THE UNIQUE CONSTITUTIONAL POSITION OF THE CANADIAN INDIAN*

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The purpose of this article is to examine the constitutional base upon which Canadian "Indian law" rests. The native Indian finds himself in many respects subject to laws different, and differently administered, from those which apply to other Canadians. To some extent his peculiar legal status reflects constitutional necessity. To some extent it rests on historical fact and on governmental initiatives voluntarily undertaken. There are good reasons for clearly distinguishing the dictates of the law of the constitution on the one hand from historical development on the other. On the Centennial balance sheet, the present condition of the native peoples of Canada must be entered as a debit item. The problem of effectively integrating the Indian into Canadian society is an extremely difficult one and one of the obstacles undoubtedly lies in the very fact of his legal apartness. It is therefore imperative to examine the extent to which the constitution presently demands that the Indian rely on Ottawa in situations in which his non-Indian neighbour looks to the laws and governmental apparatus of the province in which he resides. Constitutional doctrine, and constitutional misconceptions, play a continuing role in the pattern of governmental response to the needs of Indians. Federal and provincial governments find themselves in competition over the right to regulate one subject matter affecting Indians, while each disclaims constitutional (and financial) responsibility over another subject matter relating to the well-being of Indians. While such a phenomenon is not confined to this area of the constitution, nor

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is it one which is conducive to the effective mobilization of governmental resources toward resolving the all too evident problems of this segment of our population.[1]

The discussion of the constitutional position which follows is necessarily somewhat complex. It will be seen that the problem is not merely one of contrasting the position of the Indian with that of the non-Indian, for distinctions must be drawn within the class to which the British North America Act refers. An individual may be an Indian within the meaning of the constitution, yet be untouched by the codification of special federal law embodied in the Indian Act.[2] In appropriate cases attention must be paid to whether the individual Indian is or is not entitled to claim the benefit of an Indian treaty, and to whether or not he resides on a reserve. On certain limited questions it will be necessary to discuss constitutional arrangements arrived at with a province or provinces which have no application to other provinces.

In Part I of this article some preliminary comments concerning judicial construction of section 91, head 24, of the British North America Act are offered. Part II is concerned with federal, and Part III with provincial, legislative competence. The conclusions are summarized in Part IV.

I. *Indians and Indian Lands.*

By section 91(24) of the British North America Act, 1867, exclusive legislative authority over "Indians, and lands reserved for the Indians" is assigned to the Parliament of Canada. Two preliminary observations concerning the ambit of section 91(24) are in order. First, section 91(24) assigns legislative jurisdiction over not one but two subject matters. The principles and cases relevant to the scope of the term "Indians" are not necessarily of assistance in determining what falls within "lands reserved for the Indians". The Privy Council decisions, by and large, are concerned with Indian "lands". The Canadian courts have, on occasion, failed to distinguish between the two parts of head 24 with the result that it is sometimes unclear whether the judge in a particular case finds constitutional support for federal jurisdiction on the basis that the enactment in question concerns Indians or on the basis that it concerns the lands of Indians.[3] A second, and related,

[1] For an illustration of the type of problem which arises, see *Childrens Aid Society of Eastern Manitoba et al* v. *Rural Municipality of St. Clements* (1952), 6 W.W.R. (N.S.) 39 (Man. C.A.).

[2] R.S.C., 1952, c. 149.

[3] See, for example, *Rex* v. *Jim* (1915), 22 B.C.R. 106, 26 C.C.C. 236 (B.C.S.C.).

point is that head 24 does not assign authority over Indians *on* lands reserved for the Indians but over Indians *and* lands reserved for the Indians. In other words, there is nothing in head 24 to suggest that legislative authority over Indians, as such, hinges on whether or not the statute in question is sought to be applied to an Indian on Indian lands as opposed to an Indian who is not on such lands. This matter too will be adverted to below in connection with the importance placed in some of the cases on the question of whether or not the Indian was, at the material time, on an Indian reserve.

Several points pertaining to judicial construction of head 24 of section 91 may conveniently be referred to at the outset. The Supreme Court of Canada has held that the term "Indians" as used in head 24 includes Eskimos.[4] The meaning of the term "Indian" in particular statutes may, of course, be narrower than the corresponding term in the British North America Act. This is so in the case of the Indian Act, section 4 of which excludes Eskimos from the term "Indians" as used in that Act. It may be, too, that a person who was once an Indian for purposes of the Indian Act, but has lost his status as an Indian under that Act by enfranchisement, may nevertheless continue to be an Indian for purposes of the British North America Act.[5]

The scope of the words "lands reserved for the Indians" has also received judicial attention. In the *St. Catherine's Milling* case the Privy Council pointed out that those words were not synonymous with "Indian reserves" but were to be more broadly construed. Lord Watson, delivering the judgment of the Board, stated:[6]

> . . . counsel for Ontario referred us to a series of provincial statutes prior in date to the Act of 1867, for the purpose of shewing that the expression "Indian reserves" was used in legislative language to designate certain lands in which the Indians had, after the royal proclamation of 1763, acquired a special interest, by treaty or otherwise, and did not

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[4] *Re Eskimos,* [1939] S.C.R. 104; *Sigeareak E1-53* v. *The Queen,* [1966] S.C.R. 645, 57 D.L.R. (2d) 536.

[5] This is so despite s. 109 of the Indian Act, *supra,* footnote 2, which states: "A person with respect to whom an order for enfranchisement is made under this Act shall, from the date thereof, or from the date of enfranchisement provided for therein, be deemed not to be an Indian within the meaning of the Act or any other statute or law." It is clearly not open either to Parliament or to a Legislature to control the definition of terms in the British North America Act (hereinafter cited as B.N.A. Act), by defining the same term in a particular way in a particular statute. Accordingly, the words "or any other statute or law" at the end of s. 109 of the Indian Act are not applicable to the B.N.A. Act.

[6] *St. Catherine's Milling and Lumber Company* v. *The Queen* (1889), 14 A.C. 46, at p. 59. Italics mine.

> apply to land occupied by them in virtue of the proclamation. The argument might have deserved consideration if the expression had been adopted by the British Parliament in 1867, but it does not occur in sect. 91(24), *and the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation.* It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority.

This point may assume particular importance in British Columbia if the future course of decision establishes that the Royal Proclamation of 1763 extends to that province—a question on which the British Columbia Court of Appeal divided in the recent case of *Regina* v. *White and Bob*.[7] A finding that the proclamation does apply to the province, coupled with the fact that the greater part of British Columbia has never been formally surrendered through treaties made with the Indians,[8] would suggest a broader ambit of federal authority in relation to "lands reserved for the Indians" than is generally conceded.

The discussion of distribution of legislative power to follow is primarily concerned with the constitutional effect of assigning legislative authority over "Indians" to the Parliament of Canada. The scope of "lands reserved for the Indians" does not attract the same degree of attention for several reasons. One is that the leading cases, including a line of Privy Council decisions commencing with the *St. Catherine's Milling* case, were concerned not with legislative or regulatory power but with proprietary rights. In the last mentioned case the Privy Council pointed out that legislative authority over Indian lands did not carry with it a beneficial interest in those lands. The Indian title, described as "a personal" and usufructuary right, dependent upon the good will of the Sovereign", formed a burden on the underlying title of the

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[7] (1965), 50 D.L.R. (2d) 613, 52 W.W.R. 193. Norris J.A., held that the proclamation did (and does) apply to British Columbia. The two other judges constituting the majority did not advert to the point; the two dissenting judges held that the proclamation did not apply. The decision of the majority was affirmed by the Supreme Court of Canada without reference to the point: (1966), 52 D.L.R. (2d) 481.

[8] Fourteen agreements or treaties were concluded with the Indians of southern Vancouver Island between 1850 and 1854, one of which was considered in the *White and Bob* case. Also, Treaty No. 8, concluded in 1899, extends to the northeastern part of the Province, as well as to parts of Alberta, Saskatchewan and the Northwest Territories.

[9] In *A.-G. for Quebec* v. *A.G. for Canada* (the *Star Chrome* case), [1921] 1 A.C. 401, Duff J., giving the reasons for the Privy Council, observed that it is "a personal right in the sense that it is in its nature inalienable except by surrender to the Crown", at p. 408.

Crown. After Confederation, the underlying title became that of the Crown in right of the Province by virtue of section 109 of the British North America Act. Surrender of the Indian title simply operated to disencumber the provinces' estate of the Indian title. The result of the *St. Catherine's* case, and the decisions which followed upon it, was therefore reasonably clear, if somewhat novel in law. Since the Royal Proclamation of 1763, it had been consistent policy to permit the Indians to alienate their interest in lands only through a surrender to the Crown.[10] After Confederation the situation was that the Indian title constituted a burden on the title of lands held by the province; however, it appeared that only the Crown in right of Canada was competent to take a surrender of the lands from the Indians. In short, the terms of surrender had to be negotiated with the officials of the federal government, while the surrender operated to perfect the title of the Province to the lands surrendered. Accordingly, the sale, lease or other disposition of reserve lands required the co-operation of both levels of government. Lord Loreburn, L.C., speaking for the Privy Council in another case, used the following language:[11]

> The Crown acts on the advice of ministers in making treaties, and in owning public lands holds them for the good of the community. When differences arise between the two Governments in regard to what is due to the Crown as maker of treaties from the Crown as owner of public lands they must be adjusted as though the two Governments were separately invested by the Crown with its rights and responsibilities as treaty maker and as owner respectively.

This result was administratively awkward. Moreover, in the first decades after Confederation the federal government, proceeding under the misapprehension that section 91(24) of the British North America Act conferred proprietary rights as well as legislative authority to regulate lands reserved for the Indians, had purported to make grants of surrendered reserve lands and the title of such grantees, and their successors in title, was clearly open to attack. To perfect the titles of those who took under the earlier grants, and to facilitate future alienations of surrendered reserve lands, Canada has since concluded agreements with most of the provinces concerning past and future dispositions of Indian reserve lands.[12]

[10] *Cf.* s. 39(1)(a) of the present Indian Act, and footnote 9, *supra.*

[11] *Dominion of Canada* v. *Province of Ontario,* [1910] A.C. 637, at p. 645.

[12] *British Columbia*: See Agreement of 1912 (McKenna-McBride Agreement) and British Columbia Indian Lands Settlement Act, R.S.C., 1952, c.

If proprietary rights to Indian lands do not lie with Canada, the question remains as to what legislative authority accrues to Parliament in respect of "lands reserved for the Indians". As noted above, the problem has not attracted much judicial comment, and this perhaps is indicative of the comparatively straightforward nature of the problem. In *The King* v. *Lady McMaster* it was stated that the words comprehended "the control, direction and management of lands reserved for Indians".[13] A question which could cause difficulty in a particular case, however, but which has not yet been isolated for discussion by the courts, may arise in a case in which it becomes necessary to characterize an impugned statute as relating *either* to "Indians" *or* to "lands reserved for the Indians". A choice between these two possibilities may be required, for example, for the purposes of section 87 of the Indian Act. The effect of section 87 is to make certain laws in force in the province "applicable to and in respect of *Indians* in the province"; the section does not make such laws applicable to Indian *lands* or *reserves*.[14] It is therefore arguable, for instance, that the Indian right to hunt and fish is an incident of the "usufructuary" Indian title recognized in the *St. Catherine's* case and subsequent decisions. The contention would be that the Indian right to take game and fish is in the nature of an interest in land and that legislation in connection with that right therefore relates to "lands reserved for the Indians". If the argument were accepted, it would seem to follow that section 87 could not operate so as to bring provincial laws into play. With respect to the particular example used, it should be noted that in the *White and Bob* case,[15] the

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51. See also para. 13 of the Memorandum of Agreement scheduled to B.N.A. Act, 1930, R.S.C., 1952, vol. 6, p. 6381, and the British Columbia Indian Reserves Mineral Resources Act, S.C., 1943-44, c. 19, and Memorandum of Agreement scheduled thereto. *Prairie Provinces*: Validating agreements were unnecessary since reserves had been set aside by Canada while Crown lands were still vested in Canada. In the Natural Resource Agreements, confirmed by the B.N.A. Act, 1930, that situation was preserved with respect to existing reserves and provision was made for reserves which might thereafter be set aside by incorporating terms of the Ontario agreement of 1924 (see below). See Memoranda of Agreement scheduled to the B.N.A. Act, 1930, R.S.C., 1952, vol. 6, pp. 6349-6350 (Manitoba, paras. 11 and 12); 6361-62 (Alberta, paras. 10 and 11); 6371-72 (Saskatchewan, paras. 10 and 11). *Ontario*: See Memorandum of Agreement scheduled to S.C., 1924, c. 48. *New Brunswick*: See Memorandum of Agreement scheduled to S.C., 1959, c. 47. *Nova Scotia*: See Memorandum of Agreement scheduled to S.C., 1959, c. 50. Agreements have not as yet been concluded with Quebec or Prince Edward Island.

[13] [1926] Ex. C.R. 68, at p. 75, per Maclean J.

[14] This point was taken in *Regina* v. *Johns* (1962), 39 W.W.R. 49, at p. 53 (Sask. C.A.).

[15] *Supra*, footnote 7.

appellate courts did apply section 87 to a case concerning Indian hunting rights. No argument along the lines suggested above was addressed to the courts before which *White and Bob* was argued; nor has the question been canvassed in the judgments delivered in other Indian hunting cases. Whether or not a court may still consider the point open in a hunting case as having passed *per incuriam* in the *White and Bob* decision remains to be seen. The issue may, in any event, arise in another context.

To revert to the central theme of this article, attention will now be directed to the various respects in which the Indian is, or might be suggested to be, in a constitutionally unique position; that is to say, unique in the sense that the incidence of federal or provincial laws or both upon him is different than is the case for the non-Indian. As noted earlier, federal and provincial law-making authority have been separated for discussion in Parts II and III below, although some measure of overlap in treatment cannot be avoided.

II. *Federal Legislative Competence.*

As a general proposition, it might be expected that the minimum effect of assigning legislative authority over Indians to Parliament would be to enable the latter to effectively extend to Indians any legislation which Parliament is competent to enact for non-Indians. Several qualifications, and suggested qualifications, upon the aforementioned proposition require discussion.

First, section 91(24) of the British North America Act does not stand as the sole enactment pertinent to distribution of legislative authority over Indians in all provinces. Section 1 of the British North America Act, 1930, to which Agreements with the four western provinces are scheduled, reads as follows:[16]

> 1. The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law *notwithstanding anything in the British North America Act, 1869, or any Act amending the same,* or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid.

Overriding effect is thereby given to the clause numbered 13 in the Memorandum of Agreement with Manitoba[17] and numbered 12 in the Agreements with Alberta[18] and Saskatchewan,[19] and which provides that:

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[16] R.S.C., 1952, vol. 6, p. 6344.
[17] *Ibid.*, p. 6350. [18] *Ibid.*, p. 6362. [19] *Ibid.*, p. 6372.

> 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 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.

Most of the relevant post-1930 decisions in the Prairie provinces have been ones in which provincial legislation has been tested against the above quoted clause. There could be no doubt, and the courts have so held, that provincial legislation in conflict with the guarantee embodied in that clause could not be applied to Indians—and to the extent it purported to apply to Indians, must be *ultra vires*. The issue for the courts therefore went only to the extent of the immunity from general laws of the province afforded to Indians by that clause. The scope of the exemption from general laws is discussed below in connection with provincial legislative competence, and the cases defining the limits of the guarantee will be applicable to federal laws *if* in fact federal laws are also subject to the guarantee. As against federal legislation, in other words, there remains the issue as to whether the same immunity exists. It will be noted that the clause speaks of the right "which the *Province* hereby assures to them . . .". In *R.* v. *Strongquill*, Procter J.A., expressed the opinion *obiter* that federal legislation was equally subject to the terms of the guarantee. Referring to paragraph 12 of the Saskatchewan Memorandum of Agreement, he observed that:[20]

> . . . since the validation of par. 12 of the agreement, by the legislation enacted neither the government of the province, the government of the Dominion nor the Imperial Parliament itself can by legislation of one government alone alter or amend the rights conferred by the three governments jointly under par. 12 of the agreement on treaty Indians except as the right to do so is contained in that agreement and the validating legislation.

The view that this clause was operative as against federal legislation was acted upon in *Regina* v. *Watson*,[21] where the accused

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[20] (1953), 8 W.W.R. (N.S.) 247, at p. 263. The clause numbered 26 in the Saskatchewan Agreement, and numbered 24 in the Agreements with Alberta and Manitoba, provides that, "The foregoing provisions of this agreement may be varied by agreement confirmed by concurrent statutes of the Parliament of Canada and the Legislature of the Provinces."

[21] (1958), a decision of L.F. Bence, Provincial Magistrate, unreported.

was acquitted of a charge under the Fisheries Act[22] and regulations thereunder on the strength of the applicability of paragraph 12 of the Saskatchewan Agreement.

However, a different conclusion has recently been reached by the Manitoba Court of Appeal. In *Regina* v. *Daniels* the accused was convicted before a magistrate under the federal Migratory Birds Convention Act.[23] On appeal by way of trial *de novo* the County Court judge ordered an acquittal, the decision turning on paragraph 13 of the Manitoba Agreement.[24] On further appeal, the majority of the Court of Appeal (Freedman J.A., dissenting) restored the conviction.[25] The majority held, in terms, that the provisions of the Migratory Birds Convention Act, passed in 1917, could not be reconciled with the 1930 enactments,[26] and that the earlier Act must prevail over the Manitoba Agreement and confirming legislation of 1930. Dealing with the matter purely as an instance of conflict between two federal statutes, a question arises as to whether the normal principle of statutory interpretation ought not to have been applied, namely, that where two Acts are inconsistent or repugnant, the later will be read as having impliedly repealed the earlier.[27] But more importantly, it must be asked whether the majority, in apparently approaching the question as merely one of conflict between two statutes, gave due consideration to the *non obstante* clause in section 1 of the British North America Act, 1930,[28] and to the fact that the Agreement, confirmed by federal and provincial legislation, itself provides a method of varying the provisions of the Agreement,[29] which had not been followed in the instant case? At the time of writing, an appeal to the Supreme Court of Canada was pending and it may therefore be expected that the point under consideration will shortly be resolved. If the appeal is allowed, the immediate result will be that the Migratory Birds Convention Act, which must now be taken to apply to Indians elsewhere in Canada,[30]

[22] R.S.C., 1952, c. 119.
[23] R.S.C., 1952, c. 179 (formerly S.C., 1917, c. 18).
[24] (1965), County Court of the Pas, unreported.
[25] (1966), 57 D.L.R. (2d) 365, 56 W.W.R. 234.
[26] *Ibid.*, at pp. 372 (D.L.R.), 240 (W.W.R.).
[27] See, for example, Craies, Statute Law (6th ed. by Edgar, 1963), p. 365. *Quaere,* whether the reference in the majority judgment to regulations passed in 1958 under the Act of 1917 could properly be relied on as showing a contrary intention of Parliament? *Cf. contra,* Freedman J.A., *ibid.*, at pp. 369 (D.L.R.), 237 (W.W.R.).
[28] *Supra,* footnote 16, and accompanying text.
[29] *Supra,* footnote 20.
[30] *R.* v. *Sikyea,* [1964] S.C.R. 642 (1965), 50 D.L.R. (2d) 80 (S.C.C.); (1964), 43 D.L.R. (2d) 150 (N.W.T.C.A.); (1963), 40 W.W.R. 494 (Terr.

does not extend to the Indians of the Prairie Provinces. The wider result, of course, will be to subject all federal legislation (so far as it is sought to be enforced in the Prairie provinces) to the test of compliance with the guarantee contained in the Natural Resource Agreements.

Second, while the Memorandum of Agreement with British Columbia scheduled to the British North America Act, 1930, contains no clause corresponding to that which appears as paragraph 12 of the Alberta and Saskatchewan Agreements and as paragraph 13 of the Manitoba Agreement, there is another provision which requires mention in connection with the operation of federal legislation in British Columbia. The thirteenth article of the Terms of Union, pursuant to which that province entered Confederation, reads, in part, as follows:[31]

> 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.*

In the case of *Geoffries* v. *Williams*[32] it was argued that a federal enactment was *ultra vires* as evidencing a policy less liberal than that which had been pursued by British Columbia. The argument was rejected for both procedural and evidentiary reasons, the court holding *inter alia* that there was no evidence to indicate that Indians had been treated more generously by British Columbia prior to the union. No reference was made in the reasons to the decision of the British Columbia Court of Appeal in *Regina* v. *Point (No. 2)*[33] where an accused Indian, charged with failing to make an income tax return, raised (among other defences) article 13 of the Terms of Union. Sheppard J.A., delivering the reasons of the court, stated:[34]

> The accused further contends that sec. 44(2) of the Income Tax Act is excluded by "the terms of Union" and particularly by sec. 13. The "terms of Union" contain the terms and conditions by which the Colony of British Columbia became part of the Dominion of Canada and provides for the distribution of certain benefits and obligations as between Canada and British Columbia. Whatever the effect of the

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Ct.); and *R.* v. *George*, [1966] S.C.R. 267 (1966), 55 D.L.R. (2d) 386. (S.C.C.); (1964), 45 D.L.R. (2d) 709 (Ont. C.A.); (1964), 41 D.L.R. (2d) 31 (McRuer C.J. H.C.). Both cases are discussed *infra*.

[31] R.S.C., 1952, vol. 6, p. 6264; R.S.B.C., 1960, vol. 5, p. 5277. Italics mine.

[32] (1959), 16 D.L.R. (2d) 157 (B.C., Co. Ct.).

[33] (1957), 22 W.W.R. 527.

[34] *Ibid.*, at p. 528.

> "terms of Union" as between Canada and British Columbia the accused is not one of these parties and his rights and obligations are determined by the common and statute law and in the circumstances under consideration are determined by sec. 44(2) of the Income Tax Act.

The court's rejection of this defence appears to rest on the proposition that it is not open to an Indian, or indeed any one other than one of the contracting parties—Canada and British Columbia —to set up the Terms of Union by way of challenge to the validity of federal legislation.

Third, the Canadian Bill of Rights[35] provides that every law of Canada[36] which does not expressly state that it is to operate notwithstanding the said Bill of Rights shall "be so construed and applied so as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms" recognized and declared in the said Bill.[37] The relevant "right", for present purposes, is that spelled out in section 1(b) which reads as follows:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist *without discrimination by reason of race,* national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, . . .
>
> (b) the right of the individual to equality before the law and the protection of the law;

The construction of these provisions immediately raises two distinct problems. The first, which transcends the immediate problem at hand and goes to the effect of the whole Bill of Rights, is this: where a "law of Canada" cannot be sensibly construed and applied in a way that will avoid derogating from a right or freedom declared in the Bill—that is where there is a material conflict between the law in question and the Bill—which enactment is to prevail, the law or the Bill? The second has to do, in the present context, with what constitutes "discrimination by reason of race" which can be said to deny "equality before the law and the protection of the law".

The leading case is *Regina* v. *Gonzales,*[38] in the British Columbia Court of Appeal, where both problems received consideration. The accused Indian was convicted of having intoxicants in his

[35] S.C., 1960, c. 44.

[36] Defined in s. 5(2) to include every Act of Parliament, whether passed before or after the Bill of Rights, and any other law subject to repeal or amendment by the Parliament of Canada.

[37] S. 2.

[38] (1962), 32 D.L.R. (2d) 290, 37 W.W.R. 257, 132 C.C.C. 237.

possession off a reserve contrary to section 94(a) of the Indian Act. The appeal, taken on the ground of infringement of section 1(b) of the Canadian Bill of Rights, was dismissed in a unanimous decision. Of the three judges sitting, Davey J.A., was the only one to consider the effect of a material conflict between the provisions of the Bill of Rights and the provisions of the Indian Act. For purposes of his judgment he proceeded on the assumption, without deciding it, that section 94 of the Indian Act did violate the right of the individual to "equality before the law and the protection of the law". He held that a direct conflict between the Bill of Rights and a specific enactment such as the Indian Act must be resolved in favour of the latter. The effect of the Bill of Rights was simply to supply a canon or rule of construction; where the specific enactment was unambiguous and could not be construed so as to avoid abrogating a right declared in the Bill of Rights, then the effect of the latter was exhausted. There has been some variety of opinion expressed on this point in the lower courts. It must be noted, however, that in the only opinion on the matter so far expressed in the Supreme Court of Canada, Cartwright J., has expressly disagreed with the conclusion reached by Davey J.A., in the *Gonzales* case, taking the position that in the event of irreconcilable conflict between another Act of Parliament and the Canadian Bill of Rights, it is the Bill of Rights which must prevail.[39]

The reasons of Tysoe J.A. (with whom Bird J.A., concurred) adopted the alternative approach. The learned judge expressed the view that section 94(a) of the Indian Act did not violate section 1(b) of the Bill of Rights, and gave several reasons for his conclusion. References are made to the practical impossibility of having laws the same for everyone "regardless of such matters as age, ability and characteristics". Similarly, an analogy is drawn to the statutory disentitlement from voting applied to judges, with the observation that such provision applicable to "the judicial class" could not seriously be advanced as a denial of "equality before the law". However, these observations appear to give insufficient weight to the fact that section 1 of the Bill of Rights does not purport to rule out discrimination generally, but only discrimination on any of five specified grounds; namely (1) race, (2) national origin, (3) colour, (4) religion and (5) sex. In another passage, where these specific types of discrimination are

[39] *Robertson and Rosetanni* v. *The Queen*, [1963] S.C.R. 651, at p. 662, 41 D.L.R. (2d) 485, at p. 489.

mentioned, Tysoe J.A. propounded other limitations which he considered to be inherent in section 1(b) of the Bill. It was stated that that section meant, in a general sense,

> . . . that there has existed and there shall continue to exist in Canada a right in every person *to whom a particular law relates or extends,* no matter what may be a person's race, national origin, colour, religion or sex, to stand on an equal footing with every other person to whom that particular law relates or extends, and a right to the protection of the law. To exemplify: There shall exist in every such person a right to be subject, for instance, to the same processes of law and the same presumptions, evidential and otherwise, and whether they be in his favour or against him, and to the same penalties and punishments and to have the same rights to claim and defend as every other such person, and there shall be no discrimination in these respects in favour of or against any such person because of race, national origin, colour, religion or sex. So all persons to whom a particular law relates or extends shall be on the same level in such respects, and no one of such persons shall be in either a more or less advantageous position than any other of such persons, provided that the requirements of the particular law have been met.[40]

Section 1(b) of the Canadian Bill of Rights emerges as a somewhat anaemic guarantee. It is difficult to conceive of legislation discriminating on the basis of race or colour which will not apply equally to all members of the class defined for the purpose of the enactment—that is the class selected for discriminatory treatment. There appears to be a further suggestion that whatever force this section of the Bill may have, it will be confined in its application to procedural matters and cannot prevail against substantive law. To allow a substantive effect to section 1(b), the argument runs, must lead to the result that most of the Indian Act would be rendered inoperative.[41]

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[40] *Supra,* footnote 38, at pp. 296 (D.L.R.), 264-265 (W.W.R.), 243-244 (C.C.C.). The italics are those of Tysoe J.A.

[41] *Ibid.,* at pp. 297-298 (D.L.R.), 265-266 (W.W.R.), 244-245 (C.C.C.). While the *Gonzales* case must, for the present, be regarded as the leading decision, passing reference might be made to the decisions in lower courts concerning Indians. In *Attorney-General of British Columbia* v. *McDonald* (1961), 131 C.C.C. 126, a county court decision which preceded the *Gonzales* case, the same result was reached on a charge brought under the same section of the Indian Act. On the other hand, in *Richards* v. *Cote* (1962), 40 W.W.R. 340, a Saskatchewan District Court judge distinguished the *Gonzales* decision and held that s. 94(b) of the Indian Act (being intoxicated off a reserve), was in conflict with, and must yield to, s. 1(b) of the Bill of Rights. Again, in a line of decisions in the Territorial Court, Sissons J., has held that special rights, freedoms and customs of Eskimos are protected by the terms of the Canadian Bill of Rights: *Re Noah Estate* (1961), 36 W.W.R. 577, at p. 601; *Re Katie's Adoption Petition* (1961), 38 W.W.R. 100, at p. 101; *R.* v. *Koonungnak* (1963), 45 W.W.R. 283, at p. 305. These last mentioned decisions of Sissons J., are concerned

It is interesting to contrast this judicial treatment of section 1(b) of the Canadian Bill of Rights dealing with "equality before the law and the protection of the law" with the jurisprudence developed in connection with the Fourteenth Amendment to the United States Constitution and the guarantee therein of "equal protection of the law". In the United States the last mentioned provision has long been invoked against substantive as well as procedural law. Again, the narrow view that the Equal Protection Clause was satisfied provided only that the law dealt alike with all within the statutorily defined class, had at one time commended itself to the United States Supreme Court;[42] but that position has not withstood the later course of decision.[43] In more recent times that court, starting from the position that discrimination based on race bears a heavy burden of justification, has required it to be demonstrated that the classification is based upon a legitimate legislative purpose. Thus in *McLaughlin* v. *State of Florida,* Mr. Justice White, delivering the opinion of the court, stated:[44]

> Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation. *The Court must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose*—in this case, whether there is an arbitrary or invidious discrimination between those classes covered by Florida's cohabitation law and those excluded. That question is what Pace ignored and what must be faced here.[45]

The *Gonzales* decision does not look beyond the fact of classification. It is perhaps not too much to hope that when the opportunity presents itself the Supreme Court of Canada will concern itself with the subtler problems involved in evaluating the nature of, and the rationale for, the statutory classification being tested against section 1(b) of the Canadian Bill of Rights.[46]

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with rights and privileges, as opposed to disabilities, and accordingly stand on a somewhat different plane.

[42] See *Pace* v. *Alabama* (1883), 106 U.S. 583, 1 S.Ct. 637.

[43] For a review of the case development, see *McLaughlin* v. *State of Florida* (1964), 379 U.S. 184, 85 S. Ct. 283.

[44] *Ibid.*

[45] *Ibid.*, at pp. 191 (U.S.), 288 (S. Ct.). Italics mine. The citation for the *Pace* decision appears in footnote 42, *supra.*

[46] For a more extensive consideration of the problems in this area, see Tarnopolsky, The Canadian Bill of Rights (1966), Ch. VIII, esp. pp. 213-218. On the question of legislation extending preferential treatment as opposed to disabilities, see Kaplan, Equal Justice in An Unequal World: Equality for the Negro—The Problem of Special Treatment (1966), 61 Northwestern U. L. Rev. 363. The American decisions regarding Indians must be treated with care in the light of the special constitutional develop-

Fourth, a question arises as to the significance of the existence of a treaty purporting to grant, or to guarantee, a particular "right" to Indians, or to a group of Indians. To what extent, if at all, are the terms of such treaty relevant to the issue of Parliament's legislative authority? For purposes of discussion, a distinction may be drawn between international treaties on the one hand and treaties made with the Indians on the other.

The decision of the Supreme Court of Canada in *Francis* v. *The Queen*[47] is the governing authority as regards a treaty in the sense of an agreement recognized in international law, not made with the Indians but touching Indian rights. By Article III of the Jay Treaty of 1794, an Imperial treaty entered into with the United States, Indians were to be exempt from payment of duties on certain goods in the following terms:

> No Duty on Entry shall ever be levied by either Party on Peltries brought by Land, or Inland Navigation into the said Territories respectively, nor shall the Indians passing or repassing with their own proper Goods and Effects of whatever nature, pay for the same any Impost or Duty whatever. But Goods in Bales or other large Packages unusual among Indians shall not be considered as Goods belonging bona fide to Indians.

The Supreme Court unanimously held that the treaty could not be set up as a defence to exempt an Indian from the duties imposed by the general provisions of the Customs Act. The court held that a treaty does not change municipal law unless and until confirmatory legislation has been enacted, and no such legislation implementing the treaty had been passed. The latter proposition could not be disputed; nor on the authorities, could issue be taken with the further proposition that where there is a clear conflict between an international treaty and a statute, the courts are bound to apply the latter as against former, the last mentioned principle being a corollary of the doctrine of supremacy of Parliament. What is less clear is that the court paid sufficient attention to a related principle of statutory construction. While in a case of clear conflict, the statute must be held to override the treaty, it is familiar law that in construing a statute which is ambiguous or capable of two interpretations, that interpretation ought to be favoured which will not involve a breach of treaty provisions. To state it another way, a statute will be construed so as not to violate a treaty unless the statute expressly or by necessary im-

ment and doctrine prevailing there; see, *e.g.*, *W.F.C.*, Jr., The Constitutional Rights of the American Tribal Indian (1965), 51 Virginia L. Rev. 121.

[47] [1956] S.C.R. 618.

plication discloses that Parliament intended to do so. The legislation in question in the *Francis* case did not expressly require breach of the Jay Treaty for nowhere in the legislation were Indians referred to. As to necessary implication, it was at least arguable that the tax levied on all "persons" meant, in view of the treaty, that the term "persons" was to be construed as meaning all non-Indians. The point was not set apart for discussion in these terms in the reasons delivered in the *Francis* case; but it is, of course, too late to question the result in the *Francis* case as a matter of law. The present position is that Canadian Indians cannot claim the benefit of the customs duty exemption in the Jay Treaty.[48]

A further point touched upon in the *Francis* case concerned section 87 of the Indian Act. The section reads as follows:

> 87. *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.

With reference to the italicized words in the above quoted section, the contention is that the "laws" referred to in the section are *subject to* the terms of any "treaty" in the sense that where the terms of a statute conflict with the terms of a treaty, the former must yield to the latter. In *Francis* v. *The Queen* only two of the seven judges sitting in the Supreme Court made reference to this line of argument. Kellock J., (speaking for himself and Abbott J.) stated:[49]

> I think it is quite clear that "treaty" in this section does not extend to an international treaty such as the Jay Treaty but only to treaties with Indians which are mentioned throughout the statute.

No further reasons were given, or authority cited, for this conclusion. Keeping in mind that the *Francis* case held, in effect, that the Parliament of Canada had legislated so as to violate the Jay Treaty, and that that conclusion might have been avoided by a broader construction of the words "any treaty" in section 87,[50] it is somewhat surprising that the latter point did not attract more extended consideration in the Supreme Court.

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[48] A different situation obtains in the United States, where Jay Treaty privileges apparently continue to be extended to Indians.

[49] *Supra*, footnote 47, at p. 631.

[50] It would, at least, have required consideration of whether or not the words "all laws" in s. 87 embraced federal laws (on which point, see below). That question was not adverted to in the *Francis* case.

The above passage left open the question as to the relevance of section 87 in a case of conflict between a federal statute and a treaty which *was* a treaty within the meaning of section 87—that is, a treaty entered into with the Indians. The problem of construction is this. The section refers to "all laws . . . in force in any province", and the words quoted may be construed in more than one way. The words would certainly include "all [provincial] laws" in the sense of enactments of the provincial legislature since entry of the province into Confederation. Secondly, they might include a "provincial" law in the sense of a law in force, for example, in the colony of British Columbia, and continued in force after entry into Confederation, even though the British North America Act has vested legislative competence in the matter in the Parliament of Canada—that is, a "provincial" law in a limited sense only in that it cannot be amended or repealed by the provincial legislature. Thirdly, and most directly pertinent to the question now under consideration, the words "all laws . . . in force in any province" are capable of being read so as to include *federal* laws in force in the province.

Since section 87 was added to the Indian Act in 1951, there have been several cases in which the provisions of an Indian treaty have been set up in defence to a charge laid under a federal statute. In *Regina* v. *Simon,*[51] where the accused was convicted under the Fisheries Act,[52] the Appellate Division of the New Brunswick Supreme Court found it unnecessary to deal with the defence based on section 87, holding that the accused had failed to establish his connection with the original groups of Indians with which the two treaties he relied on had been made. In *Sikyea* v. *The Queen*[53] the accused was a treaty Indian charged with shooting a wild duck out of season contrary to Regulations passed pursuant to the Migratory Birds Convention Act.[54] His defence was that under the terms of the treaty which applied to him,[55] he was entitled to hunt for food at any time of the year notwithstanding regulations or legislation to the contrary. The Act could not readily be construed otherwise than as intended to apply to Indians as well as non-Indians; the Migratory Birds Convention, scheduled to the Act, made express provision for the kind of birds Indians could take for food, and the necessary implication was that Indians were caught by the other terms of the

[51] (1958), 124 C.C.C. 110.
[52] *Supra,* footnote 22.
[53] *Supra,* footnote 30.
[54] *Supra,* footnote 23.
[55] Treaty No. 11.

Convention and therefore of the Act. Further, the courts accepted the contention that the Act was in conflict with the terms of the treaty of which *Sikyea* invoked the protection. Johnson J.A., delivering the reasons of the Northwest Territories Court of Appeal (and with whose reasons, as well as conclusions, the Supreme Court of Canada expressly agreed[56]) stated:[57]

> It is, I think, clear that the rights given to the Indians by their treaties as they apply to migratory birds have been taken away by this Act and its Regulations. How are we to explain this apparent breach of faith on the part of the Government, for I cannot think it can be described in any other terms? This cannot be described as a minor or insignificant curtailment of these treaty rights, for game birds have always been a most plentiful, a most reliable and a readily obtainable food in large areas of Canada. I cannot believe that the Government of Canada realized that in implementing the Convention they were at the same time breaching the treaties that they had made with the Indians. It is much more likely that these obligations under the treaties were overlooked—a case of the left hand having forgotten what the right hand had done.

The appellate courts took the view that the statute overrode the terms of the treaty. Curiously enough, however, no reference was made to section 87 either in the decision of the Northwest Territories Court of Appeal or in that of the Supreme Court of Canada.

The question of whether section 87 of the Indian Act renders federal as well as provincial statutes "subject to" an Indian treaty has been settled by the recent decision of the Supreme Court of Canada in *Regina* v. *George*.[58] The facts were substantially the same as in the *Sikyea* case, the accused being a treaty Indian charged under the same statute as was Sikyea. In the *George* case, however, section 87 was argued and both McRuer C.J.H.C., and the Ontario Court of Appeal held that he was entitled to an acquittal on the ground that the terms of section 87 required the federal statute to yield to the terms of the relevant treaty. (The Ontario courts did not have the appellate court decisions in *Sikyea* before them.) The Supreme Court of Canada has now reversed the Ontario courts and entered a conviction. The majority (Cartwright J., dissenting,[59]) held that the reference in section 87 to

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[56] *Supra*, footnote 30, at pp. 646 (S.C.R.), 84 (D.L.R.).
[57] (1964), 43 D.L.R. (2d) 158. [58] *Supra*, footnote 30.
[59] Cartwright J., took the view, first, that the court was not bound by its decision in the *Sikyea* case since the s. 87 argument had not there been argued, and, second, that properly construed the words "all laws" did comprehend Acts of Parliament.

"all laws . . . in force in any province" must be construed so as to exclude Acts of Parliament. Martland J., giving the reasons of the court stated:[60]

> In my view the expression refers only to those rules of law in a province which are provincial in scope, and would include provincial legislation and any laws which were made a part of the law of a province, as, for example, in the provinces of Alberta and Saskatchewan, the laws of England as they existed on July 15, 1870.

The passage suggests that while Acts of Parliament are excluded from the purview of the expression, all pre-Confederation laws of the province (whether subject to repeal or amendment by the province or by Parliament) are caught by it, and accordingly made "subject to the terms of any treaty".

Fifth, a further point arising out of section 87 of the Indian Act requires attention. The section provides that with certain exceptions "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". To the extent that such provision makes provincial laws applicable to Indians which, for constitutional reasons, would not otherwise be applicable to them, the effectiveness of the section will be affected by any limiting rules which may circumscribe adoption by reference under the Canadian constitution. The problem arises in connection with the judicially developed ban on delegation of legislative authority as between Parliament and a provincial legislature, re-affirmed by the Supreme Court of Canada in *Attorney-General of Nova Scotia* v. *Attorney-General of Canada*.[61] There is no problem where Parliament legislates so as to adopt referentially *existing* legislation of a province (or *vice versa*). The difficulty arises where the federal statute purports to be adoptive of (or is sought to be construed so as to be adoptive of) the *future* enactments of a province. The possibility that such anticipatory adoption by reference might violate the prohibition against inter-delegation was recognized by the Ontario Court of Appeal in *Regina* v. *Fialka*[62] and appears to have prompted enactment of the Ontario Statutory References Act, 1955.[63] If adoption by reference of future enactments is in fact within the prohibition against delegation, it would follow that section 87 of

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[60] *Supra*, footnote 30, at pp. 281 (S.C.R.), 398 (D.L.R.).
[61] [1951] S.C.R. 31.
[62] [1953] 4 D.L.R. 440, [1953] O.W.N. 596.
[63] S.O., 1955, c. 80. And see Laskin, Canadian Constitutional Law (3rd ed., 1966), p. 41, where s. 1 of the Act is set out, and the point under consideration is discussed.

the Indian Act would not be effective to make provincial statutes enacted after 1951 applicable to Indians.

In a recent decision, however, the Ontario Court of Appeal in *Regina* v. *Glibbery*[64] concluded that a federal statute[65] could properly adopt subsequently enacted provincial traffic laws without violating the ban on delegation. McGillivray J.A., giving the judgment of the Court, stated:[66]

> It is obviously intended by these Regulations [under the federal Act] to make applicable to proceedings under the *Government Property Traffic Act* those portions of the *Highway Traffic Act* as they exist from time to time which do not conflict with the Regulations themselves. To do so is not, in my opinion, delegations of the type to which objection can be taken. There is not here any delegation by Parliament to a Province of legislative power vested in the Dominion alone by the B.N.A. Act and of a kind not vested by the Act in a Province. Delegation by Parliament of any such power would be clearly unconstitutional: *A.-G. N.S. et al* v. *A.-G. Can.*, [1950] 4 D.L.R. 369, [1951] S.C.R. 31. The power here sought to be delegated was not of such a type but was in relation to a matter in which the Province was independently competent.

Nowhere in the reasons is reference made to *Regina* v. *Fialka*[67] which, it will be remembered, was in the same court. Nor did the court embark on an attempt to distinguish, in principle, between an unconstitutional delegation of legislative authority from Parliament to a provincial legislature, on the one hand, and on the other, Parliament's effective anticipatory adoption of such enactments as that legislature might see fit to pass in relation to the same matter.[68] On the other hand, the result of the *Glibbery* case accords with the apparent inclination of the Supreme Court, ever since the *Nova Scotia* case[69] itself, to confine the prohibition against delegation to a narrow compass.[70]

Sixth, and finally, reference might be made to the suggestion that has on occasion been raised to the effect that the Parliament of Canada itself cannot, as a matter of constitutional law, derogate

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[64] (1963), 36 D.L.R. (2d) 548, [1963] 1 O.R. 232.
[65] The Government Property Traffic Act, R.S.C., 1952, c. 324.
[66] *Supra*, footnote 64, at pp. 552 (D.L.R.), 236 (O.R.).
[67] *Supra*, footnote 62.
[68] McGillivray J.A., referred to *A.-G. for Ontario* v. *Scott*, [1956] S.C.R. 137, but that case did not deal with adoption (or delegation) as between a provincial legislature and Parliament. It was concerned with a province's adoption of English legislation, which did not raise the constitutional objection to re-arrangement of legislative authority as distributed by the B.N.A. Act.
[69] *Supra*, footnote 61.
[70] *P.E.I. Potato Marketing Board* v. *Willis*, [1952] 2 S.C.R. 392; *Lord's Day Alliance of Canada* v. *A.-G. of B.C.*, [1959] S.C.R. 497.

from rights conferred on the Indians by the Royal Proclamation of 1763. In the course of his reasons in *Regina* v. *George,* McRuer C.J.H.C., observed that the Proclamation had at least all the force of statute and went on to state:[71]

> I think this case [*Sammut* v. *Strickland*][72] leaves it open to argue that since there was no reservation of a power of revocation of the rights given to the Indians in the Proclamation of 1763, these rights cannot be taken away even by legislation . . . . I wish to make it quite clear that I am not called upon to decide, nor do I decide, whether the Parliament of Canada by legislation specifically applicable to Indians could take away their rights to hunt for food on the Kettle Point Reserve. *There is much to support an argument that Parliament does not have such a power.* There may be cases where such legislation, properly framed, might be considered necessary in the public interest but a very strong case would have to be made out that would not be a breach of our national honour.

It is unclear precisely what support Chief Justice McRuer was referring to in the italicised sentence above. To the extent he relied on the Royal Proclamation, it will suffice to note that on appeal in the *George* case, the Court of Appeal expressly rejected any suggestion as to the Proclamation forming a limitation on the legislative competence of Parliament.[73] The point was not discussed in the reasons of the Supreme Court of Canada but the result reached in that court negatives any argument based on the Royal Proclamation as a limitation on federal legislative competence.

Discussion in this Part has, to this stage, been directed to limitations upon federal legislative competence. It remains to consider the positive aspect of the federal power, namely, the extent to which Parliament can legislate for Indians concerning matters which otherwise lie outside its legislative competence, and which it therefore could not validly enact as legislation of general application for non-Indians. For example, the Indian Act contains elaborate provisions relating to descent of property, wills and distribution of property on intestacy. Is such legislation vulnerable to attack on the ground that it is not properly "Indian" law within the meaning of section 91(24) of the British North America Act? Clearly an inquiry into the true nature and character of legislation for the purpose of characterizing it in terms of constitutional distribution of legislative authority will not be concluded by the fact that the enactment is limited in its application to a class of per-

[71] (1964), 41 D.L.R. (2d) 31, at pp. 36-37. Italics mine.
[72] [1938] A.C. 678 (P.C.).
[73] (1964), 45 D.L.R. (2d) 709, at pp. 711-712.

sons mentioned in the British North America Act. The pith and substance of the legislation may indeed be found to relate to the class of persons legislated for; but, alternatively, an examination of the enactment may disclose, to the court which ultimately decides the issue, that the statute relates to the activity or subject matter which it purports to regulate, despite the fact that it is made applicable to a limited class of persons. This is, in fact, no more than the obverse of the proposition discussed in Part III below in terms of provincial legislative competence and laws of general application. The sole fact that a statute is one of special application made applicable only to a class or classes of federal "persons" does not in itself warrant the conclusion that it lies within federal competence.

The Indian cases do not provide assistance on the point now under consideration. The problem may be illustrated by contrasting two decisions of the Privy Council dealing with another class of persons—aliens—over whom legislative authority is assigned to the Parliament of Canada by the constitution. Section 91(25) of the British North America Act allocates exclusive legislative authority over all matters coming within the purview of "Naturalization and Aliens". In *Union Colliery Co.* v. *Bryden*,[74] a British Columbia statute prohibiting employment of Chinese in coal mines was struck down on the basis of encroachment upon head 25 of section 91. Lord Watson stated that:[75]

> Their Lordships see no reason to doubt that, by virtue of s. 91, sub-s. 25, the legislature of the Dominion is invested with exclusive authority *in all matters which directly concern the rights, privileges, and disabilities* of the class of Chinamen who are resident in the provinces of Canada. They are also of opinion that the whole pith and substance of the enactments of s. 4 of the Coal Mines Regulation Act, in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and therefore trench upon the exclusive authority of the Parliament of Canada.

The passage appears to contemplate a very broad federal power under the head of section 91 under consideration. But a few years later in *Cunningham* v. *Tomey Homma*,[76] where the Privy Council upheld a British Columbia statute excluding Chinese, Japanese and Indians from the right to vote in provincial elections, a much more restrictive view of the federal power was advanced:[77]

> Could it be suggested that the province of British Columbia could not

[74] [1899] A.C. 580.
[75] *Ibid.*, at p. 587. Italics mine.
[76] [1903] A.C. 151.
[77] *Ibid.*, at pp. 156-157. Italics mine.

> exclude an alien from the franchise in that province? Yet, if the mere mention of alienage in the enactment could make the law ultra vires, such a construction of s. 91, sub-s. 25, would involve that absurdity. The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion—*that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as to what consequences shall follow from either is not touched.* The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality.

The implication appears to be that the federal power to legislate for aliens under section 91(25) is confined to matters pertaining to definition of alien status and matters which necessarily and inevitably flow from that status.[78]

It is not the writer's purpose to press the analogy between judicial construction of the term "aliens" in head 25 of section 91 and that which might be anticipated in respect of "Indians" in head 24 of that section. The scope of the present article does not allow extended consideration of the constitutional issues relating to head 25; nor does it permit stopping to consider whether assistance may be derived from the authorities touching upon the measure of federal legislative power over federally incorpated companies (although passing references will be made to both subjects in Part III of this article). It must suffice to note that the ambit of federal authority to legislate positively for Indians, while undoubtedly comprehending as a minimum the power of defining Indian status, is of uncertain extent, has not been directly tested in, or defined by, the courts, and that clear guidelines have not been supplied by the authorities pertaining to other classes of "federal persons" which might appear to offer analogies.

III. *Provincial Legislative Competence.*

Three general propositions might be stated by way of introduction to the question of provincial legislative competence. First, the allocation of legislative authority over Indians to the Parliament of Canada would be expected to preclude provincial legislation dealing

[78] In these two cases the Privy Council was not, of course, concerned with federal legislation but with the extent of provincial competence in a clear field. For some discussion of the situation where a conflict with federal legislation enacted under section 91(25) is alleged, see *Quong-Wing* v. *The King* (1914), 49 S.C.R. 440, at pp. 451-452, per Idington J. dissenting and pp. 468-469, per Duff J.

with Indians *qua* Indians. The second and complementary proposition is that provincial laws of general application—that is, those which do not single out Indians for special treatment but apply generally to residents of the province—would be expected to apply to Indians in the same way as general provincial laws apply to other classes of persons over whom legislative authority is assigned to Parliament, namely aliens, federal companies, and, what are to some extent analogous, works and undertakings within the jurisdiction of Parliament by virtue of the exceptions to section 92(10) of the British North America Act. Third, provincial laws which would be applicable to Indians if the legislative field were clear might nevertheless be ousted by federal "Indian" legislation. The last proposition is, of course, an application of the so called paramountcy (or overlapping) doctrine:[79]

> 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.

For provincial legislation there is, therefore, a double test. The first question is whether the subject matter, if not exclusively in the provincial sphere, at least has a provincial aspect so as to provide constitutional support for application of the law to Indians if the field is clear. If the first question can be answered in the affirmative, and if the subject matter is one which also possesses a federal aspect, the second problem is whether there is federal legislation occupying the field; for such federal legislation will, to the extent it conflicts with a provincial enactment, render the latter inoperative.

It should be noted at once that the first and second propositions stated in the previous paragraph are no more than starting points in the constitutional analysis. A provincial statute which selects Indians for special treatment is not necessarily *ultra vires*; nor is a provincial law of general application necessarily valid and applicable to Indians of the province. In this connection some assistance can be drawn from the lines of cases concerning the position of other classes of persons within federal legislative authority. As to validity of a provincial law which is not of general application, reference might be made, once again, to the decision of the Privy Council in *Cunningham* v. *Tomey Homma*.[80] In that

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[79] *Attorney-General for Canada* v. *Attorney-General for British Columbia*, [1930] A.C. 111, at p. 118.

[80] *Supra*, footnote 76.

case a naturalized British subject of Japanese origin, who was a "Japanese" as defined in the Provincial Elections Act of British Columbia, tested the validity of a provision in the Act which stipulated that:

> No Chinaman, Japanese, or Indian shall have his name placed on the register of voters for any electoral district, or be entitled to vote at any election.

It was held that section 91(25) of the British North America Act, which assigns to the Parliament of Canada authority over "Naturalization and Aliens", did not prevent the province from denying the franchise to aliens or naturalized subjects. The reasons given by the Privy Council suggest that an Indian attacking the provincial Act, and relying on section 91(24) of the British North America Act, would have been equally unsuccessful. Provincial legislation supported under section 92(1) of the British North America Act (which gives the province power to amend the constitution of the province, notwithstanding anything in the Act) was therefore upheld, though it discriminated against a class of person over whom legislative authority lay with Parliament. Discrimination against such a class of person which is of different kind or degree may indeed be *ultra vires* the province.[81] The present point is simply that while assignment of legislative authority to Parliament over a class of persons carries, at a minimum, the power to define the status of such persons, it does not *per se* exclude all provincial legislation purporting to attach consequences to that status.

If a provincial law of special application aimed at a class of persons within federal jurisdiction is not necessarily *ultra vires,* it is also true that a provincial law of general application is not necessarily valid and applicable as against such class of persons. Thus in *Attorney-General for Manitoba* v. *Attorney-General for Canada*[82] the Privy Council held that Manitoba legislation which required any company, wherever incorporated, to obtain approval of provincial officials prior to selling its shares in the province, was *ultra vires* insofar as the legislation purported to apply to sale of its own shares by a federally incorporated company. With respect to the point under consideration Viscount Sumner stated:[83]

> Neither is the legislation which is in question saved by the fact, that all kinds of companies are aimed at and that there is no special dis-

[81] *Union Colliery* v. *Bryden, supra,* footnote 74, as explained and distinguished in the *Tomey Homma* case and in *Brooks-Bidlake* and *Whittall Ltd.* v. *A.-G. for British Columbia,* [1923] A.C. 326.

[82] [1929] A.C. 260.

[83] *Ibid.,* at pp. 268-69.

> crimination against Dominion companies. The matter depends upon the effect of the legislation not upon its purpose . . . . Their Lordships . . . refrain from resting their decision upon any other feature in the Acts under discussion than the interference with the status of a company incorporated under Dominion laws . . . .

The question of whether a provincial enactment is or is not a law of general application, therefore, will not of itself be determinative of the validity (or applicability) of that enactment as against a class of persons within the legislative sphere of Parliament. It is, however, relevant. The fact that a provincial statute is not of general application but selective of a certain class or classes of persons, may support an inference that the true nature and character of the legislation relates to those persons, and not to the activity or conduct which the statute prescribes for those persons. In another case involving a federal company, Harvey C.J.A., described the position in the following terms:[84]

> If the Legislature is supreme there can be no jurisdiction in the courts to hold its legislation invalid on the ground that it is not uniform or is not general in its application. Therefore where we find statements in these judgments that the provincial legislation would be upheld if applied to all companies alike, implying that otherwise it could not be upheld, I think what is meant is that if it is not so uniform the court would be justified in concluding that the Legislature's real purpose was not to exercise an authority clearly given to it by sec. 92 [of British North America Act] but that it had in reality some ulterior purpose for the carrying out of which it had no authority, and to determine whether that is the case the whole Act and its scope must be considered.

It will be useful at this juncture to return once again to section 87 of the Indian Act. The section provides that subject to certain exceptions "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". As noted earlier, to the extent that section 87 operates to make applicable to Indians provincial laws which otherwise would not apply to them, that result is achieved through Parliament's adoption by reference of a provincial law which the province could not itself extend or apply to Indians. The question arises, therefore, as to which provincial laws are caught by section 87 but which would not, apart from the section, have been applicable to Indians? The section, by its terms, excludes provin-

[84] *In re The Companies Act, 1929; In re Royalite Oil Co. Ltd.*, [1931] 1 W.W.R. 484, at p. 498. See also the extended discussion of laws of general application in *B.C. Power Ltd.* v. *A.-G. of B.C.* (1963), 44 W.W.R. 65, at p. 113 *et seq.*

cial laws which are not of general application; accordingly a provincial enactment imposing a special rule for Indians is outside the section.[85] On the other hand, section 87 would seem to have at least one (albeit limited) effect. Reference was made above to authority for the proposition that a provincial law, even though of general application, would not apply to a federally incorporated company in certain circumstances, such as a provincial enactment which would have the effect of interfering with the status and capacity of the federal company. By analogy a particular provincial law of general application may be such as would be characterized as a law so affecting the essential status, capacities and activities of Indians as to be inapplicable to them (or *ultra vires* to the extent the provincial law purported to apply to Indians).[86] By the force of section 87, presumably such law would now be made applicable to Indians. Subject to the exceptions expressed within it, the section embraces "*all* laws of general application". Reference might be made in this connection to judicial dicta in several cases pre-dating the enactment of section 87 to the effect that an Indian, being a ward of the federal government, was not subject to attachment or to be imprisoned under civil process.[87] However, in *Campbell* v. *Sandy*,[88] in 1956, the court was able to rely on section 87 in distinguishing the earlier judicial pronouncements. Accordingly an order was made for committal of the defendant Indian for default of attendance upon a judgment summons, pursuant to the provincial statute.

There is a second possible area of operation for section 87 which requires discussion. It was suggested at the outset that the courts, prior to 1951 when section 87 was put into the Indian Act, had on occasion treated the question of applicability of a provincial law to an Indian as turning on whether the Indian was, at the material time, on or off his reserve. It was suggested too that in such cases the courts appeared to be approaching the matter as if section 91(24) of the British North America Act read "Indians *on* lands reserved for the Indians" instead of

[85] *R.* v. *Strongquill, supra,* footnote 20, at p. 265, per Procter J.A., and at p. 271, per McNiven J.A.

[86] *Cf. Union Colliery* v. *Bryden, supra,* footnote 74.

[87] *Re Caledonia Milling Co.* v. *Johns* (1918), 42 O.L.R. 338; *Ex parte Tenasse,* [1931] 1 D.L.R. 806; *Re Kane,* [1940] 1 D.L.R. 390. And *cf.* Laskin, *op. cit.,* footnote 63, p. 551, where the comment is made that: "The Indian as a person is not subject to attachment nor may he be taken under provincial process (any more than can an interprovincial pipe line)." No reference, however, is made to *Campbell* v. *Sandy* (1956), 4 D.L.R. (2d) 754 (Ont., Co. Ct.).

[88] *Ibid.*

"Indians *and* lands reserved for the Indians". Some of the most frequently quoted dicta in fact occur in cases where an Indian was convicted under a provincial statute in respect of his conduct off the reserve, and the court, with appropriate judicial caution, took care to leave open for future decision the question of provincial enactments extending to Indians on the reserve. This was the situation, for example, in the decisions of the Ontario Court of Appeal in *Rex* v. *Hill*[89] and *Rex* v. *Martin*[90] where Indians were convicted respectively for practising medicine without compliance with the provincial Medical Act and for possession of liquor contrary to the provincial Temperance Act. Neither enactment can be said to bear any obvious relation to "lands reserved for the Indians" and it is not apparent why the result should have been different—had the courts been required to decide the question—if the accused Indian in either case had in fact been on the reserve at the material time.[91]

On occasion a suggestion has even been raised that provincial laws could not under any circumstances extend to a reserve. In *Rex* v. *Rodgers*,[92] where a provincial game enactment was in question, all members of the Manitoba Court of Appeal were in agreement that the provincial legislature lacked legislative competence to interfere with the rights of Indians to hunt or trap on their own reserves but that, correspondingly, an Indian (and albeit a treaty Indian) on leaving the reserve comes under the control of provincial laws to the same extent that a non-Indian is subject to such laws.[93] Prendergast J.A., stated:[94]

> Provincial statutes, even of general application, do not as a rule expressly state the territory to which they are meant to apply. They are generally worded as if they applied to all the territory comprised within the boundaries of the province. But everyone understands that they cannot apply to regions in the province (if any) over which the Legislature has no jurisdiction in the particular matter, and that, however broad the terms, these regions were meant to be excepted.

The view expressed by the learned judge is suggestive of a form of territorial theory that would entirely exclude provincial laws from the reserve. If pursued, this approach would logically require

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[89] (1908), 15 O.L.R. 406.
[90] (1917), 41 O.L.R. 79, 29 C.C.C. 189 (C.A.).
[91] Assuming, for purposes of this discussion, that the legislative field was clear of any federal enactment.
[92] [1923] 2 W.W.R. 353.
[93] The dissenting judge, Dennistoun J.A., took the same approach but held that the material fact occurred off the reserve.
[94] *Ibid.*, at p. 361.

exempting non-Indians, as well as Indians, from provincial laws so long as the person in question was within the privileged confines of the reserve at the material time. Precisely this defence was set up by non-Indians in two closely similar British Columbia cases: *R.* v. *McLeod*[95] and *R.* v. *Morley*.[96] In each case a non-Indian was charged under the provincial Game Act for shooting pheasant out of season. In each case the defence that provincial legislation had no application on a reserve was rejected and a conviction entered. At a minimum, therefore, the more extreme form of territorial theory required qualification at least in respect of applicability of provincial laws to non-Indians on reserves.

In the writer's opinion, however, appreciation of the true constitutional position demands not merely a qualification upon, but a rejection of, the theory that the applicability of provincial laws to Indians (as opposed to laws relating to Indian lands) hinges upon whether or not the Indian is on a reserve at the material time, or whether the activity sought to be regulated is being engaged upon by an Indian on a reserve. The on-reserve off-reserve dichotomy stems not from constitutional necessity, it is submitted, but merely reflects long standing governmental policy in drawing the distinction for purposes of administration of Indian affairs. The policy ante-dates Confederation itself. One finds, for example, that in the statute enacted in the Province of Canada in 1857 entitled "An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians", the term "Indian" was defined so as to include only those persons of Indian blood who resided on reserves or on lands which had never been surrendered to the Crown.[97]

Indian status, as such, of course, no longer depends on the place of residence of the individual Indian. But many of his legal rights continue to be tied to the question of whether or not he lives on a reserve. Thus the provisions of the Indian Act dealing with schools have no application to Indians ordinarily resident elsewhere than on reserves or Crown lands;[98] nor, unless the Minister otherwise orders, do the Indian Act provisions dealing with descent of property, wills, intestacies, mentally incompetent Indians and guardianship.[99] There are a number of other respects

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[95] [1930] 2 W.W.R. 37 (Co. Ct.).
[96] (1931), 46 B.C.R. 28 (B.C.C.A.).
[97] (1857), 20 Vict. c. 26, ss. 1 and 2, and Consol. Stat. of Can. (1859), 22 Vict. c. 9, s. 1.
[98] Indian Act, *supra,* footnote 2, s. 4(3).
[99] *Ibid.,* s. 4(3).

in which the on-reserve Indian stands in a different position from that of his off-reserve brethren. Only adults ordinarily resident on a reserve, for example, can vote for the chief and band councillors,[100] although the responsibilities of the band council extend to matters of concern to members of the band not resident on the reserve. Again, *situs* on or off the reserve carries legal implications not only with respect to the residence of the Indian but also with regard to the location of property owned by him. Under section 86 of the Indian Act, his property situated on a reserve is exempt from taxation, and this has been applied in practice to include exemption from income tax with respect to income earned on a reserve. Such property also enjoys a limited exemption, under section 88 of the Act, from being removed or seized in satisfaction of debts, judgments, and so on.

It is and has long been the case, therefore, that the legal position of the reserve Indian varies significantly from that of his counterpart off the reserve. It is likely that the fact that federal governmental policy has been reserve-oriented has contributed to the misconception that the constitution gives to Parliament legislative authority over reserve Indians, as such, which it does not possess over off-reserve Indians; or, conversely, that the constitution denies to a province the power to enact legislation affecting Indians on a reserve, although off-reserve Indians will be subject thereto. In the writer's submission, this is to confuse legislative authority respecting Indians with the quite separate and distinct question of legislative authority over lands reserved for the Indians, where the on-reserve off-reserve distinction is, of course, of fundamental importance.

Section 87 of the Indian Act has, since its addition to the Act in 1951, no doubt reduced the importance of the strict constitutional position in some respects. That section, as has been previously noted, states that provincial laws of general application shall be applicable "to and in respect of Indians in the province". There is no distinction drawn between those Indians who are on a reserve and those who are not. Whether in this respect section 87 has merely declared what the constitutional position, properly understood, always was, or whether the section has had the effect of extending to Indians on reserves a wide range of substantive law not previously applicable to them, has no doubt become of secondary practical interest. But the question of whether provincial laws may apply to Indians on reserves without the benefit

[100] *Ibid.*, s. 76.

of section 87 is not a wholly academic problem. If provincial laws of any kind may only apply to reserve Indians by virtue of adoption by reference through section 87 of the Indian Act, they must of course be treated in all respects as federal laws. This means, for example, that the Canadian Bill of Rights becomes applicable.[101] It means also that constitutional problems may be imported with respect to the adoption of future enactments of the province under the judicially developed ban on inter-delegation.[102] It can present procedural complications as well.[103]

To this point section 87 of the Indian Act has been discussed in terms of the extent to which it operates to make provincial laws applicable to Indians which laws, apart from the section, would be inapplicable to them. The other side of the coin, to which attention will now be directed, involves consideration of the extent to which the section renders provincial laws inapplicable to Indians which otherwise might extend to such Indians. It will be convenient to set out section 87 once again, italicizing those words in the section which have an exclusionary effect:

> 87. *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.*

Provincial laws which meet the initial qualification of being laws "of general application," therefore, are made applicable to Indians:

(1) Subject to the terms of any treaty;
(2) Subject to the terms of any other Act of Parliament;
(3) Except to the extent that such laws are inconsistent with the Indian Act or any order, rule, regulation or by-law made under the Indian Act; and
(4) Except to the extent that such laws make provision for any matter for which provision is made by or under the Indian Act.

The first limitation set out in the previous paragraph is that the provincial law is "subject to the terms of any treaty". Thus in the recent case of *Regina* v. *White and Bob,*[104] which went to

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[101] *Supra,* footnote 35, s. 5(2).
[102] See text accompanying footnotes 61 to 70, *supra.*
[103] *Cf. R.* v. *Johns, supra,* footnote 14.
[104] *Supra,* footnote 7. For a more extensive discussion of the issues canvassed in this case see Lysyk, Indian Hunting Rights: Constitutional Con-

the Supreme Court of Canada, it was held that a conflict between a section of the provincial Game Act and the terms of a treaty made with Indians on Vancouver Island in 1854 must be resolved in favour of the treaty provision. By virtue of section 87 of the Indian Act, that is to say, the terms of the Indian treaty constituted a valid defence to a charge of violating the provincial statute. (It should be noted that in the *White and Bob* case the hunting which gave rise to the charge occurred off the reserve.)

As noted earlier, the word "treaty" in section 87 does not have reference to international treaties,[105] or instruments equivalent to international treaties, but to treaties made with the Indians. The point requires mention in view particularly of some of the observations made in the case of *R.* v. *Syliboy*,[106] decided a number of years before section 87 was added to the Indian Act. There the court held that an instrument concluded in 1752 between Governor Hopson of Nova Scotia and a tribe of Mic Mac Indians (Treaty and Articles of Peace and Friendship) was not a treaty in any relevant sense. The judge's approach was, essentially, to measure the instrument, and the circumstances in which it was signed, against the requirements for creation of a treaty that would be recognized in international law. Since 1951 such an inquiry becomes unnecessary, the sole question being whether the instrument brought forward is a "treaty" within the meaning of section 87 of the Indian Act. In the *White and Bob* case the courts appear to have taken a very liberal view of what constitutes a "treaty" in the sense which is now material, the document in that case being informal in nature and, further, it being unclear whether Governor Douglas signed the instrument in his capacity as governor or in his capacity as factor of the Hudson's Bay Company. It is quite possible, therefore, that instruments such as that considered in the *Syliboy* case may now be found to be treaties in the material sense, that is, for purposes of section 87.

The second limitation or condition on adoption of a provincial law which is expressed in section 87 is that it is subject to any other Act of Parliament. No further discussion of this point would seem to be called for. Where there is conflict between the terms of an Act of Parliament and a provincial law, the former must prevail.

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siderations and the Role of Indian Treaties in British Columbia (1966), 2 U.B.C. L. Rev. 401.

[105] See text accompanying footnote 49, *supra*.

[106] (1928), 50 C.C.C. 389 (N.S. Co. Ct.).

The third and fourth conditions may be discussed together. A provincial law will be inapplicable (a) where it is "inconsistent with" the Indian Act (or any order, rule, regulation or by-law made under the Indian Act) or (b) where it "make(s) provision for" any matter for which provision is made by the Indian Act (or under the Indian Act). It may be noted first that inconsistency with a "by-law" must be taken to refer to a by-law made by an Indian band council pursuant to section 80 of the Indian Act. It may be, too, that provision made in such a by-law is a "provision . . . made . . . *under* this Act" so that the provision in the by-law takes precedence over the provincial law which would otherwise be made applicable. The noteworthy point is that in the first case, and possibly in the second, the provincial law must yield to the provisions of a band by-law.

There is little authority on the scope of the exception clauses now under consideration. In *Re Williams Estate*[107] one of the questions to be determined was whether a section of the provincial Administration Act applied to the estate of an Indian who died intestate. The section provided that:[108]

> If a wife has left her husband and is living in adultery at the time of his death, she shall take no part of her husband's estate.

Counsel argued that sections 48 to 50 of the Indian Act, headed "Distribution of Property on Intestacy", formed a complete code respecting the estate of an Indian who has died intestate and that any provincial statute adding to that procedure and code would fall within the exception clauses in section 87. Lord J., held that the provincial enactment did apply. He stated:[109]

> This argument overlooks the plain wording of sec. 87 where it is made very plain *that the test is inconsistency* which to my mind means something which is at variance, or incompatible or contrary.

Here, and throughout his discussion of the point, Lord J., clearly treated the question as relating solely to *inconsistency* between the provincial enactment and the Indian Act. It may be questioned whether this approach gave sufficient weight to the concluding words of section 87 (referred to as condition (4) *supra*) which exclude, as well, provincial laws which "make provision for any matter for which provision is made" by the Indian Act.

The concluding words of section 87 were considered, and given a very broad interpretation, in the recent case of *Regina* v.

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[107] (1960), 32 W.W.R. 686 (B.C.S.C.).
[108] R.S.B.C., 1948, c. 6, s. 126(1) (now R.S.B.C., 1960, c. 3, s. 115(1)).
[109] *Supra*, footnote 107, at p. 687. Italics mine.

Peters.[110] Peters, an Indian within the meaning of the Indian Act, was charged with breach of the section in the Yukon Territory Liquor Ordinance which provides that no person under the age of 21 shall consume liquor. The magistrate acquitted on the ground that the Liquor Ordinance did not apply to an Indian.[111] On appeal by the Attorney General of Canada by way of stated case, Parker J. agreed that the Ordinance was inapplicable to an Indian. The Attorney General took this further appeal, contending that the Crown may elect to proceed against Indians for "liquor offences" either under the Ordinance or under the Indian Act. The Court of Appeal rejected this submission and held that the magistrate's acquittal was correct in law. In arriving at that conclusion the court relied specifically on the concluding words of section 87 regarding provincial laws[112] which "make provision for" a matter for which provision is made by the Indian Act. Particular point is added to the decision in that this conclusion was reached despite the fact that the Indian Act does not contain a specific prohibition against the consumption of liquor by an Indian *who is a minor*. McFarlane J.A., delivering the judgment of the court, stated:[113]

> [Counsel for the accused] submits that if the *Liquor Ordinance*, clearly in itself a law of general application, does apply to Indians, it does make provision for possession, use and manufacture of intoxicants by Indians and that these are matters for which provision is made by the *Indian Act*, thus falling within the last exception stated in sec. 87. It is true that the *Indian Act* does not make specific provision for the offence with which the respondent was charged, namely, consuming liquor, being under the age of 21 years. It may be that in considering whether a provincial or territorial law is inconsistent with the *Indian Act* it would be necessary to compare the respective enactments in specific detail. I am of the opinion, however, that the second exception "the extent that such laws make provision for any matter for which provision is made by or under this Act" should be given a broad and liberal interpretation in order to give effect to the intention of parliament which has clearly made provision, by the *Indian Act*, for the matter of the use and possession of intoxicants by Indians. The relevant provision of the Yukon Liquor Ordinance, being within the meaning of the second exception stated in sec. 87, is accordingly not applicable to Indians.

Here the Court of Appeal has not only clearly drawn the distinction which appears to have been overlooked in *Re Williams*

[110] (1966), 57 W.W.R. 727 (Y.T.C.A.).

[111] Applying his own decision in *R.* v. *Carlick* (1966), 47 C.R. 302.

[112] The Interpretation Act, R.S.C., 1952, c. 158, s. 35(24), defines "province" to include the Northwest Territories and the Yukon Territory.

[113] *Supra*, footnote 110, at p. 730.

Estate;[114] that is between inconsistency on the one hand, as opposed to the question of whether provision has been made for a particular matter, on the other, but has gone further in suggesting that the latter pre-condition to adoption of a provincial law is considerably wider in its ambit than is the former.

The question of whether a provincial law is "inconsistent with" or "makes provision for any matter for which provision is made by" the Indian Act (or order, and so on, thereunder) is comparable to the type of inquiry the courts have had to pursue under the paramountcy doctrine in constitutional law.[115] How closely the analogy will be drawn by the courts may be difficult to predict, as can be illustrated by reference to earlier decisions concerning the liquor offences incorporated in the Indian Act. Two apparently conflicting appeal court decisions pre-dating the enactment of section 87 serve to introduce the problem. In *R.* v. *Martin*[116] it was held that an Indian off the reserve had been properly convicted under the Ontario Temperance Act which made it an offence for any person to have intoxicating liquor in his possession, although it was also an offence under the Indian Act for an Indian to have an intoxicant in his possession. However, in *R.* v. *Cooper,*[117] it was held that a conviction under the British Columbia Government Liquor Act for selling liquor to an Indian must be set aside inasmuch as the field had been occupied by a similar prohibition in the Indian Act, and the provision in the provincial statute was consequently held to have been rendered inoperative. In *R.* v. *Martin* the court had primarily concerned itself with refuting counsel's contention that provincial laws were not applicable to Indians; it did not canvass the further question of whether or not the federal Act had occupied the field. In *R.* v. *Cooper,* the earlier decision could therefore be explained and distinguished on that ground.

A similar question presented itself in *Rex* v. *Shade*[118] a few months after section 87 had been added to the Indian Act. The accused Indian had been convicted under a section of Alberta's liquor statute which provided that "no person shall be in an intoxicated condition in a public place". On appeal, the court held that the offence of intoxication, as it affects Indians, was completely dealt with by the Indian Act,[119] leaving no room for the

[114] *Supra,* footnote 107.
[115] See *supra,* footnote 79, and accompanying text.
[116] *Supra,* footnote 90.
[117] [1925] 2 W.W.R. 778, 35 B.C.R. 457, 44 C.C.C. 314 (C.A.).
[118] (1951-52), 4 W.W.R. (N.S.) 430 (Dist. Ct.).
[119] Ss. 94 and 96.

application of provincial law. Accordingly the conviction was quashed. While section 87 was referred to, the court treated it as merely confirming the result achieved under the paramountcy doctrine in pre-1951 cases. Feir D.C.J., stated:[120]

> Section 87 is a new section, not appearing in any of the prior legislation affecting Indians. It seems to be a clarification and restatement of previous case law which, in so far as offences against provincial statutes are concerned, is found mainly in these cases . . . [citing *inter alia R.* v. *Martin* and *R.* v. *Cooper*].

In *Regina* v. *Peters*, by way of contrast, the court did not consider the pre-1951 cases to be helpful in applying section 87. McFarlane J.A. stated that:[121]

> In reaching this conclusion I have considered the several authorities cited by counsel and in particular *Rex* v. *Martin* . . . and *Reg.* v. *Cooper* . . . decisions of the courts of appeal in Ontario and British Columbia respectively. I think they are not of much assistance, having regard particularly to the fact that sec. 87 of the *Indian Act*, quoted *supra*, was not enacted until 1951.

The area is a difficult one and the usefulness of the older paramountcy cases concerned with Indians is questionable for two reasons. The first is that in recent decisions the Supreme Court of Canada has taken a narrow view as to what constitutes a conflict between provincial and federal statutes (where either would be *intra vires* standing alone) so as to bring the paramountcy doctrine into play.[122] Accordingly, it is doubtful if some of the older decisions, holding a legislative field to be completely occupied by the Indian Act, would now be followed.[123] Second, the exceptions in section 87 regarding "inconsistency with" or "making provision for" the same matters as dealt with by or under the Indian Act, may of course be construed differently from either the older or the more recent views as to the sort of conflict necessary to give rise to the paramountcy doctrine. If the view recently expressed in the *Peters* case is to be sustained, it may be that the courts will be inclined to draw a close analogy between the somewhat restrictive view of the paramountcy doctrine apparently

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[120] *Supra*, footnote 118, at p. 432. [121] *Supra*, footnote 110, at p. 730.

[122] See *O'Grady* v. *Sparling*, [1960] S.C.R. 804; *Stephens* v. *The Queen*, [1960] S.C.R. 823; *Smith* v. *The Queen*, [1960] S.C.R. 776; *A.-G. for Ontario* v. *Barfried Enterprises Ltd.*, [1963] S.C.R. 570; *Mann* v. *The Queen*, [1966] S.C.R. 238.

[123] *Cf.*, for example, *Re Kane*, *supra*, footnote 87, where it was held that the Indian Act was exhaustive on the subject of Indian taxation so as to exclude provincial legislation with the result that the provision of a city charter providing for payment of a poll tax had no application to an Indian residing on or off the reserve.

favoured by the Supreme Court of Canada of late and the "inconsistency" exception of section 87, while at the same time recognizing a broader ambit for the exception based on a determination of whether provision has been made for the same matter by or under the Indian Act.

Putting aside section 87 of the Indian Act, another enactment going to provincial legislative competence in a particular sphere requires consideration. Reference has been made earlier to the clause in the Agreements with Manitoba, Alberta, and Saskatchewan, confirmed by the British North America Act, 1930, by the terms of which clause the province assures to the Indians the right:[124]

> . . . 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.

There is no doubt that provincial game legislation, in those three provinces, must yield to the assurance or guarantee contained in the clause; the only question is as to the extent of the immunity conferred on Indians of those provinces by the terms of the clause.

The cases construing the clause fall into two groups. The first has to do with what lands fall within the description of "unoccupied Crown lands" or "other lands to which the said Indians may have a right of access". The result of two Saskatchewan Court of Appeal decisions appears to be that a forest reserve falls within the description[125] (so that provincial game laws are inapplicable to an Indian hunting thereon), but a game preserve does not.[126] Further, there is authority at the appellate level for the proposition that privately owned lands upon which an Indian is given permission to hunt by the owner are lands to which the Indian has a "right of access" within the meaning of the section.[127]

The second group of authorities has to do not with the lands over which exercise of the hunting right is assured, but the scope of the right itself. The operative words are those which confer the right to take game and fish "for food at all seasons of the

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[124] *Supra*, footnotes 16 to 19, and accompanying text.

[125] *R.* v. *Strongquill, supra*, footnote 20. The case of *Rex.* v. *Mirasty*, [1942] 1 W.W.R. 343 (Lussier P.M.) must be taken to have been overruled in *Strongquill* although not referred to in the latter decision.

[126] *R.* v. *Smith*, [1935] 2 W.W.R. 433. Though this case was distinguished, rather than overruled, in *Strongquill*, the reasoning in the two decisions is difficult to reconcile.

[127] *Regina* v. *Little Bear* (1958), 26 W.W.R. 335 (Alta C.A.), aff'g (1958), 25 W.W.R. 580 (Dist. Ct.).

year". In *Rex* v. *Wesley*[128] an Indian had been convicted under the Alberta Game Act of killing a deer below the size permitted by the terms of that statute. Counsel for the Crown argued for a narrow construction of the proviso in section 12 of the Alberta Agreement, the substance of his contention being that the only effect of section 12 was to free the Indians from seasonal restrictions. The Appellate Division unanimously allowed the appeal. In the leading judgment McGillivray J.A., expressed the opinion that the Crown's argument had overemphasized the words "all seasons" at the expense of the words "for food". The court came down in favour of a much broader concept of rights guaranteed to the Indians by section 12. The important question was whether the Indian was hunting *for food* (and it was admitted in the instant case that Wesley was hunting for food) or whether, on the other hand, he was hunting for sport or commerce. If hunting for food, the Indian was within the scope of the proviso to section 12; if hunting for sport or for purposes of selling the game, he was outside the protection of the proviso in section 12 and therefore subject to the same game laws as the non-Indians.

In the recent case of *Regina* v. *Prince*[129] the charge did not relate either to seasonal prohibitions or to the type of game but to the manner in which the hunting was carried on. The accused Indian was charged with violation of the provision in the Manitoba statute prohibiting the use of night lights in hunting big game. The majority of the Manitoba Court of Appeal held that the view taken in the *Wesley* case of the scope of the relevant section in the Natural Resource Agreements was too wide. Miller C.J.M., delivering the majority judgment, stated:[130]

> The point is: Just what restrictions in *The Game and Fisheries Act* do apply to Indians? It seems to me that the manner in which they may hunt and the methods pursued by them in hunting must, of necessity, be restricted by the said Act. Mr. Pollock, counsel for the Indians, argued that they were only restricted by the provisions of *The Game and Fisheries Act* when hunting for sport or commercial purposes. I can only say that I am unable to read any such provision into sec. 13 of the *Manitoba Natural Resources Act.*

Freedman J.A., giving the reasons for the minority, agreed with the reasons of McGillivray J.A., in the *Wesley* case. The decisive question upon which applicability of the proviso in section 13 (and from which the non-applicability of provincial legislation

[128] [1932] 2 W.W.R. 337 (Alta App. Div.).
[129] [1964] S.C.R. 81.
[130] (1962), 40 W.W.R. 234, at pp. 238-39.

resulted) was whether or not the Indian was hunting "for food". If so, the provincial game prohibitions were excluded.

> To hunt game with the aid of a night light is clearly unsportsmanlike. Here, however, the accused Indians were not engaged in sport. They were engaged in a quest for food. Once that quest was satisfied they would then be subject to the restrictions of the Act.[131]

On appeal, the Supreme Court of Canada, in a unanimous decision of the full court, reversed the decision appealed from. Hall J., delivering the reasons of the court, expressly agreed with the dissenting reasons of Freedman J.A., in the court below.[132] In the result, the present position appears to be that an Indian in the Prairie provinces, hunting on lands which are unoccupied or to which he has a right of access, is for all practical purposes exempt from provincial game legislation provided that he is hunting for food.

IV. *Summary.*

Federal legislative competence with respect to Indians is unfettered by treaties—either Indian treaties or international treaties —or by the Royal Proclamation of 1763. The decision of the Manitoba Court of Appeal in *Regina* v. *Daniels*[133] stands for the proposition that federal legislation need not yield to the game and fish guarantees contained in the Natural Resource Agreements with the Prairie provinces and confirmed by the British North America Act of 1930; a final determination of the point awaits the pending appeal in the Supreme Court. What little judicial attention has been paid to article 13 of the Terms of Union with British Columbia has not been favourable to a construction which would allow it to be used as a weapon by a private litigant for the purpose of challenging the validity of federal legislation. It remains possible, although perhaps unlikely in view of the present direction of case development, that the constitutional prohibition against inter-delegation may yet be invoked to prevent section 87 of the Indian Act from making provincial laws enacted subsequent to 1951 applicable to Indians which laws, in the absence of that section, would not be applicable. With respect to the Canadian Bill of Rights it is perhaps too early to formulate conclusions with any degree of confidence. Even if the subsequent course of decision vindicates the view of Cartwright J. that a clash between the Bill of Rights and another federal statute must result in the latter yielding to the former, the question will remain whether

[131] *Ibid.*, at p. 243.
[132] *Supra,* footnote 129, at p. 84.
[133] *Supra,* footnote 25.

the Bill of Rights guarantee is confined to procedural matters, as the majority decision in the *Gonzales* case[134] suggests, or whether the scope of the guarantee extends to substantive law and, if so, with what limitations.

In positive terms, and putting to one side federal laws relating to Indian lands, there is a dearth of authority on the question of the extent to which Parliament may legislate for Indians in areas in which it would not be open to it to legislate for non-Indians. Nor is much assistance derived from the authorities dealing with other classes of "persons" uniquely within federal legislative competence. It is competent to Parliament to define the status of Indians; how far it may go in determining the consequences of that status is a question which has yet to attract thoroughgoing judicial analysis.

Provincial legislation may not, of course, relate to Indian lands, and section 87 of the Indian Act does not touch upon the distribution of legislative authority in this respect. Some of the less obvious possibilities of this exclusionary rule have not in terms been canvassed by the courts; an example cited was with respect to the question of whether the right to hunt, fish and trap might not be capable of being characterized as relating to the use of lands rather than in terms of personal right. Further, in the Prairie provinces the rights of hunting, fishing and trapping are guaranteed against erosion under provincial prohibitory enactments by the Natural Resource Agreements confirmed by the British North America Act of 1930.

Provincial laws of general application will extend to Indians whether on or off reserves. It has been suggested that the constitution permits this result without the assistance of section 87 of the Indian Act, and that the only significant result of that section is, by expressly embracing *all* laws of general application (subject to the exceptions stated in the section), to contemplate extension of particular laws which otherwise might have been held to be so intimately bound up with the essential capacities and rights inherent in Indian status as to have otherwise required a conclusion that the provincial legislation amounted to an inadmissible encroachment upon section 91(24) of the British North America Act. Finally, section 87 of the Indian Act will preclude applicability to Indians of provincial laws which conflict with Indian treaties or with Acts of Parliament other than the Indian Act, or which are either "inconsistent with" the Indian

[134] *Supra,* footnote 38.

Act (or any order, rule or regulation made thereunder) or which "make provision for " any matter for which provision is made by or under the Indian Act.

In sum, where Parliament has not legislated, and putting aside matters relating to Indian lands, the provinces have a relatively free hand in legislating for the well being of the Indian, and this is so with respect to reserve Indians no less than for those who have moved off the reserve into the mainstream of non-Indian society. The area of constitutional flexibility is in fact very great. Accepting that constitutional "responsibility" for Indians is the correlative of legislative authority, there is little justification for the reluctance not infrequently expressed by provincial governments to undertake the same responsibility for ameliorating the condition of Indians and Indian settlements that these governments would assume for non-Indians and non-Indian communities.