the land in issue to the defendant had been signed by the defendant's father. Mr. Justice Rae determined that the father was disqualified by reason of interest, being interested in the business for which the defendant sought the land. It was held that the purported allotment was a nullity.

The powers of a band council to legislate have been equated with those of a rural municipality. Sections 81 and 83 of the Indian Act prescribe the purposes for which a band council may enact by-laws. Paragrah 81(*g*) enables land use control by providing for the making of by-laws regarding:

> the dividing of the reserve or a portion thereof into zones and the prohibition of the construction or maintenance of any class of buildings or the carrying on of any class of business, trade or calling in any such zone.[355]

The provision was held by the British Columbia Supreme Court[356] to authorize the making of a by-law which designated an entire reserve as a zone and prohibited all construction within that zone. The by-law contemplated that any new construction would require an amending by-law. Paragraph 81(*g*) does not authorize the making of a by-law that prohibits a class of business except where the permission of the band council is obtained. The Quebec Court of Appeal in *La Reine et Conseil de la Bande des Mohawk de Kanawake c. Rice*[357] determined that the section provides for a power of general regulation by by-laws, not special authorization by band council resolution.

Paragraph 81(*q*) confers the power upon band councils to make bylaws "with respect to any matter arising out of or ancillary to the exercise of powers under this section". In *Re Stacey and The Queen* it was argued:

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[354] *Id.* at 337, [1982] 1 C.N.L.R. at 71.

[355] R.S.C. 1970, c. I-6.

[356] Joe v. Findlay, *supra* note 225.

[357] [1980] C.A. 310, [1981] 1 C.N.L.R. 71 (1980).

> S. 81 confers not only a legislative power on a band council but also an executive and *judicial* power: the band can not only "make by-laws", it also has the power to legislate "with respect to any matter arising out of or ancillary to the exercise of powers" under s. 81, in other words, the power (executive) to assure that its regulations are respected and that the offenders be brought before the authority designated by the band to decide whether there was an offence and if so, to determine the punishment (judicial).[358]

Mr. Justice Bernier for the Quebec Court of Appeal declared the argument not to be "well founded" and observed:

> The powers conferred by s. 81 are first of all, powers to regulate, and to regulate only "administrative statutes". In other words, a band council has, in this area, the same sort of legislative powers as those possessed by the council of a municipal corporation. The power to give effect to regulations cannot extend beyond these administrative statutes; they are accessory and nothing more.[359]

Section 86 of the Indian Act provides that provision of a copy of a by-law certified by a superintendent of the Department of Indian Affairs affords evidence that a by-law was duly made. In *R. v. Bear*[360] Stevenson J. quashed convictions entered for violations of a band by-law in the absence of proof in proper form of the by-law. A copy certified by the Assistant Clerk of the Privy Council was ruled insufficient.

A band council is a "federal board, commission or other tribunal" within paragraph 2(g) of the Federal Court Act[361] and is accordingly subject to the exclusive jurisdiction of the Federal Court with respect to the issuance of prerogative writs against it under section 18 of that Act. In *Gabriel v. Canatonquin*[362] Thurlow A.C.J. examined the powers of a band council under the Indian Act and concluded that it resembled "a somewhat restricted form of municipal government", and determined, with the support of two decisions of the Quebec Superior Court,[363] that a band council was a "federal board, commission or other tribunal".[364] The Federal Court of Appeal[365] affirmed this conclusion, and was thereafter followed by the Quebec Court of Appeal in *La Reine et Conseil de la Bande des Mohawk de Kanawake c. Rice.*[366] The matter remains to be finally decided because of doubts as to the correctness of this conclusion expressed by Laskin J. (as he then was) in *Attorney General of Canada v. Lavell*[367] in the Supreme Court. Mr. Justice Laskin postulated such

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[358] *Supra* note 331, at 68 (emphasis in original).

[359] *Id.*

[360] 35 N.B.R. (2d) 181, 88 A.P.R. 181 (Q.B. 1981).

[361] R.S.C. 1970, c. 10 (2nd Supp.).

[362] [1978] 1 F.C. 124 (Trial D. 1977).

[363] Rice v. Council of Band of Iroquois of Caughnawaga (unreported, Que. S.C., 13 Feb. 1975); Diabo v. Mohawk Council of Kanawake (unreported, Que. S.C., 3 Oct. 1975).

[364] Gabriel v. Canatonquin, *supra* note 362, at 128.

[365] Canatonquin v. Gabriel, *supra* note 351.

[366] *Supra* note 357. *See also* Beauvais v. The Queen, [1982] 1 F.C. 171, [1982] 4 C.N.L.R. 43 (F.C. Trial D. 1981).

[367] [1974] S.C.R. 1349, 38 D.L.R. (3d) 481 (1973).

doubts on the "resemblance" of a band council to the board of directors of a corporation.[368] In *Beauvais v. The Queen*,[369] Walsh J. of the Federal Court Trial Division pointed out "that there is no applicable federal law to justify the institution of a claim in *damages* in this Court against defendant the Mohawk Council of Kanawake so that such a claim would have to be processed in the Superior Court" of Quebec.[370]

The capacity of a band council to act with respect to powers arising other than under the Indian Act appears limited. In *Francis v. Canada Labour Relations Board*,[371] the Federal Court of Appeal concluded that a band council could not be an "employer" within the Canada Labour Code and accordingly set aside a certification order. Mr. Justice Heald considered that since a band council was not a "person" within the meaning of the Indian Act it could not be a "person" within the definition of "employer" in the Canada Labour Code. The conclusion is unexplained and appears inexplicable. His Lordship also considered, along with Thurlow C.J., that a band council has no capacity to enter into employment contracts. Mr. Justice Heald suggested that the band itself might satisfy the requirements of an "employer";[372] Thurlow C.J. wondered if the individual members of the band might constitute employers. Mr. Justice Le Dain dissented because there was "a *de facto* situation of employment".[373] The decision of the majority of the Court of Appeal indicates a determination to allow to the band council any powers other than those specifically conferred by the Indian Act.

The decision was not approved by the Saskatchewan Court of Appeal in *Whitebear Band Council v. Carpenters Provincial Council of Saskatchewan*.[374] Mr. Justice Cameron described the facts of the employment and, as the band council argued the case on the footing that it was the *de facto* employer, declared a preparedness to assume such. In *R. v. Paul Band Indian Reserve No. 133*[375] Hughson J., by contrast, held that the band was a legal entity and constituted an employer within the meaning of the Alberta Labour Act.

The capacity of a band to act as a guardian of an Indian child was denied in *Tom v. Children's Aid Society of Winnipeg*. The Manitoba Provincial Court held that the Child Welfare Act contemplated "guardianship for nurture, and places upon an individual the responsibility to feed, to raise, to train and to educate". A band, an artificial entity, did not meet the requirements of the Act and could not otherwise qualify in the absence of the approval of the Minister.[376] The Manitoba Court of Appeal "regrettably" affirmed the decision but commented

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[368] *Id.* at 1379, 38 D.L.R. (3d) at 504-05.
[369] *Supra* note 366.
[370] *Id.* at 179, [1982] 4 C.N.L.R. at 48.
[371] *Supra* note 306.
[372] *Id.* at 244-46, [1981] 2 C.N.L.R. at 142-44.
[373] *Id.* at 248, [1981] 2 C.N.L.R. at 145.
[374] *Supra* note 308.
[375] *Supra* note 311.
[376] *Supra* note 320, at 168.

that the members of the band "have concerns which ought to be considered in determining what is in the best interest" of the child.[377] On 22 February 1982 an Agreement was signed by Canada, Manitoba and the Four Nations Confederacy of Manitoba respecting Indians resident on reserves. The Agreement contemplates that Indian authorities, including bands, shall be responsible for the provision of services respecting child welfare and juvenile probation subject to the review of a tripartite Indian Child Welfare Committee.

VI. Indian Status under the Indian Act

Subsection 2(1) of the Indian Act declares that an "'Indian' means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian". Section 11 prescribes those persons who are entitled to be registered and section 12 those persons who are not entitled to be registered.

In 1979, the Saskatchewan Court of Appeal in *Kinookimaw Beach Association v. The Queen*[378] determined that an "Indian corporation" could not claim the benefits of the tax exemption provided by section 87 of the Indian Act because it is "the association which is being taxed and not the shareholders". The Court would not lift the corporate veil or examine the purpose of section 87 to determine if the "substance" of the corporation should benefit from the exemption.[379] The Alberta Court of Appeal followed *Kinookimaw Beach* and declared a general denial of Indian status to an "Indian corporation" in *Re Stony Plain Indian Reserve No. 135*.[380] A reference to the Court required an answer to the question:

> Is a corporation that has its registered office on an Indian reserve, in which all the shareholders are registered Indians residing on an Indian reserve and are members of an Indian band, an Indian within the meaning of section 91(24) of the British North America Act, 1867, as amended, or the Indian Act (Canada) as amended?[381]

An additional question modified the enquiry by stipulating that the registered office might be located off a reserve and some of the shareholders might be non-Indians. The Court answered "No" to both questions, and observed:

> Whether the question is considered under s. 91(24) of the B.N.A. Act or under the Indian Act, the status of a corporation as a legal entity which exists independently of the character or status of its shareholders is recognized in law. It follows that the status of any or all of its shareholders, or the presence of a registered office on or off a reservation, has no bearing on the status accorded it at law.[382]

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[377] *Supra* note 322, at 214, [1982] 1 C.N.L.R. at 172.
[378] [1979] 6 W.W.R. 84, [1979] 4 C.N.L.R. 101.
[379] *Id.* at 90, [1979] 4 C.N.L.R. at 106.
[380] *Supra* note 217.
[381] *Id.* at 311, [1982] 1 C.N.L.R. at 141.
[382] *Id.* at 325, [1982] 1 C.N.L.R. at 154.

The Court referred to such conclusion in *obiter* in considering whether lands surrendered, and granted or leased to an "Indian corporation", remained surrendered lands.

The Court did not consider the jurisprudence of lifting the corporate veil beyond reference to *Kinookimaw Beach*, nor did it examine the provisions of the Indian Act respecting status, nor engaged in any consideration of the object and history of the Indian Act or subsection 91(24) of the Constitution Act, 1867. It is suggested that such a case requires this analysis, especially inasmuch as it bears upon the jurisdiction of Parliament to legislate with respect to Indian economic development and Indian corporations. In this latter regard, the Court did seek to limit the significance of the decision:

> A suggestion was made in argument that the Indian Act could be amended in such a way as to give a corporation a special "Indian" status. We do not intend this opinion to be taken as considering the constitutionality of such an amendment.[383]

The entitlement to registration provisions of section 11 of the Indian Act was construed by the Federal Court[384] in 1979 so as to deny Indian status to illegitimate children unless their mothers were born to Indian status. Such construction entailed implying that the term "person" referred only to those of legitimate birth. This deviation from the "plain meaning" of the language was sought to be justified, albeit somewhat unsuccessfully, by reference to the other provisions of the Act and the suggested intent of the legislator. Such intent was suggested to be "that the status of an Indian should be reserved for someone who was definitely of Indian blood".[385] That the decision of the Federal Court does not accomplish this result was made manifest in *Sahanatien v. Smith*.[386] The Federal Court denied status to the natural but illegitimate son of Indian parents, whose mother was enfranchised as a child by order of the Governor of Council. The Court observed that the son was a "full-blooded Indian". The denial of status was maintained even in spite of his adoption under provincial legislation by registered Indians. The Court declared, in accord with *Natural Parents v. Superintendent of Child Welfare*,[387] that the provincial legislation could not have "any effect upon the status and rights acquired as an Indian under the *Indian Act*".[388]

In *Re Giasson*,[389] Ouimet J. of the Quebec Superior Court expressed his sympathy with an applicant who had sought a review of the decision of the Registrar to apply the so-called "double non-Indian mother" rule under paragraph 12(1)(*a*)(iv) of the Indian Act. The provision declares that a person born of a marriage entered into after 4 September 1951

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383 *Id.*

384 Martin v. Chapman, [1980] 1 F.C. 72, [1981] 2 C.N.L.R. 78 (Trial D. 1979).

385 *Id.* at 76, [1981] 2 C.N.L.R. at 82.

386 134 D.L.R. (3d) 172 (Trial D. 1982).

387 *Supra* note 317.

388 Sahanatien v. Smith, *supra* note 386, at 176.

389 [1979] C.S. 1089, [1982] 2 C.N.L.R. 66 (1979).

and whose mother and whose father's mother were not of Indian status by birth is no longer entitled to be registered upon attaining the age of 21 years. Mr. Justice Ouimet declared that he must "apply the law in all its rigour" and reject the application. In *Re O'Bomsawin*,[390] the learned judge reached the same conclusion, expressing similar sympathies. In doing so, he rejected the argument that the section should be construed so as to maintain the applicant's status in order to avoid any suggested retroactive effect.

In *Re James David Jock*,[391] the Ontario County Court granted such an application and avoided the disentitlement otherwise declared in paragraph 12(1)(*a*)(iv). Judge Smith considered the mischief rule and observed that the "mischief aimed at is clearly the prevention of the maintenance of an artificial Indian status in a person whose characteristics of blood, personality traits, culture and even language had ceased to have any real affinity with the genuine Indian community". The learned judge then determined that paragraph 12(1)(*a*)(iv) did not apply to James David Jock because his grandmother, albeit entered on the Band list only because of her marriage to his grandfather, was a "full-blood" Indian of the same tribe even though she was born and grew up on the United States portion of the St. Regis reserve. Judge Smith determined that the grandmother was a member of the band for whom the St. Regis reserve land in Canada had been set apart within paragraph 11(1)(*b*) and accordingly was regarded as having been entitled to registration upon birth. On the special circumstances of the case, with particular reference to the St. Regis reserve and tribe, the learned judge rejected the suggestion that entitlement to registration upon birth required residence or birth in Canada.[392]

The function of a judge under subsection 9(4) of the Indian Act, which provides for a review of the Registrar's decision, was characterized as "appellate" in nature by the Federal Court of Appeal in *Minister of Indian Affairs and Northern Development v. Ranville*.[393] The Court concluded that such a judge acts *qua* judge under subsection 9(4), and not as *persona designata*, and accordingly does not constitute a "federal board, commission or other tribunal" subject to review under section 28 of the Federal Court Act.

The disentitlement to registration of an Indian woman upon marriage to a non-Indian man by paragraph 12(1)(*b*) of the Indian Act was upheld by the Supreme Court of Canada in *Attorney General of Canada v. Lavell*[394] in 1973. The consequences of such disentitlement were instanced in *Boadway v. Minister of National Revenue*.[395] The Tax Review Board held that upon marriage to a non-Indian the Indian

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[390] [1981] 4 C.N.L.R. 76 (Que. S.C. 1980).
[391] [1980] 2 C.N.L.R. 75.
[392] *Id.* at 80.
[393] [1982] 1 F.C. 485, [1982] 4 C.N.L.R. 80 (1980).
[394] *Supra* note 367.
[395] 80 D.T.C. 1321, [1981] 2 C.N.L.R. 31 (1980).

appellant could no longer assert any exemption from income tax under section 87 of the Indian Act, despite the fact that she remained registered for nine months after marriage pending the decision of the Supreme Court in *Lavell*. The Board declared that the registration list was "only for administration purposes" and since the "appellant was not entitled to be registered as an Indian . . . she is subject to taxation under the *Income Tax Act*".[396]

On 30 July 1981 the United Nations Human Rights Committee[397] declared that the loss of Indian status under section 12(1)(*b*) resulting in the denial of the right to reside on the complainant's home reserve constituted a violation of Article 27 of the International Covenant on Civil and Political Rights. Article 27 provides:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The Committee observed that:

> Persons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant.

The Committee recognized the need to restrict rights of residence on a reserve for such purposes as protection of its resources and preservation of the identity of its people, but concluded:

> Whatever may be the merits of the Indian Act in other respects, it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe.[398]

VII. EQUALITY

A. *Non-Discrimination and the Canadian Bill of Rights*

The Canadian Bill of Rights has not been relied upon in very recent years to strike down sections of the Indian Act or the provision of special privileges for persons of Indian ancestry. In *R. v. Rocher*,[399] fisheries regulations which conferred special privileges upon such persons were not considered to be in violation of the Bill of Rights. And in *King v. The Queen*,[400] the liquor controls established by the Indian Act on reserves were upheld. There the Indian accused was convicted in provincial court of a violation of paragraph 97(*b*) of the Act, which makes it an offence for any person to be intoxicated on a reserve. The offence

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[396] *Id.* at 1322, [1981] 2 C.N.L.R. at 33.

[397] Indian Act discriminatory on the grounds of sex: Lovelace v. Canada, 2 Human Rights L.J. 158, [1982] 1 C.N.L.R. 1 (1981).

[398] *Id.* at 12, 14, [1982] 1 C.N.L.R. at 165-66.

[399] *Supra* note 181.

[400] [1982] 2 W.W.R. 367, [1982] 2 C.N.L.R. 144 (Sask. Q.B.).

was committed in his home on the reserve. On appeal, it was argued that the accused was being discriminated against because it is not an offence to be intoxicated in your own home under Saskatchewan law and accordingly he was denied equality before the law *vis-a-vis* all the residents of the province who do not reside on Indian reserves. Under the Indian Act, on the reserve in question, *posssession* of intoxicants was not unlawful provided it was in accord with the law of the province. Mr. Justice Noble rejected the appellant's argument and dismissed the appeal observing:

> The essential point is that the Indian Act makes it an offence for any person to be intoxicated on an Indian reserve, irrespective of their race, national origin, colour, religion or sex. Thus, it cannot be successfully argued that the Indian, such as the appellant, is being treated differently or is placed uner a legal disability of any kind as a result of s. 97(b).[401]

His Lordship did not address the problem that arises because only Indians are entitled to live on a reserve and accordingly only Indians have their homes there and may thus be convicted of being intoxicated in their own homes.

B. *Affirmative Action*

Affirmative action programs in all spheres of social and economic enterprise have been undertaken throughout Canada in an attempt to improve the lot of persons of Indian and Inuit ancestry so that such persons do not continue as a disadvantaged minority. An educational program with these objectives was challenged by a non-native person in *Bloedel* v. *Board of Governors of the University of Calgary.*[402] The majority of the Board of Inquiry established under the Alberta Individual's Rights Protection Act[403] ruled that the denial of tutor-counselling services to the complainant, which services were paid for with respect to native students by the Deparment of Indian Affairs, constitute a denial of "services. . . customarily available to the public" because of the race or colour of the complainant and were therefore in violation of section 3 of the Act. The majority of the Board observed that the Act made "no provision for the legitimation of what have been popularly referred to in some jurisdictions, as 'affirmative action' programs" and declared that in the absence of specific provision "no program, no matter how praise-worthy, which tends to differentiate on the basis of race or colour can be permitted".[404]

Such conclusion was rejected by the four members of the Supreme Court of Canada who thought it necessary to consider the question in *Athabasca Tribal Council v. Amoco Canada Petroleum Co.*[405] Mr. Justice Ritchie, (Laskin C.J.C., Dickson and McIntyre JJ. concurring),

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401 *Id.* at 371, [1982] 2 C.N.L.R. at 147.
402 [1980] 1 C.N.L.R. 50.
403 S.A. 1972, c. 2.
404 *Bloedel, supra* note 402, at 58, 59.
405 [1981] 1 S.C.R. 699, 29 A.R. 350, [1981] 4 C.N.L.R. 27.

adopted the views of Morrow J.,[406] who had dissented in the Alberta Court of Appeal, and referred to the preamble to the Individual's Rights Protection Act. The preamble declared it to be a fundamental principle that "all persons are equal in dignity and rights without regard to race". Mr. Justice Morrow had observed that:

> If these high sounding words have any meaning and significance at all, surely one cannot read the statute in a way to result in or to have the effect of reaching the very opposite effect to the declared purpose.[407]

Mr. Justice Ritchie considered with respect to the affirmative action program before the Court:

> In the present case what is involved is a proposal designed to improve the lot of the native peoples with a view to enabling them to compete as nearly as possible on equal terms with other members of the community who are seeking employment in the tar sands plant. With all respect, I can see no reason why the measures proposed by the "affirmative action" programs for the betterment of the lot of the native peoples in the area in question should be construed as "discriminating against" other inhabitants. The purpose of the plan as I understand it is not to displace non-Indians from their employment, but rather to advance the lot of the Indians so that they may be in a competitive position to obtain employment without regard to the handicaps which their race has inherited.

His Lordship concluded that "the Court of Appeal was in error in holding that an affirmative action program based on racial criteria would be in breach of *The Individual's Rights Protection Act*".[408]

Prior to the appeal being heard by the Supreme Court, the legislature of Alberta amended the Act to authorize the Lieutenant Governor in Council to make regulations, *inter alia*, "authorizing . . . programs that, in the absence of the authorization, would contravene this Act".[409] The other members of the Supreme Court chose not to pronounce upon the question because it was considered that the amendment provided "a mechanism for affirmative action programs when needed".

Affirmative action programs pursuant to special statutory provisions have been approved in Saskatchewan with respect to teacher education for Metis and non-status Indians[410] and employment in the construction and operation of a uranium mine of persons of Indian ancestry resident in Northern Saskatchewan.[411]

The program in *Athabasca Tribal Council v. Amoco* had come before the Court because the Tribal Council had sought to require the Energy Resources Conservation Board of Alberta to condition approval of the proposed project upon the undertaking of such a program. The Board is established under The Energy Resources Conservation Act[412]

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406 *Athabasca Tribal Council*, [1980] 5 W.W.R. 165, 112 D.L.R. (3d) 200.

407 *Id.* at 191, 112 D.L.R. (3d) at 222.

408 *Supra* note 405, at 711-12, 29 A.R. at 362-63, [1981] 4 C.N.L.R. at 38.

409 The Individual's Rights Protection Amendment Act, 1980, S.A. 1980, c. 27, s. 7.

410 *Re* An Application for approval of Sask. Urban Native Teacher Educ. Program, 1 C.H.R.R. D/131 (Sask. H.R.C. 1980).

411 Key Lake Mining Corp. (unreported, Sask. H.R.C., Mar. 1982).

412 S.A. 1971, c. 30.

and empowered to act under that statute and The Oil and Gas Conservation Act.[413] Under paragraph 24(1)(*b*) of the Energy Resources Conservation Act, the Board is empowered to "recommend to the Lieutenant Governor in Council such measures as it considers necessary or advisable in the public interest related to the exploration for, production, development, conservation, control, transportation, transmission, use and marketing of energy resources and energy". Section 43 of the Oil and Gas Conservation Act required the approval of the Board before the proposed project might proceed and declared that an "approval granted under this section shall be subject to the terms and conditions therein prescribed". Mr. Justice Ritchie, for the Court, concluded that the Board did not have jurisdiction to prescribe the implementation of an affirmative action program as a condition of the approval of a tar sands plant under section 43. The learned judge referred to the expressed objects of the statutes and declared:

> [T]he Board's jurisdiction is governed and controlled by the statutes to which I have referred and in conformity with the purposes for which these statutes were enacted, that jurisdiction is limited to the regulation and control of the development of energy resources and energy in the Province of Alberta. The powers with which the Board is endowed are concerned with the natural resources of the area rather than with the social welfare of its inhabitants, and it would, in my view, require express language to extend the statutory authority so vested in the Board so as to include a program designed to lessen the age-old disadvantages which have plagued the native people since their first contact with civilization as it is known to the great majority of Albertans.[414]

The decision denies the Indian people a valuable forum in which to challenge and suggest conditions respecting resource projects. Such a forum has been used effectively by aboriginal peoples in other countries, for example, the warden's court in Australia. The decision has a significance far beyond the particular project in question, and suggests a limited scope for the attachment of conditions directed to the concerns of Indian people in the disposition of mineral resources throughout Canada.

VIII. The Repatriation of the Constitution and the Canada Act

The patriation of the Canadian constitution in the form that was enacted by the Parliament of the United Kingdom was vigorously opposed by the Indian peoples of Canada. The opposition included proceedings in the English courts to prevent the enactment of the Canada Act, to challenge its validity, and to assert rights against the Crown in right of the United Kingdom irrespective of the passage of the Act. In the *Alberta* case,[415] the applicant Indian organizations sought a declara-

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[413] R.S.A. 1979, c. 267.

[414] *Athabasca*, *supra* note 405, at 708, 29 A.R. at 359, [1981] 4 C.N.L.R. at 35.

[415] *Supra* note 187.

tion, prior to the passage of the Act, that the Crown in right of the United Kingdom still was under treaty or other obligations to the Indian peoples of Canada. The Court of Appeal rejected the application asserting that such obligations as existed resided in the Crown in right of Canada. The reasons of the Court were examined above in the context of "Treaties". On 19 March 1982 the Canada Act received Royal Assent. Two days later the Attorney General of England moved to strike out statements of claim filed by the Indian organizations of British Columbia, Manitoba and Saskatchewan as disclosing no reasonable cause of action.[416] The motions with respect to all the actions were heard together. In the action brought by the Indians of British Columbia and Manitoba, it was asserted, and declarations with respect thereto were sought, that pursuant to the British North America Acts, 1867 to 1964 (now Constitution Acts, 1867 to 1964), with specific reference to the Natural Resource Transfer Agreements appended to the Act of 1930, and section 4 of the Statute of Westminster, 1931:

> (1) the United Kingdom Parliament has no power to amend the constitution of Canada so as to prejudice the Indian Nations of Canada without their consent;
>
> (2) the Canada Act 1982 is ultra vires.

Vice Chancellor Megarry rejected the arguments and the application of the plaintiffs. The Vice Chancellor stated that "it is a fundamental of the English constitution that Parliament is supreme" and that "[t]he Canada Act 1982 is an Act of Parliament, and sitting as a judge in an English court I owe full and dutiful obedience to that Act". The learned judge observed that he did not "think that, as a matter of law, it makes any difference if the Act in question purports to apply outside the United Kingdom", whether it was enacted with respect to a foreign state that had never been British or colonies which have subsequently been granted independence. Megarry V.C. asserted, moreover, that no declaration might be awarded against the Attorney General of England where such party lacked any interest in the subject matter of the declaration, and that "the courts of England cannot pronounce upon whether a law of indenpendent sovereign is valid within that state, for to do this would be to assert jurisdiction over that state".[417] Such latter grounds for refusing a declaration appear consequential to the principal conclusion that the Canada Act 1982 could not be declared *ultra vires* by a court of the United Kingdom. In the result, Megarry V.C. concluded that the statement of claim of the Indian organizations of British Columbia and Manitoba disclosed no reasonable cause of action and should be struck out.

The Federation of Saskatchewan Indians sought to assert that irrespective of the passage of the Canada Act the treaties with the Indians of Saskatchewan remained in full force and effect and binding on the

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[416] Manuel v. A.G., *supra* note 194.

[417] *Id.* at 830-32, [1982] 3 C.N.L.R. at 21-23.

Crown in right of the United Kingdom and constituted trusts to which the Crown was subject. Megarry V.C. considered that the cause was indistinguishable from the *Alberta* case, for the reasons considered above in the context of "Treaties", and struck out the statement of claim.

On 30 July 1982 the English Court of Appeal[418] dismissed an appeal brought by the Indians of British Columbia and Manitoba from the decision of Vice Chancellor Megarry. Lord Justice Slade, speaking for the Court, stated that it was not arguable that section 4 of the Statute of Westminster, making necessary the express declaration of the Dominion's request for and consent to the enactment, had not been complied with in relation to the Canada Act 1982. The recitation of such request and consent in the preamble to the Act was "conclusive". Lord Justice Slade declared that the wording of section 4 was designed to obviate the need for inquiries as to the manner in which the consents of numerous persons and bodies had to be expressed and as to whether all of them had in fact been given.[419] The Court thereby declared that the consent of the Indian nations of Canada was not necessary to the amendment of the British North America Acts.

The Indian organizations of Canada were accordingly unsuccessful in the courts of the United Kingdom in preventing the passage of the Canada Act or asserting any rights against the Crown in right of the United Kingdom. The action did, however, elicit the following *obiter* observations from Lord Denning M.R.:

> It seems to me that the Canada Bill itself does all that can be done to protect the rights and freedoms of the aboriginal peoples of Canada. It entrenches them as part of the constitution, so that they cannot be diminished or reduced except by the prescribed procedure and by the prescribed majorities. In addition, it provides for a conference at the highest level to be held so as to settle exactly what their rights are. That is most important, for they are very ill-defined at the moment.[420]

Far from entrenching the rights of the peoples of Indian and Inuit ancestry, the Canada Act may provide for their abrogation. Section 52 of the Constitution Act[421] declares the Constitution of Canada to be the "supreme law of Canada". The Constitution is defined so as not to include the aboriginal or treaty rights of the aboriginal people of Canada.

In a submission prepared before the enactment of the Canada Act, the Guarantee of Rights contained in the Canadian Charter of Rights and Freedoms was pessimistically assessed as follows:

> 1. Section 6 declares the equality of opportunity of all citizens of Canada "to pursue the gaining of a livelihood in any province" and prohibits affirmative action employment programs for disadvantaged Indian groups except where "the rate of employment in that province is below the rate of employment in Canada".

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[418] Manuel v. A.G., [1982] 3 W.L.R. 837.

[419] *Id.* at 846.

[420] *Alberta* case, *supra* note 187, at 653, [1981] 4 C.N.L.R. at 99.

[421] *Enacted by* Canada Act, 1982, U.K. 1982, c. 11.

Indian *unemployment* in the Prairie Provinces has been estimated between 60% and 80% and yet the rate of employment in those provinces is higher than the national rate. Section 6 entails the abrogation of the Indian treaty right to economic and social assistance and the denial of employment programs designed to alleviate the conditions of disadvantaged Indians.

2. Section 15(1) declares that every individual "has the right to the equal protection and equal benefit of the law without discrimination".

Section 15 is headed "General Rights" as distinct from "Legal Rights" and is clearly directed to securing equality of opportunity in all things, not merely the criminal justice system. Section 15(1) entails the abrogation of the special rights conferred by treaty and by the nature of their indigenous status upon the Indians of Canada. It represents a denial of the recognized legal status of Indian people as "Citizens Plus". It is suggested that the application of section 15(1) will abrogate treaty rights to:

a. hunt, trap and fish, essential to the livelihood of many Indians in Canada;
b. education;
c. health and medicine;
d. social and economic assistance;
e. outstanding and unsatisfied entitlements to land. It is to be observed that such impact with respect to land is in considerable contrast to recent efforts of the Commonwealth of Australia with respect to the Northern Territory and the establishment of land purchase arrangements for Aborigines;
f. exemption from taxation and seizure;
g. self-government and self-management.

Section 15(2) declares that section 15(1) does not preclude affirmative action programs. Such provision affords no protection for Indian treaty and aboriginal rights. The exercise of such rights does not constitute "affirmative action" but represents the implementation of the terms under which Canada was settled by European peoples. Indians do constitute a disadvantaged group in Canada and accordingly some portion of such rights may survive the enactment of section 15(1) but only upon a judicial and government acceptance thereof as affirmative action. It is a paradox that the disadvantaged status of Indian peoples should have been brought about by the abrogation of Indian treaty rights but yet it is sought to remedy such status by the further abrogation of such rights. It is, in any event, to be observed that Indian rights indirectly connected to economic conditions such as self-government and protection of Indian culture and language, are unlikely to be considered to lie within the ambit of section 15(2).

Section 33 allows the Canadian Parliament or provincial legislatures to declare that an enactment shall operate notwithstanding section 15. Such power enables discrimination in the application of section 15 which may or may not allow for the maintenance of Indian rights. The Indian peoples are accorded no such discretion as to whether they may continue to assert their rights.

3. Sections 16-23 declare English and French to be the official languages of Canada and guarantee the right to use such languages in official proceedings and, in certain circumstances, in primary and secondary education. No such guarantee is extended to rights to use Indian languages or to provide for the education of Indian children in their own language.

In Saskatchewan, persons whose first language is an Indian language substantially outnumber those whose first language is French.

> Section 22 declares that sections 16-20 shall not "abrogate or derogate from any legal or customary right or privilege" with respect to languages other than English or French, *but* such affords no protection from abrogation of such right by *other* statutory or governmental action.
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> 4. Section 37(2) declares the commitment of the Parliament and Government of Canada to the principle of equalization payments. Such payments are calculated upon the size of provincial populations, including Indians, but the monies have not been expended upon Indian persons or projects, or transferred to Indian governments. Section 37(2) constitutes a continuation of the failure to implement the treaty right to social and economic funding.[422]

Section 25 of the Charter provides:

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
> (*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
> (*b*) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

Section 25 is not a part of the guarantee of rights in the Charter and affords no guarantee of treaty or aboriginal rights. Neither federal nor provincial governments are restrained by section 25 from abrogating treaty or aboriginal rights. Section 25 merely declares a rule of construction affording an ill-defined and perhaps illusory protection from the other rights which are guaranteed in the Charter. The language of section 25 is to be distinguished from that of sections 21, 22 and 50 (92A(6)), which expressly bar abrogation or derogation. Section 25 merely declares that the guarantee shall not be "construed" so as to do so.

The language of section 25 is also to be distinguished from that of section 2 of the Canadian Bill of Rights which provides that "every law of Canada shall be so construed *and applied* as not to abrogate, abridge or infringe. . .".[423]

Subsection 35(1) in Part II of the Constitution Act provides:

> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Ordinary usage would suggest that section 35 confers no guarantees, protection or entrenchment whatever of aboriginal or treaty rights. The expression "hereby recognized" would ordinarily be regarded as indicating the mere acknowledgement of the existence of aboriginal and treaty rights at the time of the enactment of the Canada Act. It provides only that judicial notice be taken of such rights in the construction of the laws of Canada.

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[422] R. Bartlett and R. Soonias, The Abrogation of Indian Treaty and Aboriginal Rights by the Canada Bill: The Impact of the Canada Bill upon Indians and Indian Rights in Saskatchewan (Federation of Saskatchewan Indians 1982).

[423] R.S.C. 1970, App. III. *See* R. v. Drybones, [1970] S.C.R. 282, 9 D.L.R. (3d) 473 (1969).

Dictionary understandings of "affirm" refer to confirmation, ratification and positive assertion. The wording suggests the confirmation of the existence of aboriginal and treaty rights, but does not provide any mechanism for their protection. Section 35 appears to do no more than provide that in the construction of the laws of Canada, the courts must consider and take notice of the existence of such rights, but does not preclude the courts from abrogating such rights.

It is suggested that the above understanding is that which the ordinary meaning of section 35 appears to dictate. Academic[424] and non-Indian political commentators have not emphasized such construction. Newspaper accounts[425] of the political debate declared that section 35 represented "entrenchment" of Indian rights. It is suggested that such conclusion may have unhappily derailed the campaign for constitutional protection of the rights of aboriginal peoples prior to the passage of the Canada Act. Constitutional "recognition" of the rights of aboriginal peoples is important but is not the same as entrenchment. In the absence of entrenchment the "existing aboriginal and treaty rights" may be diminished or abrogated by the federal government or competent provincial legislation without compliance with the amending requirements of the Constitution Act. Section 35 itself may only be amended upon satisfaction of such requirements, but the *rights described therein* if not entrenched may be diminished or abrogated in accord with the distribution of powers contained in the enactments that comprise the Constitution of Canada.

The Canada Act makes no provision for a requirement of consent or agreement to the diminution or abrogation of aboriginal or treaty rights. The Constitution of Canada, including the Constitution Act, 1930, may be amended upon satisfaction of the requirements, established by sections 38 to 47. Such requirements do not contemplate or provide for aboriginal consent or agreement. Subsection 37(2) provides that the constitutional conference convened within one year of the Act coming into effect "shall have included in its agenda an item respecting constitutional matter that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada". The Prime Minister "shall invite representatives of those peoples to participate in the discussions on that item". The section merely provides, however, for the calling of a conference but does not require that any legislative action be taken to protect the rights of the aboriginal peoples. The aboriginal representatives are entitled to participate only in discussions upon that agenda item. They are not entitled to participate in discussions upon other items which must necessarily bear significantly upon rights of the aboriginal peoples. Moreover, any legislative action arising from the conference entailing the amendment of the Constitution requires the consent of the

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[424] Sanders, *Aboriginal Peoples and the Constitution,* 19 ALTA. L. REV. 410 (1981).

[425] *Native Rights Entrenched in Last Minute Huddle*, Vancouver Sun, 31 Jan. 1981, at A2; *Britain "won't sway" Liberals*, Vancouver Sun, 6 Feb. 1981, at 1.

federal Parliament and the provincial legislatures but does not require the consent or agreement of the aboriginal peoples. Section 49 provides for a constitutional conference to be held after fifteen years to review the amending provisions (Part V). Section 49 does not provide for the participation of the aboriginal peoples in such review.

In conclusion, it may properly be asserted that the Canada Act, far from protecting or guaranteeing the rights of the aboriginal peoples of Canada, provides for the diminution and abrogation of such rights without their consent. The aboriginal peoples might well view as mockery, and with a sense of having heard them somewhere before, the closing words of Lord Denning M.R. in the *Alberta* case:

> There is nothing, so far as I can see, to warrant any distrust by the Indians of the Government of Canada. But, in case there should be, the discussion in this case will strengthen their hand so as to enable them to withstand any onslaught. They will be able to say that their rights and freedoms have been guaranteed to them by the Crown — originally by the Crown in respect of the United Kingdom — now by the Crown in respect of Canada — but, in any case, by the Crown. No Parliament should do anything to lessen the worth of these guarantees. They should be honoured by the Crown in respect of Canada "so long as the sun rises and the river flows." That promise must never be broken.[426]

The only aspect of the Canada Act which might be viewed favourably by the aboriginal peoples is the understanding of who comprises such persons. Subsection 35(2) declares:

> In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

Status and non-status Indians and the Inuit were formerly regarded as aboriginal peoples within the ambit of federal jurisdiction under subsection 91(24) of the Constitution act, 1867.[427] The Metis were much less clearly so regarded, and, of course, jurisdiction with respect thereto was denied by the federal government. Inasmuch as the Metis people have generally not been successful in claims against the federal government in recent years, the provision with respect thereto may afford a more effective basis upon which to found such arguments. Such potential is, however, subject to the substantial limitations of sections 25 and 35 of the Constitution Act.

IX. Conclusion

The ambit of Indian hunting, trapping, and fishing rights in the Prairies and Ontario has not been further restricted by judicial decisions in the early 1980's. That in itself is a change in the pattern which develloped in the 1960's and 1970's. The Supreme Court has recognized that "Indians should be preserved before moose", and apparently acknowl-

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[426] *Supra* note 187, at 653, [1981] 4 C.N.L.R. at 99.

[427] *See Re* Eskimos, *supra* note 295.

edges that further limitations may challenge such priority. In the Maritime provinces, such recognition is not yet apparent but may be forthcoming upon the rendering of the judgment in the appeal from the Nova Scotia Court of Appeal in *R. v. Simon*.[428] The Court of Appeal of British Columbia may also require clearer direction from the Supreme Court before it recognizes that a denial of hunting, trapping and fishing rights may impair the capacity of Indians. The power of federal legislation to abrogate treaty or aboriginal rights throughout Canada continues to remain unfettered.

Indians may fare better in dealings with the Crown in the right of Canada following the understanding of the interpretation of treaties adopted by the Ontario Court of Appeal in *R. v. Taylor*.[429] The decision, in conjunction with the decisions of the Quebec Superior Court upon the James Bay Agreements, suggests a movement away from the "plain meaning" or "literal" approach in favour of a construction that recognizes the circumstances and aspirations of the Indian people at the time of treaty and the need to maintain the honour of the Crown. That treaty obligations were owed by the Crown in right of Canada, and not the Crown in right of the United Kingdom, was clearly declared by the English courts. The conclusion would seem to extinguish the significance of the notion, much pressed by the Indian nations, that the Imperial Crown might properly intervene in Canadian affairs for their protection.

Some of the difficulties in the way of Indian actions to recover reserve lands of which Indians have been dispossessed have been removed by recent court decisions. The right of a band to maintain an action in trespass against Indians and non-Indians has been affirmed. The British Columbia Supreme Court awarded exemplary damages in trespass against a provincial Crown corporation. The Federal Court of Appeal has suggested that the purpose and provisions of the Indian Act and its predecessor legislation did not contemplate the acquisition of rights by adverse possession on reserve lands. The Federal Court Trial Division acknowledged the trust relationship subject to which reserve lands are held. The same Court awarded ten million dollars against the Crown for breach of trust with respect to surrendered lands and stipulated that a high standard of trusteeship must be met by the Crown. The principal contrast to the success with which such actions have been rewarded is the decision of the Supreme Court of Canada in *Cardinal v. The Queen*.[430] The restrictive understanding of the requirements of a valid surrender adopted by the Court suggests a reluctance to allow the subjection to Indian claims of the vast areas suggested to have been improperly disposed of by the Crown in the early years of the twentieth century.

The Canada-Manitoba-Four Nations Confederacy Agreement respecting Child Welfare of 1982 provided additional powers of Indian

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[428] *Supra* note 103.
[429] *Supra* note 72.
[430] *Supra* note 260.

control and government. Judicial decisions did not, however, suggest any deviation from the established pattern of federal and provincial jurisdiction with respect to Indians and Indian lands. No preparedness to recognize greater band power than those of a "municipal" variety is evident in any of the decisions.

Indian efforts to prevent the passage of the Canada Act in the English courts were unsuccessful. The Act may be regarded as the most significant legal development affecting the aboriginal peoples of Canada in this century. It is to be hoped that the significance proves to be that of a new era of protection and assurance of rights rather than of their denial and abrogation. The constitutional conference to be held in 1983 will suggest the future direction that will be taken.[431]

[431] The First Ministers' Conference on Aboriginal Constitutional Matters was held on 15-16 Mar. 1983 in Ottawa. It arrived at a Constitutional Accord which may be construed as suggesting an "entrenchment" of aboriginal rights.