Canada's Indian reserves :
legislative powers

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CANADA'S INDIAN RESERVES: LEGISLATIVE POWERS

AN UPDATE

by

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INTRODUCTION

This paper has been prepared as a sequel to that published by Indian and Northern Affairs Canada in 1981.[1] It serves as a commentary upon that original paper, given the benefits of hindsight and commentaries in legal decisions, legal literature and a new constitutional arrangement which now sets aboriginal and treaty rights beyond the normal scope of either federal or provincial legislation.[2] At the same time, the writer will attempt to place these developments in the context of the earlier work.

THE NEW CONSTITUTIONAL ORDER

Under section 91 (24) of the now renamed Constitution Act, 1867,[3] Parliament retains exclusive legislative authority over "Indians and Lands reserved for the Indians." As discussed in the earlier paper, there are various ways in which the two powers enumerated in that section can be regarded as "exclusive": the general rule now seeming

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1 Canada's Indian Reserves: Legislative Powers (Ottawa: Indian and Northern Affairs Canada, 1981).

2 Constitution Act, 1982, as amended, especially ss. 35 & 52.

3 See Constitution Act, 1982, s. 53 (1) and Schedule I.

to be that provincial laws of general application[4] can apply to Indians, and to some extent to lands reserved for Indians, so long as such laws do not impair Indian status or conflict with section 88 of the Indian Act;[5] but provincial laws which affect the Indian use, benefit or occupation of reserves[6] will be found inoperative or ultra vires.

These premises, which encapsulate the theses set out in the first paper, must now be subordinated to certain provisions of the Constitution Act, 1982, notably to section 35, which provides, in part:

> (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

Section 52 provides, in part:

> (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.

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4 See R. v. Kruger and Manuel, [1978] 1 S.C.R. 104, at 110, for a discussion of the term "laws of general application."

5 R.S.C. 1970, c. I-6.

6 Constitutionally, "reserves" covers a much broader category of lands than those defined as such by the Indian Act, including lands covered by the Royal Proclamation of 1763: R. v. St. Catherines Milling & Lumber Co. (1888), 14 App. Cas. 46, at 59 (P.C.).

What this means is that the old theory of constitutional interpretation, which assumed that all conceivable legislative powers were assigned either to Parliament or to the legislature of a province, is obsolete. There are now some classes of laws which cannot be abrogated or interfered with by any legislation short of an amendment to the Constitution itself. Foremost among such classes of laws are "existing aboriginal and treaty rights," and these must include land rights. Aboriginal title, frequently referred to as "Indian Title," includes land rights of the type recognized by the Royal Proclamation of 1763, which may territorially be included in Indian reserves today where, for example, reserves were created by omission from a treaty.[7] Other land rights in reserves have been assured by the treaties which promised the setting apart of reserves, and those rights as well now have constitutional protection.

Section 52 (1) of the 1982 Act operates to strike down, absolutely, any federal or provincial law which is inconsistent with constitutional affirmation of existing[8] aboriginal and treaty

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7 As is the case, for example, with Robinson-Huron treaty reserves, many of which were created by holding them back from the general release of aboriginal title to far more extensive traditional lands. See the comments of Chancellor Boyd in R. v. St. Catherines Milling & Lumber Co. (1885), 10 O.R. 196, at 213.

8 For consideration of the word "existing" see R. v. Eninew, [1984] 2 C.N.L.R. 126 (Sask. C.A.).

rights. For that reason, it is necessary to consider what kinds of laws might be considered "inconsistent" with those land rights.[9]

The original paper described the law of inconsistency, laws with double aspects and paramountcy based on the formula prescribed by Lord Tomlin in the Privy Council decision in Re Fisheries Act, 1914[10] as followed by the Supreme Court of Canada in its 1980 decision in Fowler v. The Queen.[11] Subsequently, however, the Supreme Court took a second look at the whole area in the case of Multiple Access Ltd. v. McCutcheon.[12]

In Multiple Access the issue was insider trading in the securities of the federally incorporated company. The respondents allegedly used confidential information, available to them because of their positions with the company, to derive personal benefits from trading in its stock. Other shareholders, acting on behalf of the company in what is called a derivative action, pursued their remedy under the Ontario

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9 See generally the discussion of "operative inconsistency" at pp. 17-21 of the original paper.

10 [1930] A.C. 111 (P.C. Can.)

11 (1980), 113 D.L.R. (3d) 513, at 517 (S.C.C.).

12 [1982] S.C.R. 161.

Securities Act, legislation which governs the sale of securities within the province. The respondents argued that there was an equivalent (virtually identical) remedy prescribed by the Canada Corporation Act, the federal statute which dealt with organization and affairs of the corporate entity.

The issue was, therefore, one of operative inconsistency: both said the same thing in terms of duty to the company and potential liability, only the procedures involved under the statutes differed. The respondents argued that the federal statute had "occupied the field" and that, by the doctrine of paramountcy, the provincial statute was inoperative and could not be relied upon. The Ontario Court of Appeal agreed with their argument.[13]

In the Supreme Court of Canada, six of the nine justices stated that both federal and provincial statutes were valid, even if there were some theoretical risk of having separate actions proceeding against the same defendants on the same facts[14] (theoretical since no court would permit double recovery). Effectively, the Court said that there was scope in our constitutional arrangements for federal and provincial laws to say the same thing, assuming, of course, that both were validly in relation to proper heads of legislative power.

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13 (1978), 19 O.R. (2d) 516 (C.A.).

14 Supra, note 12, at 191.

The Court reaffirmed the Smith[15] test of operative inconsistency: does compliance with the one law involve breach of the other?[16] That could not be the case in Multiple Access since both laws said substantially the same thing, but what is noteworthy is that the test remains the same. That is certainly true when a federal law is compared, constitutionally, to a provincial law; it is submitted that the test will also be found to apply in contests between any laws and the "supreme" law set out in the present Constitution.[17]

What can be derived from this new dualism, described by the Court as "the ultimate in harmony,"[18] with respect to laws affecting aboriginal and treaty rights? The Court gave some indication of when it will permit such harmony to prevail:

> The double aspect doctrine is applicable . . . when the contrast between the relative importance of the two features is not so sharp. When, as here, the corporate-security federal and provincial characteristics of the insider trading legislation are roughly equal in importance there would seem little reason, when considering validity, to kill one and let the other live.[19]

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15 [1960] S.C.R. 776, at 800.

16 As subsequently affirmed by: Construction Montcalm Inc. v. Minimum Wage Commission, [1979] 1 S.C.R. 754, at 780; also Robinson v. Countrywide Factors Ltd., [1978] 1 S.C.R. 753.

17 See s. 52 of the 1982 Act, cited above at p. 2.

18 Supra note 12, at 190.

19 Id. at 182.

This passage signifies a willingness on the part of the court, when similar federal and provincial laws are both in play, to examine the policy reasons why the one (always federal) ought to be allowed to kill off the other. And if there are no apparent reasons why that should be done, both will be allowed to live.

The more common situation with laws affecting Indian reserve lands is that there will be insufficient, if any, federal law to set up a true inconsistency. In fact, in many situations such as fisheries and highway traffic laws, the federal power is used to adopt and apply provincial laws. In other areas, such as matrimonial property located on reserve, there is nothing in the federal statutes that remotely resembles the comprehensive regimes prescribed by provincial legislatures. Even in the simplest, non-marital property relationships such as, for example, joint ownership of reserve land, there is no provision whatever for the partition or sale of that interest (assuming that one of the joint tenants resists). What, then, happens when there is a comprehensive provincial scheme and a non-existent federal one? What does "exclusive" mean in these situations?

This was, of course, the situation in Surrey v. Peace Arch Enterprises.[20]

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20 (1970), 74 W.W.R. 380 (B.C.C.A.), discussed at pp. 10-12 of the earlier paper.

In that case, there were no federal laws regarding public health and sewage control on surrendered lands, but the Court held that provincial laws did not apply because they could not: the use and occupation of Indian lands was an exclusive federal matter. This was not a Multiple Access situation where both federal and provincial laws were available to the litigants; if the provincial laws did not apply, there was a regulatory vacuum.

A similar situation arose in the case of Re Walker and Minister of Housing for Ontario.[21]

There, the City of Chatham attempted to assist the operation of its municipal airport by enacting building height restrictions that applied to surrounding lands. The provincial minister of housing approved the by-laws. The federal government, under the Aeronautics Act, clearly had the authority to enact such regulations and had been asked to enact them; the city acted when the federal minister refused. The municipal laws were challenged on the constitutional ground that they encroached on the exclusive authority of Parliament over matters involving air navigation[22] even though the federal power had not been used. The court agreed that the municipal laws were invalid.

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21 (1983), 41 O.R. (2d) 9 (C.A.).

22 See Re Aerial Navigation, [1932] A.C. 54 (P.C.); Johannesson v. West St. Paul, [1952] 1 S.C.R. 292.

The Court of Appeal reviewed the various constitutional principles in play: the province had a general power to regulate the use of public or private land in the province, but it could not exercise that power in such a way as to affect the federal power over air navigation. The court would have upheld provincial regulation of land use that did not affect the federal power, but it was obvious from the history of the matter that such an effect was the only reason the by-laws were passed.

In deciding Walker, the court also considered its own earlier decision in Hamilton Harbour Commissioners v. Hamilton,[23] which involved a conflict between the city's powers to regulate lands owned by the Harbour Commission. In that case, the court had held that the city by-laws were valid so long as they did not "explicitly attempt to prohibit or regulate the use of land for purposes related to navigation and shipping."[24]

This was a clear case involving operative inconsistency: where the court found none, the provincial law survived. But a different view was taken in Walker:

> We have come to the conclusion that no question of the aspect doctrine or of applying the paramountcy principle arises in this case. The orders attacked are orders in relation to aeronautics, a subject-matter reserved to the exclusive legislative jurisdiction of the Parliament of Canada.[25]

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23 (1978), 21 O.R. (2d) 459 (C.A.).

24 Id., at p. 484.

25 Supra, note 21, at 21.

It appears, then, that the Ontario courts will protect what they discern to be the exclusive jurisdiction of Parliament from the intrusive effects of provincial laws, but that does not mean that the use and occupation of Indian reserve lands will always be categorized as exclusively a federal subject. The Four B Manufacturing case[26] is an example of the recent trend to distinguish "activities" taking place on land from the substantial use or occupation of the land itself.

In no area of native law are these recent developments more apparent than in the division of matrimonial property located on Indian reserves. The watershed case was Sandy v. Sandy, a decision of the Ontario Court of Appeal discussed in the earlier paper.[27] At that writing, it was suggested that exclusivity was becoming increasingly irrelevant since the courts had coercive powers which could be exercised under provincial law to circumvent any real or apparent conflict with the lands provisions of the Indian Act.[28]

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26 Discussed at pp. 27-33 of the original paper.

27 At pp. 22-23.

28 This was described in terms of a "Partington" order, which was a misnomer: the order derives from the case of Chadderton v. Chadderton, [1972] 1 O.R. 793 (H.C.J.).

This approach has continued in two decisions of the British Columbia Court of Appeal:[29] Derrickson v. Derrickson[30] and Paul v. Paul.[31]

In Derrickson, the court examined the Sandy case in light of Multiple Access and found that there would still have been a conflict between federal and provincial law sufficient to render the latter void. The court did find, however, that where there was no jurisdiction to award an interest in reserve lands, the court still retained power under the provincial statute to award compensation for adjusting the division of family assets, including the value of the interest that could not be directly awarded.

In Paul, the lower court made an order granting the plaintiff interim exclusive occupancy of the family home on a reserve. The Court of Appeal overturned that order, giving three sets of reasons for doing so. One judge felt that the conflict of legislation ousted provincial jurisdiction; a second pointed out that the court could not have made a permanent order at trial, and therefore could not make an interim order pending trial.

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29 Both cases are under appeal to the Supreme Court of Canada.

30 [1984] 2 W.W.R. 754, [1984] 3 C.N.L.R. 58.

31 (1984), 12 D.L.R. (4th) 462; rev'g (1983), 141 D.L.R. (3d) 711 (B.C.S.C.).

The third judge, Esson J.A., dissented, holding that the court could make an order for interim possession pursuant to the provincial statute. He reasoned in this way:

> It is not questioned that the provisions of the [B.C.] Family Relations Act, other than those dealing with interest in property, apply to Indians living on reserves. In Derrickson v. Derrickson it was held that, while the court could not make an order for division of real property held under a certificate of possession [pursuant to the Indian Act], it could make an order in respect of other family assets and, in doing so, may make an order for compensation for the purpose of adjusting the division of family assets between the spouses. That being so, there is just as much reason for the court to have jurisdiction, ... "to grant temporary relief pending determination of the rights to the property of the spouses" in this case as there would be in a case in which no interest under the Indian Act is involved.[32]

It will now be up to the Supreme Court of Canada to decide whether the distinction between reserve land interests and money representing the value of those interests is sufficient in law to circumvent an otherwise clear conflict between provincial and federal statutes.

In the constitutional, as opposed to the statutory, scheme, there is no substantive difference between the effect of provincial laws on aboriginal, or Indian, title and their effect on Indian reserve lands. For that reason, cases involving the Teme-Augama claim to

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32 12 D.L.R. (4th) at pp. 469-70.

traditional lands in Northern Ontario and the logging conflict over Meares Island in British Columbia will continue to expand the courts' consideration of the issue of legislative powers. And legal writers will continue to analyze the same issue.

The trend in the literature seems to be to downplay the exclusivity of Parliament's legislative powers over "Lands reserved for the Indians." In many instances, there is a failure to distinguish adequately between the two heads of power contained in section 91 (24) of the Constitution Act, 1867.[33] Many articles focus unnecessarily on section 88 of the Indian Act which, as the courts have recognized, deals with "Indians" and not with reserved lands; others are content to strike out against the "enclave" theory, which can now be considered defunct and no longer worthy of such effort.

For the moment, all that can be surmised is that our Constitution can no longer be regarded, to any extent, as an aggregate of watertight legislative compartments. Increasingly, the courts will make policy decisions about which provincial laws ought to be allowed inside

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33 See, for example, Hughes, "Indians and Lands Reserved for the Indians: Off-Limits to the Provinces?" (1983), 21 Osgoode Hall L.J. 82.

reserve boundaries and which ought to be excluded. Much of the difficulty could have been avoided long ago had Parliament chosen to legislate anything approaching a comprehensive legal base for the administration and protection of reserve lands; it has not done so.

In future, as Indian self-governments become recognized and legislatively active, the entire issue must again come under the judicial microscope. Indian governments can be expected to expressly exclude the operation of provincial laws which they regard as unfair, undesirable or inconsistent with traditional aspects of their community life. It is to be hoped that our courts will be sensitive to what is happening, and why.

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