

Canada's Indian reserves : legislative powers

/ prepared by Wm. B. Henderson for Research Branch,
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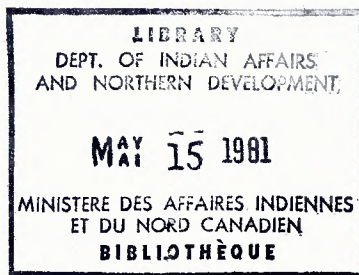
CANADA'S INDIAN RESERVES: LEGISLATIVE POWERS

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I INTRODUCTION

"Lands reserved for the Indians" have a special place in the distribution of legislative powers within our federal system; the phrase describes a class of subjects over which the legislative power of Parliament is exclusive. This does not mean, however, that provincial laws have no application within the borders of Indian reserves. Indians living on reserves have always had the provincial laws of tort and contract, for example, available to them except as Parliament has from time to time modified or abrogated these.

Problems have repeatedly arisen when provincial laws, at least arguably, have affected interests in, or the use of, reserve lands. Here the courts have been ready to find such laws inoperative, but such cases have failed to yield a satisfactory constitutional theory which assists in the identification of those matters which come within the class of subjects, "Lands reserved for the Indians."

Part of the difficulty stems from the fact that Indian reserves can be constitutionally construed as falling within other heads of

federal powers than those contained within section 91(24) of the B.N.A. Act. As a result, many cases seem to be concerned with "Lands reserved for the Indians" when the actual discussions relate to the fact that the reserve in question is federal property or that, as federal land, it is immune to taxation. Such reasoning obscures the fundamental distinction between legislative powers and the proprietary interests of the Crown, be it in right of Canada or of a province, and is attributable to the traditional "shopping list" method of constitutional advocacy.

Another dimension of the problem, if it be treated solely as one of constitutional theory, is that the extent to which the federal power over a particular class of lands is qualified, or augmented, by the fact that it is reserved for the benefit of a special class of citizens, Indians, remains a vexing one for the courts. While on the one hand it would seem inappropriate to discuss Indian reserves as constitutional real estate without considering federal powers over their occupants, on the other it is not always apparent whether a particular provision deals with a matter in relation to Indians or to the lands reserved for them.

As a practical matter, however, one looks to the federal statute books in vain for provisions dealing with environmental problems on reserves, with matrimonial property, with mortgages, or with the registration of security interests. Where these are dealt with at

all, they are laid down in the most elementary terms scarcely consistent with the complexities of modern life. Indian persons, or Indian bands, needing legal advice in these areas must be content with what they are told by the Department of Indian and Northern Affairs or must seek out one of the few lawyers in the country who is knowledgeable in the area of native law. Either way, if the problem relates to reserve lands, the likely response will be that only federal law can apply, that there is none on point, and that there is not likely to be any in the near future. There is something in this dilemma to displease everyone.

One way, at least, of getting around the reluctance of Parliament to legislate to the full scope of its powers and to accord to Indian reserve residents the full scope of laws available to their fellow citizens would be to recognize a greater provincial presence on the reserve. Admittedly, such an approach is anathema to some who view a broadly construed, exclusive federal power over Indians and Indian reserves as vital to the continuance of a unique Indian presence in Canadian society. Even if they are correct in this, individual Indians pay a price -- not because they live under a unique legal regime, although there is a price to be paid for this as well -- because, for many of their problems and transactions, they do not live under any legal regime at all.

What is relevant to these concerns is a constitutional identification of the core features of Parliament's power. Once these are identified, the fact that Parliament does not legislate in relation to them does not mean that provincial legislation applies. As Chief Justice Laskin pointed out, in Canadian Pioneer Management Ltd. v. Labour Relations Board of Saskatchewan:

of course, there is no accretion to provincial legislative authority by the failure or unwillingness of Parliament to legislate to the full limit of its powers under s. 91 of the British North America Act.¹

In the final analysis, it may be that federal exclusivity in legislating as to reserve life is the best policy, but such a finding will not be a legal one. If that is to be the policy -- and the current mood for constitutional reform affords an opportunity to say so -- the present state of this essay is to posit, in relation to "Lands reserved for the Indians," what that law is.

II WHAT CLASS OF LANDS?

Where Parliament has legislative powers, these may necessarily involve the definition of a class. Thus, powers in relation to "Naturalization and Aliens"² have been held to extend to the definition of who is an alien and who is a naturalized citizen and no

further.³ Similarly, Parliament's powers in relation to "Indians" seem to involve the definition of who is an Indian, but also seem to go further than simple definition. Beetz J. has written, of the Eskimo inhabitants of Quebec:

They are not Indians under the Indian Act, R.S.C. 1970, c. I-6, section 4(1), but they are Indians within the contemplation of s. 91.24 of the Constitution: Reference as to whether "Indians" in s. 91(24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec, [1939] S.C.R. 104. Should Parliament bring them under the Indian Act, provincial laws relating to descent of property and to testamentary matters would cease to apply to them and be replaced by the provisions of the Indian Act relating thereto.⁴

This passage points out not only that Parliament has defined "Indians" in such a way as to exclude Eskimos or Inuit, but also that Parliament can only exclude them from its own legislation and not from the B.N.A. Act. Parliament cannot define the terms in the B.N.A. Act. It also shows that Parliament can do more than merely define "Indians," it can also regulate their wills and estates as a matter in relation to its powers over Indians.⁵

Parliament's inability to diminish the effect of the B.N.A. Act suggests that Parliament cannot, by its own legislation, extend the terms of the B.N.A. Act to cover situations not properly within its ambit. One provision that must be suspect is section 18(1) of the Indian Act, which reads, in part:

[S]ubject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

This provision seems to contemplate situations where a particular use of reserve or surrendered lands is not apparently an Indian use or for Indian benefit and gives to the Governor in Council a method of preserving the "Indianness"⁶ of that use or of that land for the purposes of the Act. If the land has, however, been taken out of the constitutional class of "Lands reserved for the Indians," the Indian Act could not salvage the situation. Whatever the limits of the class might be, Parliament cannot alter them.

Similarly, the Legislatures of the Provinces cannot impose their own definitions upon the terms of the B.N.A. Act. Where, for example, the term "unoccupied Crown Lands" occurs in the Natural Resources Agreements with Manitoba, Saskatchewan and Alberta, provincial attempts to define what lands are to be deemed "unoccupied" have been struck down.

In my opinion the legislature has no power by unilateral action to define the language used nor amplify, extend, modify or alter the terms of the said Natural Resources Agreement, [B.N.A. Act, 1930] nor to derogate from the rights granted to the Indians by the said agreement. These are constitutional rights which can only be amended or interpreted as provided for in the B.N.A. Act. 1867, and amendments thereto.⁷

It is for the courts, then, and not for legislative bodies to say what lands might be comprised within the class "Lands reserved for the Indians." The courts have defined this class as extending, "according to the ordinary and natural meaning of the words used, to all lands reserved, upon any terms or conditions, for Indian occupation."⁸

This is a very broad definition. It embraces all lands and all interests in land tantamount to occupation that have been reserved for Indians, presumably "Indians" within the constitutional rather than the Indian Act definition. There is no requirement that the title to such lands be in the Crown, only that the Indian interest be "reserved, upon any terms or conditions." There is no temporal limitation either; the interest could be, for example, an estate pur autre vie. Nor is there any limit upon the conditions that might be attached to the reservation, at least so long as these do not diminish the Indian interest to something less than occupation. This definition has been held to apply to traditional lands as well as to Indian reserves as defined in the Indian Act, where the courts have been able to identify a positive act of reservation.⁹ It is not certain, however, that the class extends so far as to include lands in which the "Indian title" is protected by operation of law and not referable to any positive act.¹⁰

It may be useful at this point to see how far Parliament has gone to legislate in relation to the constitutional class of "Lands reserved for the Indians." The Indian Act contains five relevant provisions:

2(1) In this Act

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"reserve" means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band;

.

"surrendered lands" means a reserve or part of a reserve or any interest therein, the legal title to which remains vested in Her Majesty, that has been released or surrendered by the band for whose use and benefit it was set apart.

.

"band" means a body of Indians

- (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after the 4th day of September 1951,
- (b) for whose use and benefit in common, moneys are held by Her Majesty, or
- (c) declared by the Governor in Council to be a band for the purposes of this Act;

- (2) The expression "band" with reference to a reserve or surrendered lands means the band for whose use and benefit the reserve or the surrendered lands were set apart.

36. Where lands have been set apart for the use and benefit of a band and legal title thereto is not vested in Her Majesty, this Act applies as though the lands were a reserve within the meaning of this Act.

There is a preliminary problem here with the phrase "lands, the legal title to which is vested in Her Majesty." It is not clear whether these are lands which are the property of the Dominion or whether the

phrase also includes Crown lands within a province. "Her Majesty" is a phrase which simply refers to the Sovereign, who is no ordinary owner of land.¹¹ Neither the Sovereign nor the Crown is divisible between the federal government and the provinces. In the Saskatchewan Natural Resources Reference, Newcombe J. held:

There is only one Crown, and the lands belonging to the Crown are and remain vested in it, notwithstanding that the administration of them and the exercise of their beneficial use may, from time to time, as competently authorized, be regulated upon the advice of different Ministers charged with the appropriate service (i.e., by provincial or federal Ministers).¹²

This, however, is a problem of the internal workings of the Indian Act. It poses no constitutional problem, since Indian reserves can and have been created from provincial Crown lands, and it poses no practical problem, since such reserves would be caught by Section 36 of the Act even if they are not included in its definition of "reserve."

Of greater interest is provision for "surrendered lands," lands or interests in lands that are taken out of reserve lands by surrender to the Crown, put under a separate regulatory regime, and where the title remains vested in Her Majesty. In terms of the constitutional definition, which imports the concept of "Indian occupation," there may arise difficulties of interpretation. Where the interest

surrendered is not inconsistent with Indian occupation -- a surrender of mineral rights, for example -- the Act may still be effective as legislation in relation to "Lands reserved for the Indians." But where the interest surrendered is inconsistent with a continued Indian occupation -- such as a surrender for sale to non-Indians -- these provisions may have to depend upon another head of federal legislative power such as section 91(1A), "The Public Debt and Property." Here, of course, title would have to remain vested in Her Majesty in right of Canada.

In Corporation of Surrey v. Peace Arch Enterprises Ltd.,¹³ it was held that lands surrendered from an Indian reserve for leasing to non-Indian entrepreneurs remained "Lands reserved for the Indians" because the surrender was not absolute: the band retained its reversion after the lease expired. MacLean J.A. added this comment:

It might well be (but it is not necessary for me to decide) that if an absolute surrender were made by the Indians under the Indian Act, and this surrender was followed by a conveyance from the Government to a purchaser the land would cease to be "lands reserved for the Indians" under sec. 91(24) of the B.N.A. Act, 1867, but that it not the case here.¹⁴

It is apparent, then, that very different constitutional results can flow from the use of different criteria to define "Lands reserved for the Indians." If one looks to "Indian occupation," many surrendered lands would no longer be subject to Parliament's exclusive powers. If, on the other hand, one looks to a continuing Indian interest in the land, such as a reversion or a financial interest in proceeds, the

same lands would remain within section 91(24). It is possible, however, to reconcile the two approaches to surrendered lands.

It could be said that Parliament's powers in relation to Indian reserves extend to all interests in land reserved by some positive act for the common benefit of Indians of a particular band or group of Indians, but only to the extent of the actual interests reserved. Thus where a band retains an interest in the proceeds of a lease or sale, Parliament's authority would be limited to the proceeds (at least under section 91(24) and it could, for example, appoint a trustee to receive them who would not be subject to provincial Trustee Acts. Again, if Parliament were to say that such proceeds were to be exempt from taxation,¹⁵ this would be sustainable under section 91(24).

Where land, to give another example, is surrendered for leasing to non-Indians, Parliament's legislative authority over the non-Indian possession would be limited to the Indian financial interest during the continuance of the lease and would expand to its former amplitude when the band's reversion ripened into possession. This scheme of distribution, however, is contrary to the court's holding in the Peace Arch case, and some comment on the facts of that case may serve to justify such a departure.

Peace Arch Enterprises was involved in the operation of an amusement park on land surrendered from the Semiahmoo Indian Reserve and leased

to it for the purpose. The issue was whether the lessees were subject, in their use of the land, to municipal by-laws and to regulations under the British Columbia Health Act. The Court of Appeal, adopting the reasoning outlined above, held that they were not. As the lands were reserved for the Indians, only Parliament could regulate their use of the land. It is not readily apparent, however, what Indian interest in land, or what Indian occupation of land, is preserved by permitting non-Indian lessees to violate public health laws in providing recreation facilities for other non-Indians. Can bad policy be good constitutional law?

The Peace Arch case was commented upon by Martland J., writing for the majority in Cardinal v. Attorney-General of Alberta,¹⁶ in terse terms: "Once it was determined that the lands remained lands reserved for the Indians, provincial legislation relating to their use was not applicable."¹⁷ It is impossible to say whether this statement merely reports the conclusion reached by the British Columbia Court of Appeal, or whether the majority can be taken as having approved that conclusion.

In The Queen v. Smith,¹⁸ Le Dain J., of the Federal Court of Appeal, wrote that Peace Arch "appears to have been impliedly approved by the Supreme Court of Canada in the Cardinal case."¹⁹ He also observed, however, that Cardinal did not deal with the right to possession of a part of a reserve or surrendered lands.²⁰

The Queen v. Smith was such a case. Mr. Smith was the successor in title to a family who lived upon lands which had been part of the Red Bank Indian Reserve since the early part of the nineteenth century. The parcel in question, however, and several neighbouring tracts had been occupied by non-Indians since the middle of the last century. The action, brought by the Attorney-General of Canada on behalf of the band, was for vacant possession of the lands and was dismissed at trial on the basis that the defendant and his predecessors had acquired a prescriptive title by virtue of sixty years' uninterrupted possession of the land.²¹ This result was successfully appealed to the Federal Court of Appeal and has since been taken to the Supreme Court of Canada.

One of the crucial facts in the case was that the band had surrendered the land for sale in 1895. This raised the issue of whether the lands were still, constitutionally, reserved for the Indians. The case also differed from Peace Arch since the lands there were surrendered for lease and the band had a reversionary interest in them. In Smith, the band had surrendered its right to use or occupy the lands in return for money.

The Court of Appeal relied on two earlier cases, Mowat v. Casgrain²² and The King v. Lady McMaster,²³ for the proposition that, where there is no question of title between Canada and a province, section 91(24) will sustain federal jurisdiction to collect rent or sale

proceeds to which the Indians are entitled to recover possession of reserved lands. These, however, did not answer the real question.

Le Dain J. wrote:

There is authority to support the conclusion that the Crown in right of Canada has, as an incident of this power of control and management, the right to bring an action to recover the possession of surrendered land. The principle has been affirmed in decisions involving land in a reserve within the meaning of the Indian Act but, in my opinion, it must logically be equally applicable to surrendered lands within the meaning of the Act, since essentially the same federal power and responsibility is involved.²⁴

Does this mean, then, that lands surrendered for sale from an Indian reserve are "Lands reserved for the Indians" for all purposes, thus excluding all provincial laws or that the remaining Indian interest, to the proceeds, alone is within section 91(24) and that only such provincial laws as are inimical to it are inoperative? Peace Arch says the former; Smith relies upon Peace Arch and on the Indian Act to state the latter:

The right of the Crown in right of Canada to claim possession of land that is part of a reserve or surrendered lands within the meaning of the Indian Act exists, as an incident of the federal Government's power of control and management of such land, for the protection of the Indian interest in the land. While the land is under federal legislative and administrative jurisdiction, it is the Crown in right of Canada that must act for the protection of that interest, whether it consists of the right of occupation or possession itself, or the "Indian moneys" (see s. 62 of the Act) which are to be accepted in return for its surrender.²⁵

The only thing that is clear from these reasons is that there is a federal jurisdiction over surrendered lands that flows from section

91(24). Le Dain J. cites, unfortunately, a logical extension from the Indian Act to sustain this finding. But the Indian Act cannot alter the B.N.A. Act. He also relates this jurisdiction to the Indian's monetary interest in the land. This is logical and, if it does not come strictly within the traditional definition of "Lands reserved for the Indians," it is probably necessarily incidental to those interests which do. On this basis, then, it is submitted that Smith is right: no provincial law can intrude upon an outstanding interest in "Lands reserved for the Indians."

This, however, does not follow Peace Arch except in the result. In Peace Arch, the Indian interest in the surrendered land was limited to two things: rent for it and the reversion of it. The provincial laws struck down there were not intrusive upon either of these; they were public health laws and they should have been sustained in their application to those lands, especially in the absence of any federal laws in the same field. Had there been federal laws as well, then the question would not be one of exclusive jurisdiction, it would have been one of paramountcy.

It should be noted, however, that the federal Court of Appeal went on to find that there had not been sixty years' continuous adverse possession.²⁶ If the Supreme Court of Canada sustains this factual finding, the constitutional issues discussed here may remain unresolved by our highest court.

The next section discusses the question of what laws are in relation to matters coming within the class of subjects, "Lands reserved for the Indians." In all cases, if the analysis set out above is correct, the word "Lands" must, in each case, be taken to refer to the actual interests in land reserved for the Indians. What is constitutionally federal in relation to one reserve may not be so in relation to another. No doubt this is a result the courts have sought to avoid in the continuing search for a touchstone of federal exclusivity. It is, nonetheless, a result they may ultimately be forced to adopt as factual situations become increasingly complex and the old touchstones more obviously inappropriate.

III WHAT LAWS ARE "IN RELATION TO" SECTION 91(24) LANDS?

Under the constitutional distribution of legislative powers, laws of Parliament operate in an exclusive field when they deal with matters in relation to "Lands reserved for the Indians." In theory, each statute has as its focus a single, identifiable matter. In practice, however, different parts of a statutory scheme may deal with separate "matters," and these matters may be "in relation to" different heads of federal powers; for example, the liquor provisions of the Indian Act deal with temperance, a matter that has always been held to be in relation to section 91(27), "The Criminal Law...", even though they occur in a statute that is "in relation to" section 91(24). So long as these matters are in relation to an enumerated head of section 91, however, no province can usurp the exclusive powers of Parliament.

The problem with this analysis is that it does not go far enough into the many areas of conflict between federal and provincial powers. Many valuable volumes have been written to explain why "exclusive" does not really mean "to the exclusion of all others," but there is no need either to repeat or to summarize them here. It is sufficient to say that, in as many cases as not, both Parliament and a provincial legislature may pass laws which deal with precisely the same matter. And both may pass muster as being "in relation to" exclusive heads of power, the one federal, the other provincial. An example of this would be laws dealing with the wills of Indians. Parliament might say that an Indian's will devising property not located on an Indian reserve -- a house in Toronto, for example -- shall be subject to regulations made by the Governor in Council.²⁷ Such laws have been held to be valid as in relation to "Indians."²⁸ But provincial laws also deal with devises of real property in the provinces, and these laws would also be effective to pass the Indian's land as they are in relation to section 92(13), "Property and Civil Rights in the Province." Such laws are said to have a "double aspect."

A double aspect situation arises when two laws deal with the same matter, and both are in relation to exclusive heads of power. In such cases, the law of Parliament is said to be "paramount." The provincial law is inoperative so long as the federal law is on the books. Should the federal statute lapse, however, or be repealed, the

provincial law again takes effect. Thus, if Parliament were to repeal its statute governing the Indian's will, described above, the house would still pass to the beneficiary under provincial law.

The classic analysis of federal-provincial jurisdictional conflicts is found in Re Fisheries Act, 1914²⁹ in which Lord Tomlin stated four propositions:

- (1) The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s.91, is of paramount authority, even though it trenches upon matters assigned to the provincial legislatures by s.92....
- (2) The general power of legislation conferred upon the Parliament of the Dominion by s.91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s.92 as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion....
- (3) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s.91....
- (4) There can be a domain in which provincial and Dominion legislation may overlap in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail....³⁰

While this quotation is lengthy and difficult, it is the shortest textbook ever written upon our constitution and was cited and followed by the Supreme Court of Canada in the recent case of Fowler v. The Queen,³¹ also a fisheries case.

Another passage cited in Fowler,³² originally part of a dissent in Interprovincial Cooperatives Ltd. v. The Queen,³³ is also useful and must now be taken to carry the authority of the full Court:

Federal power in relation to fisheries does not reach the protection of provincial or property rights in fisheries through actions for damages or ancillary relief for injury to those rights. Rather, it is concerned with the protection and preservation of fisheries as a public resource, concerned to monitor or regulate undue or injurious exploitation, regardless of who the owner may be, and even in suppression of an owner's right of utilization.

Nowhere in our constitutional writings is there a better explanation than this, even though it is perforce an analogy, of how Parliament comes to have legislative powers over lands that are not only provincial but private once their use and occupation has been reserved for the Indians. These are the "special reserve," defined in s.36 of the Indian Act, but are also within section 91(24) of the B.N.A. Act.

To return to Lord Tomlin's four propositions, it is obvious that if Parliament's exclusive power as described in the first statement are not so sweeping in relation to section 91(24) as Peace Arch would suggest, then there must be many more areas of potential conflict as described by the fourth statement. And if this is the case, there

must be many provincial laws which are applicable to Indian lands and to the use of Indian lands, if only because there is no federal law with which it might conflict. Peace Arch itself would be a prime example: provincial health laws are validly applicable to Indian reserve lands on three grounds.

1. They represent a valid exercise of provincial powers.
2. They are not ultra vires as being in relation to a matter coming within the class of subjects "Lands reserved for the Indians."
3. Assuming that Parliament could pass similar laws in relation to Indian reserve and that these would be paramount to the provincial laws, it has not done so.

To take an example, if a federal statute dealt only with the devise of an Indian's real property, and his will also dealt with his personalty, would it be governed partly by federal law and partly by provincial law? Or could it be said that the federal government had passed all the laws it wished to dealing with Indian wills, and that no provincial laws could deal with Indian wills at all? It could not. In order for a federal law to be paramount, there must be an "operative inconsistency" between it and the provincial law: in the same situation the one law must say "do this!" and the other one "do that!"³⁴ In the example given, both laws would be effective; they do not conflict.

All this does not mean, of course, that there are no areas which are exclusively federal. If the Indian testator owned his house on an

Indian reserve, federal law might govern his will, or it might say who is to inherit the house notwithstanding his will, or might recognize his will subject to the needs of his family after his death. But even if federal law said nothing on the subject, provincial law would probably be held not to apply. This would be because the "matter" is not wills and estates, but possession of lands in an Indian reserve. Parliament's power here is truly "exclusive."

The distinction must be made, however, between powers which are exclusive and those which are exhaustive. In other words, all possession of lands within an Indian reserve is not within Parliament's exclusive powers. Two types of cases demonstrate this.

In several cases dealing with taxation of federal property by provinces and municipalities, it has been held that "non-federal persons" (for example, tenants of the Crown) can be taxed for their possession and use of the lands even though the federal interest remains constitutionally exempt from such taxation. This general principle has also been extended to Indian reserves:

There is authority to the effect that non-Indians who occupy lands on an Indian reserve can be made subject to taxation as to their interest only, but not so as to tax the residual interest of the Indian lands: Sammartino v. A.G.B.C., [1972] 1 W.W.R. 24, 22 D.L.R. (3d) 194 (B.C.C.A.); Vancouver v. Chow Chee, 57 B.C.R. 104, [1942] 1 W.W.R. 72 (C.A.)³⁵

These authorities suggest that Parliament can only legislate exclusivity in relation to Indian possession of Indian reserve lands

and in relation to non-Indian possession only to the extent of protecting the Indian interest. If the protection of non-Indian possession were also exclusive, then provincial taxing laws should not apply by virtue of Lord Tomlin's first proposition. Whether or not they could be ousted by the fourth proposition remains a moot point since Parliament has not expressly protected non-Indian interests in reserve lands from taxation.³⁶

These cases are not, however, conclusive. Recent cases have protected surrendered lands from, for example, registration of mechanics' liens although the lands were not strictly in the possession of Indians.³⁷ This, again, gives rise to a strange situation as federal law makes no provision for such registration.³⁸

A more subtle incursion of provincial law is demonstrated by the case of Sandy v. Sandy³⁹ which involved the application of the Ontario Family Law Reform Act. In that case, a wife claimed rights under the provincial statute in a matrimonial home located on the Six Nations Indian Reserve. At trial, Grange J. held that the statute could not apply:

In my view, it would be impossible to enforce the land provisions of the Family Law Reform Act, 1978 without directly contravening the Indian Act.⁴⁰

This formulation of the result falls within Lord Tomlin's fourth proposition as an operative inconsistency. This must be taken to mean that the judge did not view the federal law as exclusive. The Ontario

Court Appeal did not take such a strict view of the matter as the judge at trial. It held that certain provisions of the Family Law Reform Act were not in conflict with federal legislation at all. It referred to personal property provisions of the provincial statute as being valid and continued:

Further we are of the view that an Indian such as the respondent husband in this case has an "interest" in real property within the meaning of s.8 of The Family Law Reform Act and that his spouse is therefore entitled to a payment in compensation for the matters referred to in s.8 although she is not entitled to an award of a share of the interest of her husband in the real property.⁴¹

This is clearly not exclusive federal ground. In fact, it stops only one step short of a Partington order: a judgment for compensation that will be satisfied by transfer of the real property. Such an order would not conflict with the Indian Act.

Lord Tomlin's formulation of constitutional conflicts has served well as a touchstone for other areas of constitutional law and it is perhaps too late to hope for its consistent application in respect of section 91(24).

The courts have not always rigorously followed the constitutional formula in cases dealing with Indian reserve lands. If anything, they have gone further than necessary to uphold the exclusivity of federal powers, with the result that many decisions lack a supporting

structure to which the next case can be added. In order to design such a structure, however, it is necessary to "borrow" judicial reasoning from other areas which, however similar they may be, relate to other exclusive heads of legislative power. Such reasoning may be persuasive, but there is a danger in treating the heads of power exactly alike; our constitutional law has not evolved in that way.

A further danger lies in treating "Lands reserved for the Indians" as totally separate from its companion jurisdiction, "Indians." This problem is discussed in the next section.

IV "INDIANS" OR "LANDS RESERVED FOR THE INDIANS"?

It seems well established that section 91(24) embraces two distinct powers, however closely they may be related: exclusive power to legislate in relation to "Indians" and exclusive power to legislate in relation to "Lands reserved for the Indians." It is worthwhile, however, to see what legal consequences, if any, attach to the relationship between Indians and Indian reserves that would not attach to either head of power alone. In other words, if a particular law were to relate in some way both to Indians and to Indian reserves, would this justify some legal consideration that would not be given if it related to only one of them? Or are they, on the other hand, totally distinct and legally distinguishable?

From an historical perspective, it made eminent sense that there should be separate powers as to Indians and to Indian reserves. There were laws relating to both classes of subjects ante-dating Confederation, and, as the founding fathers looked westward, there would be an obvious requirement to deal with the Indians of the Plains who had, until that time, had minimal contacts with Canadian society. They did not, of course, live upon reserves. And the same reasons that justified the two classes of laws also justified conferring the legislative powers in respect of them to the same body, Parliament. Logically, however, the concept of Indian reserves alone would have necessitated a legislative power to define Indian status. Professor Sanders has stated that necessity in these terms:

Whenever there are restricted rights to residency on or ownership of certain land, or courts with jurisdiction over specific groups within a society, there is need for a status definition system.⁴²

In fact, the first legislated definition of "Indian" in this country related solely to the right to use and occupy reserve lands.⁴³ One might wonder, then, if Parliament's true power relates to "Lands reserved for the Indians" and if the separate power, relating to "Indians" is redundant.

A very similar submission seems to have been made to the Supreme Court of Canada in Reference re "Indians." Duff C.J.C. responded in this way:

Nor can I agree that the context [in head 24] has the effect of restricting the term "Indians". If "Indians" standing alone in its application to British North American denotes the aborigines, then the fact that there were aborigines for whom lands had not been reserved seems to afford no good reason for limiting the scope of the term "Indians" itself.⁴⁴

In other words, although the term "Indians" occurs twice in section 91(24) of the B.N.A. Act, the powers of Parliament in relation to "Indians" are neither derivative from, nor co-extensive with, its powers in relation to "Indians" for whom lands have been reserved. In the latter instance, the power is limited to the definition of the class of persons who have interests in reserved lands. In relation to the former, the powers are much broader. As Martland J. has pointed out, "the ambit of that authority is uncertain, in that it has not been positively defined by the courts."⁴⁵ It may be broad enough to give effect to Rand J.'s observation that aborigines are, "in effect, wards of the State, whose care and welfare are a political trust of the highest obligation."⁴⁶

Once the two limbs of section 91(24) are seen to be logically and legally independent, it becomes difficult to assert that any greater legal consequence would attach to a law which might be in relation to either of them, or, notionally, to both. Such a situation could only be developed by faulty analysis. If a particular enactment is not truly in relation to either "Indians" or "Lands reserved for the Indians," no legal consequences flow from section 91(24) at all.

The recent decision of the Supreme Court of Canada in Four B Manufacturing Ltd. v. United Garment Workers of America⁴⁷

underscores this point. In that case, the authority of the Ontario Labour Relations Board to regulate the labour relations of a manufacturing concern located on a reserve was challenged on the basis that provincial labour legislation was inapplicable to its employees, the majority of whom were Indians. The alternative submissions on behalf of the employer were, first, that such legislation encroached upon the exclusive jurisdiction of Parliament to regulate the civil rights of Indians on a reserve, and secondly, that even if provincial laws could apply, it was rendered inoperative by the paramountcy of the federal Labour Code. Only the first submission is relevant here.

Beetz J., writing for the majority, rejected any encroachment on the federal power over Indians. Noting that the employer was a corporation, he went on to comment that even

if the employer were an Indian, neither Indian status is at stake nor rights so closely connected with Indian status that they should be regarded as necessary incidents of status such for instance as registrability, membership in a band, the right to participate in the election of Chiefs and Band Councils, reserve privileges, etc.⁴⁸

He also rejected any connection to federal powers over "Lands reserved for the Indians":

S.91(24) of the British North America Act, 1867 assigns jurisdiction to Parliament over two distinct subject matters, Indians and Lands reserved for the Indians, not Indians on Lands reserved for the Indians. The power of Parliament to make laws in relation to Indians is the same whether Indians are on reserve or off a reserve. It is not reinforced because it is exercised over

Indians on a reserve any more than it is weakened because it is exercised over Indians off a reserve. (See Kenneth Lysyk, The Unique Constitutional Position of the Canadian Indian (1967), 45 Can. Bar Rev. 513, at p. 515).⁴⁹

Laskin C.J.C., joined by Ritchie J., dissented. It is not clear, however, whether or not he avoided the constitutional pitfall. He found that:

The factory operation in its direction and in its complement of employees is substantially an enterprise of Indians for Indians on an Indian Reserve.⁵⁰

He seems, in other words, to find two bases for federal powers to the exclusion of provincial legislation. But this may only be a semblance. In relation to "Lands reserved for the Indians," he notes that the factory operated on the reserve, in a building leased from the Band Council, under a permit issued by the Minister in accordance with the provisions of the Indian Act. Those provisions, he said, projected into the permit arrangement,

manifest an exercise of federal legislative authority in maintaining the Reserve for the use and benefit of Indians who are members of the Band for which the Reserve has been set apart.⁵¹

In relation to the powers over "Indians," he says that

[W]here...the issue concerns the conduct of Indians on a Reserve, provincial legislation is inapplicable unless brought in by referential federal legislation, or, as in the Cardinal case, brought in by a constitutional qualification of the federal power in relation to "Indians, and Lands reserved for the Indians."⁵²

Having neither expressly committed, nor exactly avoided, the constitutional error, the Chief Justice proceeds to find that the "combination of circumstances which govern the operation of the factory"⁵³ bring it within the Canada Labour Code as "an undertaking or business that is within the legislative authority of the Parliament of Canada"⁵⁴ and consequently⁵⁵ "outside the exclusive legislative authority of provincial legislatures."⁵⁶ This is a quantum leap that bears closer scrutiny.

The first enquiry must be whether the labour relations of Indian employees on an Indian reserve are within the exclusive competence of Parliament. If so, that competence must be founded on one or the other link of section 91(24). Can labour relations be a "matter" in relation to "Lands reserved for the Indians"? Although he does not do so here, it is likely that Chief Justice Laskin would answer this question in the affirmative. In Construction Montcalm Inc. v. Minimum Wage Commission,⁵⁷ the issue was whether or not provincial laws setting minimum wages could apply to workers employed by a contractor on the construction of Mirabel Airport. The Chief Justice pointed out that the land was federal Crown land within section 91(1A), "The Public Debt and Property," subject to the exclusive control of Parliament, and continued:

[T]he fact that what we have here is federal Crown property is itself enough to exclude [provincial] regulatory control over it and what is done on it.⁵⁸

In Cardinal v. Attorney-General of Alberta, he took a similar stance with regard to Indian reserves:

Indian reserves are enclaves which, so long as they exist as reserves, are withdrawn from provincial regulatory power. If provincial legislation is applicable at all, it is only referential incorporation through adoption by the Parliament of Canada.⁵⁹

In both these cases, however, he wrote in dissent and was expressly differed with in the majority decisions. Moreover, even if his position is not wrong, it is, as Professor Gibson has pointed out, inconsistent.

In the...case of Canada Labour Relations v. C.N.R. Chief Justice Laskin held, on behalf of the entire court, that federal labour law does not apply to the employees of a resort hotel owned by a publicly owned federal railway company, and carrying on business within Jasper National Park. By unavoidable implication, that decision acknowledged the applicability of at least some general provincial laws to activities within the territorial limits of federally-owned land.⁶⁰

It would appear, then, that Indian labour relations are not subject to the exclusive control of Parliament as being in relation to "Lands reserved for the Indians." Are they subject to Parliament's exclusive powers in relation to "Indians"? The majority in Four B refers to this possibility, but does not expressly decide the point.

[I] come to the conclusion that the power to regulate the labour relations in issue does not form an integral part of primary federal jurisdiction over Indians or Lands reserved for the Indians. Whether Parliament could regulate them in the exercise of its ancillary powers is a question we do not have to resolve any more than it is desirable to determine in the abstract the ultimate reach of potential federal paramountcy.⁶¹

Here the majority not only rejects the exclusive ("primary") jurisdiction of Parliament, but also regards any question of paramountcy as "abstract." This must be based on a finding that even if Parliament could legislate in respect of Indian labour relations, it has not done so.

Another point of interest is Chief Justice Laskin's holding, both in Cardinal⁶² and in Four B,⁶³ that provincial laws could apply to Indians on the reserve if "referentially incorporated" by federal law. In Four B, the majority expressly holds that provincial labour laws are laws of general application within the contemplation of section 88 of the Indian Act:⁶⁴

Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province....

It will be noted that section 88 has been found to refer only to legislation touching on "Indians" and not legislation touching on "Lands reserved for the Indians."⁶⁵

In his dissent in Four B, however, the Chief Justice makes no reference to section 88, although he has frequently referred to it in the past as referentially incorporating provincial laws to apply to Indians. This leads to alternative inferences: either he would oust provincial law solely because the enterprise is located on an Indian reserve, a proposition that the Court has consistently rejected, or he

would attach more legal consequence to the fact that the Indian employees are on lands reserved for Indians than Parliament's powers in relation either to "Indians" or "Lands reserved for the Indians" alone could justify. This latter proposition is expressly rejected by the majority in Four B and, as pointed out earlier, cannot be good constitutional law.

There remains one final possibility that might justify the Chief Justice's finding that Four B was an "undertaking or business within the legislative authority of the Parliament of Canada," as provided in section 2 of the Canada Labour Code. This would involve holding that the theoretical possibility that Parliament could pass laws dealing with the labour relations of Indians on reserves would be sufficient to bring the Code into play and to remove those relations from "the exclusive legislative authority of provincial legislatures" as provided in section 2(i) of the Code. It is unlikely, however, that this was his reasoning. He did not, for example, even discuss such a theory in Canada Labour Relations Board v. C.N.R.⁶⁶ Moreover, in the more recent case of Canadian Pioneer Management Ltd. v. Labour Relations Board of Saskatchewan, he expressly rejects it.

The central issue in this case affecting Pioneer Trust Company is...whether it falls within the opening words of s.2 of the Canada Labour Code...as being "a federal work, undertaking or business" that is within the legislative authority of the Parliament of Canada or within s.2(i) of the Canada Labour Code as being "a work, undertaking or business outside the exclusive legislative authority of provincial legislatures."⁶⁷

Even if Parliament could have brought trust companies within its regulatory authority in relation to banking, it has chosen not to do so, and I think that this Court should respect that position.⁶⁸

As a result, federal law cannot "enter by a back door" to oust provincial laws in the absence of express contradiction, or operative inconsistency, with positive federal law in an area of concurrent jurisdiction. Montcalm and Canadian Pioneer, taken together, establish that position. And Montcalm, together with Four B, confirms that the fact that provincial and federal law might meet on federal land, even if that land is an Indian reserve, is irrelevant so long as the provincial law does not encroach upon the "primary" or "integral" aspects of the federal jurisdiction.

It may now be taken as sound law that there are two heads of federal power contained within section 91(24) of the B.N.A. Act. They are neither inter-dependent nor cumulative in their effect. As Dean Lysyk pointed out over a decade ago,⁶⁹ it is not sufficient simply to refer to head 24 in its entirety; federal legislative provisions must be brought home as in relation to "Indians" or to "Lands reserved for the Indians."

V CONCLUSION

What emerges from this discussion is an independent and vital head of federal legislative power, "Lands reserved for the Indians": independent in that it stands apart from its companion powers over

"Indians"; vital in that it challenges our judiciary to look behind such moribund recitations as the statement in Cardinal:

Once it was determined that the lands remained lands reserved for the Indians, provincial legislation relating to their use was not applicable.⁷⁰

The fact is that there is no coherent body of law to justify such categorical affirmations of exclusivity. Surely Indian possessory interests in lands reserved for them will qualify for such treatment, but when the Indian interests become less than possessory a different sort of qualification is needed.

This process of definition requires more facts in each case, development of a body of law instead of the embalming of it, and increasing identification of whose policy interests are being served and in what way. And if the current mood is for constitutional reform, this, surely, is the way to advance it.

William B. Henderson

FOOTNOTES

1. [1980] 1 S.C.R. 433, at 440.
2. S. 91(25), B.N.A. Act.
3. Cunningham v. Tomey Homma, [1903] A.C. 151 (P.C. Can.).
4. Supra note 1, at 469.
5. Attorney General of Canada v. Canard, [1976] 1 S.C.R. 170.
6. This was a term used by the Court in Natural Parents v. Superintendent of Child Welfare, [1976] 2 S.C.R. 751.
7. Regina v. Strongquill (1953), 105 C.C.C. 262, at 290 (Sask. C.A.) (McNiven J.A.); see also Regina v. Sutherland (1980), 53 C.C.C. (2d) 289 (S.C.C.).
8. St. Catherines Milling & Lumber Co. v. The Queen (1888), 14 App. Cas. 46, at 59 (P.C. Can.).
9. Id., at 54.
10. See Calder v. Attorney General of British Columbia, [1973] S.C.R. 313.
11. See generally G. LaForest, "Natural Resources and Public Property Under The Canadian Constitution" (1969)
12. [1931] 1 D.L.R. 865, at 877 (S.C.C.).
13. (1970), 74 W.W.R. 380 (B.C.C.A.). Cf. Carter v. Nichol (1911), 1 W.W.R. 392 (Sask.).
14. Id., at 387.
15. Indian Act, s. 87.
16. [1974] S.C.R. 695.
17. Id., at 705.

18. (1980), 113 D.L.R. (3d) 572 (Fed. C.A.).
19. Id., at 572.
20. Id., at 570.
21. [1978] 1 F.C. 653 (Trial D.).
22. (1897), 6 Que. Q.B. 12.
23. [1926] Ex. C.R. 68.
24. Supra, note 18, at 564.
25. Id., at 571.
26. Id., at 579.
27. See C.R.C. 1978, c. 954.
28. Supra, note 5.
29. [1930] A.C. 111 (P.C. Can.).
30. Id., at 118.
31. (1980), 113 D.L.R. (3d) 513, at 517 (S.C.C.).
32. Id., at 519.
33. [1976] 1 S.C.R. 477, at 495 (Laskin C.J.C.).
34. Smith v. The Queen, [1960] S.C.R. 776, at 800.
35. Western Int'l Contractors Ltd., v. Sarcee Devs. Ltd., [1979] 3 W.W.R. 631, at 647 (Atla. C.A.). See also Re Provincial Assessor and Rural Mun'y of Harrison (1971), 20 D.L.R. (3d) 208 (Man. Q.B.).
36. Indian Act, s.87.
37. Western Int'l, supra; Palm Dairies Ltd. v. The Queen (1978), 91 D.L.R. (3d) 665 (Fed. Ct., Trial D.).
38. Indian Act, s.55.

39. (1979), 100 D.L.R. (3d) 358 (Ont. H.C.).
40. Id., at 363.
41. (1979), 27 O.R. (2d) 248, at 249-50 (C.A.).
42. Sanders, The Bill of Rights and Indian Status (1972),
7 U.B.C.L. Rev. 81, at 83
43. S.C. 1850, c.74.
44. [1939] S.C.R. 104, at 116-17.
45. Natural Parents, supra note 6, at 772.
46. St. Ann's Shooting and Fishing Club Ltd. v. The King, [1950]
S.C.R. 211, at 219.
47. (1979), 30 N.R. 421 (S.C.C.).
48. Id., at 428.
49. Id., at 429-30.
50. Id., at 436.
51. Id.
52. Id., at 438.
53. Id., at 440.
54. Id., at 440-41.
55. Id., at 441.
56. Id.
57. [1979] 1 S.C.R. 754.
58. Id., at 764.
59. Supra, note 16, at .
60. D. Gibson, "The 'Federal Enclave' Fallacy in Canadian
Constitutional Law" (1976), 14 Alta. L. Rev. 167, at 178.
61. Supra, note 47, at 428.



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