Statement by the Minister of Indian Affairs and Northern Development on legislative jurisdiction in relation to Indians

/ Jean Chrétien

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Paulette - Please put this on the Circulation File attached to my memo to Katie on the subject

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Statement by the

MINISTER OF INDIAN AFFAIRS and NORTHERN DEVELOPMENT

on

LEGISLATIVE JURISDICTION IN RELATION TO INDIANS*

At the meeting of the Standing Committee on November 19 last, Mr. O'Connell mentioned that there is a general misunderstanding concerning the constitutional position of the Indians and asked if I would make a statement on the matter.

I indicated I would be happy to comply with the request and after consulting the law officers of the Crown on this complex matter the following appears to be the position.

Head 24 of Section 91 of the constitution of Canada gives to the Parliament of Canada exclusive legislative authority in relation to "Indians and Lands reserved for the Indians". This exclusive legislative authority carries with it by necessary implication the exclusive right to determine the special policies, if any, that are to prevail in relation to these citizens of Canada. Moreover it follows from the exclusive character of this legislative authority and right that the legislatures of the provinces of Canada cannot and do not have authority to legislate in relation to "Indians and Lands reserved for the Indians" or to determine Indian policy.

It is also part of the constitutional law of Canada that neither the Parliament of Canada nor the legislature of a province can confer upon the other, whether by delegation or grant, the authority to make laws in relation to any matter notwithstanding that such matter may be within its own legislative authority. Consequently, a transfer of legislative jurisdiction in the field of Indian Affairs is not possible without a constitutional amendment.

This class of subject matter, "Indians and Lands reserved for the Indians" and certain of the classes of subject matter reserved by our constitution to the legislatures of the provinces, such as "Property and Civil Rights in the Province" or "Generally all matters of a merely local or private Nature in the Province", (heads 13 and 16 of Section 92) can be said to overlap each other. In this event a law validly enacted pursuant to either legislative power will have effect if the field is clear, but, if the field is not clear and two

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statutes meet, it is part of our constitutional law that the statute of Parliament must prevail. Also of relevance to this aspect of the problem is Section 87 of the Indian Act which reads as follows:

> "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, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act."

As a result of this constitutional law principle and Section 87 of the Indian Act an Indian is, generally speaking, for the purposes of the application of provincial laws described in the section in the same position as his fellow residents in the province except insofar as those laws treat of matter specially dealt with by Parliament for him.

Turning to the special problem of designing and implementing programs for the Indians in fields such as health or welfare it is apparent that a considerable degree of flexibility exists by virtue of the principles just mentioned. The provinces are free to legislate for the well-being of their residents and, except to the extent that it is in conflict with federal policy expressed in or pursuant to the Indian Act, or some other law of Parliament, such provincial legislation extends to Indians in their capacity as residents of the province and the benefit thereof can be claimed by them.

As was stated earlier it is the exclusive right of the Government of Canada to determine policy relating to Indians in their capacity as Indians and this right includes the right to determine what provincial schemes or programs of the nature under discussion are appropriate for extension to the Indians and to arrange, through the established practice of inter-governmental negotiation or agreement, for the Indians to be recognized as residents of the province for the purposes of the scheme program.

Questions and Answers pertaining
to the Paper on the
Constitutional Position of the Indian

The paper prepared by Justice is fairly brief and is couched in legal language. The implications of some of the statements in it may not be readily apparent and it seems reasonable to assume that in seeking a better understanding of it specific questions may be asked. Some of these are anticipated hereunder and brief answers are provided.

1. Do the provinces agree with the position set out in the paper?

This question cannot be answered specifically as the provinces have not seen this paer. As a general statement it can be said that most provinces tend to the view that Indians are a federal responsibility. Only one province - Ontario - has clearly announced that it recognizes that it has some responsibility to its Indian citizens. Others while expressing some willingness to assume program responsibility insist this be undertaken at full cost to the federal government because of their view that the basic responsibility lies federally.

2. On what do the provinces base their view concerning responsibility?

The basis appears to lie in their interpretation of the phrase "legislative authority" in Head 24 of Section 91 of the B.N.A. Act as having the same meaning as "full responsibility". They frequently point to the fact that Canada assumed responsibility for Indians after Confederation, and has retained the responsibility, as supporting their interpretation.

It is true that Indians are in a unique position. They find themselves in many respects subject to laws different and differently administered than those which apply to other Canadians. To some extent this situation reflects the belief of the Parliament of Canada that special policies were required in relation to them. However, to some extent it also rests on historical fact and on federal initiatives voluntarily undertaken.

3. Is there a Constitutional obligation on Canada to enact laws for Indians?

No. The paper points out that the Parliament of Canada has the exclusive right to determine special policies if any in respect to Indians. It is permissive rather than mandatory authority.

4. Do provincial laws of general application apply fully on reserves?

No. In the first place they do not apply if they conflict with Indian treaties, the Indian Act or other federal legislation. In the second place they apply only to Indians not to the lands comprised in the reserve.

5. Is an amendment to the B.N.A. Act required to enable Indians to receive provincial services?

No. There is no exclusive right in either level of government to provide services to Indians. Who shall provide them is a matter to be resolved by an agreement between the governments.

6. Can the provinces be given legislative authority over Indians and the lands of Indians?

This could not be done without an amendment to the Constitution, for as is pointed out in the paper, the Parliament of Canada cannot confer upon a legislature the authority to make laws vested in it by the B.N.A. Act.

7. Is an amendment to the Constitution required to enable Indians to achieve equality under the law with other citizens?

No. It would seem that this result could be achieved by the Parliament of Canada withdrawing federal "Indian" legislation thus enabling the provinces to enact properly framed laws of general application which would apply to all citizens (including Indians).

8. Is there any legal obstacle to Indian communities melding into the normal pattern of provincial affairs?

Yes. Indian reserve lands are not subject to provincial legislation as the legislative authority over them that is vested in Canada and cannot be transferred or delegated to provinces.

9. Is there an urgent need for a change in the Constitution?

No. There appears to be sufficient constitutional flexibility to enable the needs of the Indians to be met by mutual agreement by the provinces and the federal government.

10. In the event that a change in the Constitution is contemplated to give the provinces legislative authority what could be done to ensure the continued existence of Indians' reserves?

The question cannot be answered with any degree of certainty. It is unlikely any guarantee could be built into the Constitutional change. There might be appropriate prior arrangements with the provinces that they would make provision for reserves retaining their present characteristics but it is not foreseeable that the provinces could be bound to retain these provisions indefinitely.

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11. Can laws of the provinces or Canada contravene the provisions of treaties?

(a) Section 87 of the Indian Act provides that provincial laws apply to Indians subject to the terms of their treaties.

(b) On the other hand, federal legislative competence is unfettered by the Indian treaties, by the Royal Proclamation of 1763 or by the guarantees in respect to hunting and fishing rights contained in the Natural Resources Transfer Agreements with the Western Provinces confirmed by the B.N.A. Act of 1930.