

ARE NORTHERN LANDS RESERVED FOR THE INDIANS?

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The primary purpose of this article is to consider relatively recent decisions, statutes and agreements pertaining to the aboriginal rights of northern native peoples in the light of settled law relating to lands reserved for the Indians.

I. *Indian or Aboriginal Title.*

1. *By Right of the Royal Proclamation.*

Subsection 91(24) of the British North America Act, 1867 assigns exclusive legislative authority in respect of "Indians, and Lands reserved for the Indians"¹ to the Parliament of Canada. The leading case on the meaning of lands reserved for Indians remains *St. Catherine's Milling and Lumber Company v. the Queen*,² the facts of which follow. In 1873, the Dominion concluded a treaty with certain Indians whereby the Indians surrendered to the Crown in right of the Dominion their interest in certain lands in northern Ontario. Ten years later, the Dominion licensed the company to lumber on the surrendered lands. The province of Ontario maintained that the surrendered lands belonged to the Crown in right of the province and thus disputed the authority of the company to cut the timber but the company maintained that the lands belonged to the Dominion, firstly, by virtue of the acquisition by the Dominion of the Indian title in the lands, and secondly, by the inherent right of the Dominion to the lands by virtue of subsection 91(24) of the British North America Act.

A. *In the Chancery Division.*

The case was heard at first instance by Chancellor Boyd whose collection and treatment of the historical and legal factors involved was the subject of recurring appreciation in the higher courts.³ After

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¹ 1867, 30 and 31 Vict., c. 3, as am. (U.K.), hereinafter cited as B.N.A. Act.

² (1888), 14 App. Cas. 46 (Jud. Ct P.C.).

³ *Regina v. St. Catherine's Milling & Lumber Co.* (1885), 10 O.R. 196 (Chancery Division). The initial passages of his judgment sketched the histories of both the constitution of the Canadas and the administration of public lands in Ontario from 1763 to 1867 and may be summarized as follows. Upon the cession by France to Britain of Canada, the power to legislate, subject to the control of Westminster, in respect of

summarizing the history of the constitution and the ownership of public lands in Canada since the conquest, the Chancellor proceeded to review government policy towards native peoples. He indicated plainly that he regarded the established colonial policy of treating with the natives for the purchase of their traditional hunting lands as strictly political and without any genuine legal basis. The following extract from an opinion given by certain councillors in 1675 was quoted in the judgment as an accurate statement of the law:⁴

Though it hath been and still is the usual practice of all proprietors to give their Indians some recompense for their land and seem to purchase it of them yet that is not done for want of sufficient title from the King or Prince who hath the right of Discovery, but out of prudence and Christian charity least otherwise the Indians might have destroyed the first planters (who are usually too few to defend themselves) or refuse all Commerce and Conversation with the planters, and thereby all hopes of converting them to the Christian faith would be lost. In this the Common Law of England and the Civil Law doth agree Though some planters have purchased from the Indians yet having done so without the consent of the Proprietors for the time being, the title is good against the Indians but not against the Proprietors without a confirmation from them upon the usual terms of other plantations.

The Chancellor proceeded by reference to authority and statute to show that Crown ownership of traditional Indian hunting lands differed from that of vacant lands only by reason of a right in the Indians to occupy their lands subject to the absolute discretion of the Crown. Boyd C. never attributed legal status to the Indian right of occupation but rather assigned it to expedient policy. Accordingly, when the Chancellor construed the meaning of lands reserved for Indians, he concluded from examining various statutes of Upper Canada, Lower Canada, Prince Edward Island, New Brunswick and Canada that the

Canada and the ownership of public lands were vested in George III. By the authority of the Royal Prerogative, the King issued the first major constitutional instrument of the English regime, known as the Royal Proclamation of 1763 which, as an exercise of the plenary legislative authority then extant in his prerogative relative to Canada, a newly conquered possession, had the force of statute. (The Royal Proclamation has been referred to as the Indian Charter of Rights.) In 1774, the lands in suit were included in Quebec by virtue of the Quebec Act but in 1791, when Quebec was divided into Upper and Lower Canada by 31 George III, c. 31 the lands in suit became part of Upper Canada. In 1840, the provinces were reunited by 3-4 Vict., c. 35 but in 1867, at Confederation, they were re-created under the styles of Ontario and Quebec. In 1837, the custody, control and ownership of all public lands in Upper Canada were transferred to the provincial government by 7 Will. IV, c. 118. There then followed a review by the Chancellor of certain pre-Confederation statutes in which the words "public lands" were considered and construed so as to include lands purchased from the Indians.

⁴ See *Regina v. St. Catherine's Milling & Lumber Co.*, *supra*, footnote 3, at pp. 207-208. The quotation is from Documents relating to Colonial History of the State of New York, Vol. xiii, at p. 486. At p. 209, Boyd C. indicated that Marshall C.J.U.S. had "concisely stated the same law of the mother-country", allowing for the change in government, in deciding a leading American decision: *Johnson v. McIntosh* (1823), 21 U.S. (8 Wheat.) 240.

expression meant Indian reserves and was to be construed strictly as meaning those lands referred to by statute and specifically set apart for the exclusive use of Indians and most probably for the exclusive use of certain bands or tribes of Indians. He stated:⁵

As a deduction from all this legislation, I am induced to believe that the expressions "Indian Reserves", or "lands reserved for the Indians", had a well recognized conventional and perhaps technical meaning before and at the date of Confederation.

In contradistinction to the reasoning of the Chancellor, the company argued that traditional Indian hunting lands fell within the meaning of subsection 91(24) of the B.N.A. Act by virtue of the Royal Proclamation of 1763. The salient provision of the proclamation respecting the lands in suit follows:⁶

And we do further declare it to be our Royal will and pleasure, for the present, as aforesaid, to reserve under one sovereignty, protection, and dominion for the use of the said Indians all the lands and territories not included . . . within the limits of the territory granted to the Hudson's Bay Company; as also all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the West and Northwest as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatsoever, for taking possession of any of the lands above reserved without our especial leave and license for that purpose first obtained; and we do further strictly enjoin and require all persons whatsoever, who have either wilfully or inadvertently seated themselves upon any other lands which not having been ceded to, or purchased by us are still reserved to the said Indians, as aforesaid, forthwith, to remove themselves from such settlements.

The Chancellor held that the Royal Proclamation did not assist the company because the Quebec Act had superseded the relevant provisions of the proclamation insofar as the lands in suit were concerned. He held more generally that the proclamation was a provisional arrangement and further stated:⁷

The proclamation, no doubt, remained operative as a declaration of sound principles which then and thereafter guided the Executive in disposing of Indian claims, but as indicating for this century the scope of the Indian reservations, or the intent with which they must have been created under provincial rule, it must be regarded as obsolete.

The Chancellor continued by distinguishing the "primitive" Indian right of occupancy in public or waste lands on which "they might be

⁵ See *Regina v. St. Catherine's Milling & Lumber Co.*, *supra*, footnote 3, at pp. 220-221. Comp with *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 App. Cas. 46, at p. 59 where in the Privy Council, Lord Watson said of the expression, lands reserved for the Indians, ". . . and the words actually used are according to their natural meaning, sufficient. . . .".

⁶ The full text of the Royal Proclamation may be found in R.S.C., 1970, Appendix II, No. 1.

⁷ *Regina v. St. Catherine's Milling & Lumber Co.*, *supra*, footnote 3, at p. 227.

found at large" from the tenure accorded to the Indians in those lands "reserved" for them.⁸ While the extinction of the former right formed the basis of treaty, the latter right amounted to:⁹

... a legally recognized tenure of defined lands; in which they have a present right as to the exclusive and absolute usufruct, and a potential right of becoming individual owners in fee after enfranchisement.

After finding that the Royal Proclamation did not apply to the subject lands in 1867 and that it had not, in any event, reserved lands for the Indians, the Chancellor declared that traditional hunting lands were a class of public lands within the meaning of section 109 of the B.N.A. Act.¹⁰ Indian title, he indicated, constituted an interest other than that of the province in the public lands of the province yet the Chancellor also indicated that the extinguishment of the Indian interest added nothing in law to the strength of the title of the Crown in the lands. When the treaty of 1873 extinguished the Indian title and the compensatory reserve was allocated to the Indians, then Dominion jurisdiction by virtue of subsection 91(24) attached to the reserve. Thus, in the result Boyd C. found for the province.

B. In the Appeal Court.

On appeal the case was heard in the Appeal Court of Ontario by Hagarty C.J.O., Burton, Patterson and Osler J.J.A.¹¹ The Chief Justice of Ontario specifically adopted the construction put on lands reserved for Indians by Boyd C. but was not prepared to hold that Indian title constituted an interest or trust, in any legal sense, in the public lands of the province, yet he did leave open the question as to whether Ontario could, before the extinguishment of the Indian title, have entered upon or sold the lands.¹² This latter undecided point might indicate that, in his opinion, the power to extinguish Indian title lay solely with the Dominion and therefore explains the explicit assumption later made by the Chief Justice that it was the duty of the

⁸ *Regina v. St. Catherine's Milling & Lumber Co.*, *ibid.*, at p. 228.

⁹ *Regina v. St. Catherine's Milling & Lumber Co.*, *ibid.*, at p. 230.

¹⁰ The B.N.A. Act, s. 109 states: "All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts in respect thereof, and to any Interest other than that of the Province in the same." It is submitted that the Chancellor's judgment is somewhat inconsistent in that the Indian interest is said to be possessory, primitive and within the purview of s. 109, while it is also said that there was no difference between vacant and public lands and lands subject to the Indian right.

¹¹ *Regina v. St. Catherine's Milling & Lumber Co.* (1885), 13 O.A.R. 148.

¹² *Regina v. St. Catherine's Milling & Lumber Co.*, *ibid.*, at p. 148.

Dominion to act for the benefit of the province by disencumbering public lands of Indian title.¹³

Burton J. agreed that Indian title was recognized by government for reasons of policy alone and quoted certain words of Chief Justice Marshall in *Fletcher v. Peck*, an early American authority on Indian title, to show that Indian title could not amount to Indian ownership in fee simple of traditional lands.¹⁴ In reply to the contention of counsel that the method of treating with the Indians had been so well established since the cession of Canada as to warrant the finding at common law of an Indian right to unsundered lands, his Lordship replied:¹⁵

There is no question that the same humane policy which the Imperial Government pursued in reference to them has been faithfully observed by the old Province of Canada from the time that the jurisdiction passed to them. and I have no doubt will still be continued whether the jurisdiction be with the Provinces or the Dominion.

On the question of whether the lands in suit were vested in the Dominion by virtue of subsection 91(24), Burton J. indicated that if a transfer of proprietary rights in Indian lands from the provinces to the Dominion had been intended at Confederation, then lands reserved for Indians would have appeared in the third schedule to the Act, which detailed such specific transfers. On the question of the meaning of lands reserved for Indians, Burton J. also relied on statutes of the provinces and Dominion to indicate that the expression meant Indian reserve.¹⁶ Burton J. completed his view of the narrow nature of Indian title when he dissented from the judgment of the Chief Justice on the ability of the Dominion to extinguish the Indian right. In his view, the proper authority to conclude agreements or "so-called" treaties with the Indians for the extinguishment of their rights was the Lieutenant-Governor and arose from the jurisdiction assigned by the B.N.A. Act to the province over public lands.

Patterson J.A. indicated that the title to traditional Indian lands was in the Crown subject to an Indian right of occupancy. While he was not prepared to discuss whether or not traditional Indian lands

¹³ *Regina v. St. Catherine's Milling & Lumber Co.*, *ibid.*, at pp. 157-158. On the subject of the benefit of extinguishment the language of the Chief Justice bears some similarity to that of Lord Loreburn of the Privy Council in *Dominion of Canada and Province of Ontario*. [1910] A.C., p. 637. In that case, the Dominion sued Ontario for monies expended by the Dominion pursuant to the subject treaty in *St. Catherine's*, known as the North West Angle Treaty.

¹⁴ *Regina v. St. Catherine's Milling & Lumber Co.*, *ibid.*, at pp. 159-160. Marshall C.J. U.S. said: "The Court is of opinion that the nature of Indian title, which is certainly to be respected by all Courts until it be legitimately extinguished, is not such as to be absolutely repugnant to seizin in fee on the part of the State." *Fletcher v. Peck* (1810), 10 U.S. (6 Cranch.) 87.

¹⁵ *Regina v. St. Catherine's Milling & Lumber Co.*, *ibid.*, at p. 161.

¹⁶ *Regina v. St. Catherine's Milling & Lumber Co.*, at pp. 162-163.

were included in subsection 91(24) he did indicate that he concurred with Boyd C. that the lands in suit were not reserved for Indians.

Osler J.A. concurred with both Boyd C. and Hagarty C.J.O.

C. In the Supreme Court.

On appeal to the Supreme Court of Canada the case was heard by Ritchie C.J., Fournier, Henry, Taschereau JJ. with Strong and Gwynne JJ. dissenting.¹⁷ Ritchie C.J., Henry and Taschereau JJ. expressly concurred with Boyd C. in holding that the expression lands reserved for Indians meant reserves or lands specifically set apart for Indians.¹⁸ The Chief Justice also agreed with the Chancellor that Indian title constituted an interest other than that of the province in the public lands of the province and the treaty, he said, relieved the title of the province by extinguishing the burden or incumbrance of the Indian title.

Fournier J. concurred with Ritchie C.J.

Henry J. expressed himself as entirely approving of the judgment of the Chancellor and added the following remarks in light of his knowledge of the provisions of the Royal Proclamation referred to above:¹⁹

But, I would ask, how can it be said that the lands in question in this suit were ever reserved? They were always the property of the crown. The Indians had the right to use them for hunting purposes, but not as property the title of which was in them. Thus, then, we have these words in the statute explained by the knowledge we have of certain lands being expressly reserved for the Indians.

Reservation cannot be affected by implication; there must be some act.

Taschereau J. was of the opinion that the Royal Proclamation conferred no legal title upon those Indians of Canada living beyond the boundaries of the province of Quebec as constituted in 1763. He stated:²⁰

Their occupancy under that document has been one by sufferance only. Their possession has been, in law, the possession of the crown.

The learned judge also denied that traditional dealings with the Indians should give rise to the admission at common law of Indian title as a legal title.²¹ Thus in his opinion there was no legal Indian interest in

¹⁷ *St. Catherine's Milling and Lumber Company v. The Queen*, (1887), 13 S.C.R. 577.

¹⁸ *St. Catherine's Milling and Lumber Company v. The Queen*, *ibid.*, Ritchie C.J. at p. 600, Henry J. at p. 639 and Taschereau J. at p. 650.

¹⁹ *St. Catherine's Milling and Lumber Company v. The Queen*, *ibid.*, at pp. 641-642.

²⁰ *St. Catherine's Milling and Lumber Company v. The Queen*, *ibid.*, at p. 647.

²¹ *St. Catherine's Milling and Lumber Company v. The Queen*, *ibid.*, at pp. 648-649.

the subject lands but he was prepared to admit that if such a legal Indian interest did exist then it was held subject to the title of the province as set out in section 109 of the B.N.A. Act.

Strong J., in an influential dissenting judgment, took a view of the meaning of subsection 91(24) that in some respects was more consonant with the judgment of the Privy Council than the judgments of his brethren. Beginning with the proposition that the B.N.A. Act had initially vested all public property in the Dominion and had then assigned certain public property, by sections 109 and 117, to the provinces, he arrived at the unique conclusion that the Act left the residuum of public property in the Dominion. He held that the Act vested in the Crown in right of the Dominion the title to those lands the revenues of which were allotted to the Dominion by section 102. As revenues that arose from lands reserved for Indians fell to the Crown in right of the Dominion, he thus maintained that title to such lands was vested by section 102 in the Dominion. This preliminary justification of Dominion title in lands reserved for the Indians aside, Strong J. turned to identify the kinds of lands that fell within the legislative scope of the expression.

Relying on American authority, Strong J. suggested that government policy recognized a usufructuary title in all unsundered Indian lands, including those lands subject to Indian or native title. He stated:²²

This title, though not perhaps susceptible of any accurate legal definition of exact legal terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making any valid alienation otherwise than to the crown itself, in whom the ultimate title was, in accordance with the English law of real property, considered as vested.

After outlining the self-interested reasons that motivated the traditional dealings of the Crown with the natives and in reference to three leading American cases on native title, Strong J. stated:²³

Therefore, when we consider that with reference to Canada the uniform practice has always been to recognize the Indian title as one which could only be dealt with by surrender to the crown, I maintain that if there had been an entire absence of any written legislative act ordaining this rule as an express positive law, we ought, just as the United States courts have done, to hold that it nevertheless existed as a rule of the unwritten common law, which the courts were bound to enforce as such, and consequently, that the 24th sub-section of section 91, as well as the 109th section and the 5th sub-section of section 92 of the British North America Act, must all be read and construed upon the assumption that these territorial rights of the Indians

²² *St. Catherine's Milling and Lumber Company v. The Queen*, *ibid.*, at p. 608.

²³ See *St. Catherine's Milling and Lumber Company v. The Queen*, *ibid.*, at p. 613. The American cases cited at p. 610 were *Johnston v. McIntosh*, *supra*, footnote 4, *Worcester v. State of Georgia* (1832), 31 U.S. (6 Pet.) 350, and *Mitchell v. United States* (1835), 34 U.S. (9 Pet.) 711.

were strictly legal rights which had to be taken into account and dealt with in that distribution of property and proprietary rights made upon confederation between the federal and provincial governments.

Given the above holding that Indian title existed as a proprietary right at the common law, Strong J. stated:²⁴

To summarize these arguments, which appear to me to possess great force, we find, that at the date of confederation the Indians, by the constant usage and practice of the crown, were considered to possess a certain proprietary interest in the unsundered lands which they occupied as hunting grounds; that this usage had either ripened into a rule of the common law as applicable to the American Colonies, or that such a rule had been derived from the law of nations and had in this way been imported into the Colonial law as applied to the Indian Nations; that such property of the Indians was usufructuary only and could not be alienated, except by surrender to the crown as the ultimate owner of the soil; and that these rights of property were not inaptly described by the words "lands reserved for the Indians", whilst they could not, without doing violence to the meaning of language, be comprised in the description of public lands which the Provinces could sell and dispose of at their will.

Strong J. also held that Indian title could only be properly surrendered to or extinguished by Parliament and attributed Parliament's power to extinguish title as incidental to the head "Indians" rather than "lands reserved for Indians",²⁵ but in considering the meaning of lands reserved for Indians the dissenting Justice stated:²⁶

Then, taking into consideration this wide power of legislation respecting the Indian tribes, and seeing that it must necessarily include a power of control over all Indian treaties dealing with proprietary rights, it is surely a legitimate application of the maxim *noscitur a sociis* to construe the words "Lands reserved for the Indians" as embracing all territorial rights of Indians, as well those in lands actually appropriated for reserves as those in lands which had never been the subject of surrender at all.

Strong J. then proceeded to discuss the inequities of awarding traditional Indian lands to the provinces as public domain where the Dominion was obligated to bear the expenses of the treaties procured by the Dominion where it had obtained the surrender of Indian title. Further, in perhaps a powerful but rhetorical plea for the inclusion of the subject lands in subsection 91(24), the dissenting Justice indicated that the country was on the eve of the transfer of the Northwestern Territory and Rupert's Land from the Hudson's Bay Company and that the need for the traditional successful government policy relating to Indian lands persisted. Restating the undesirability of a construction of subsection 91(24) that would permit two governments to administer and manage Indians and their lands, he came to the conclusion that the contentions of the province entirely failed. At that point

²⁴ *St. Catherine's Milling and Lumber Company v. The Queen*, *ibid.*, at pp. 615-616.

²⁵ *St. Catherine's Milling and Lumber Company v. The Queen*, *ibid.*, at p. 615.

²⁶ *St. Catherine's Milling and Lumber Company v. The Queen*, *ibid.*, at p. 615.

in his judgment, Strong J. summoned up the Proclamation of 1763 to support his opinion that the lands in suit were subject to subsection 91(24). After holding the proclamation as materially in force at Confederation, he argued that the instrument expressly treated the words "lands not ceded to or purchased by the King" and "lands reserved to the Indians" as convertible terms and further indicated that the expression "lands reserved to the Indians" ought to be treated as lands reserved for the Indians.²⁷ The final passages of his judgment were aimed at dispelling arguments raised by the majority and Boyd C. respecting the narrow interpretation of subsection 91(24) and the supercession of the Royal Proclamation by the Quebec Act.

Gwynne J., in his dissenting judgment, reviewed certain Indian surrenders obtained in Quebec and Upper Canada to show that the surrenders had been conducted in accordance with the relevant provisions of the proclamation. He also reviewed various statutes of Upper Canada relating to public lands and concluded that unsurrendered traditional lands had not been treated by legislation as public lands. Turning to examine the nature of the Indian interest in traditional lands, he stated:²⁸

After the most explicit recognition by the crown of the Indian title for upwards of a century in the most solemn manner, by treaties entered into between the crown and the Indian nations assembled according to their national custom, and by deeds of cession to the crown and of purchase by the crown, prepared by officers of the crown for execution by the Indians—it cannot, in my opinion, admit of a doubt that at the time of the passing of the British North America Act the Indians in Upper Canada were acknowledged by the crown to have, and that they had, an estate, title and interest in that part of the Province of Canada formerly constituting Upper Canada for the cession of which to the crown no agreement had been made with the nations or tribes occupying the same as their hunting grounds, or claiming title thereto, which estate, title and interest could be extinguished in no other manner than by cession made in the most solemn manner to the crown.

Gwynne J. also reasoned that lands subject to Indian title were included in any construction of subsection 91(24) because where traditional lands had been surrendered, the compensatory reserve was excepted out of the surrendered lands and thus remained lands "not yet ceded to or purchased by the crown". In his opinion the nature of the Indian interest in both kinds of reserved lands was the same.

D. *In the Privy Council.*

On final appeal to the Privy Council, where the Dominion intervened, their Lordships' judgment was delivered by Lord Watson. The Privy

²⁷ *St. Catherine's Milling and Lumber Company v. The Queen*, *ibid.*, at pp. 626-627.

²⁸ *St. Catherine's Milling and Lumber Company v. The Queen*, *ibid.*, at pp. 663-664.

Council held that the Indians in possession of the lands in suit had held their interest in those lands solely by virtue of the Royal Proclamation. Lord Watson stated:²⁹

Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the land surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown.

The Quebec Act had not, therefore, as Chancellor Boyd held, materially superseded the Royal Proclamation. Their Lordships rejected the contention that the convertibility of the expressions "lands reserved to Indians" and "never been ceded to or purchased by", as recited by the proclamation, imparted ownership of the beneficial fee to the Indians. Further, their Lordships did not consider the exact nature of the Indian right found to have existed in the lands in suit, but were satisfied that it was a personal and usufructuary right that burdened the paramount estate of the Crown until surrendered or otherwise extinguished. Such surrender or extinguishment served to complete the title of the Crown. Their Lordships then proceeded to consider whether the ownership of the Crown was in right of Ontario or Canada. Turning to the B.N.A. Act, their Lordships considered the provisions of the act that distributed the revenues and assets of the confederating provinces between the provinces and the Dominion at the time of union. Two sections of the Act were said to transfer property owned by the confederating provinces to the Dominion, namely sections 108 and 102. Section 108 transferred public undertakings detailed in the third schedule to the Act (such as those associated with canals, public harbours and post offices) and "obviously" could not be reasonably held to transfer the reserved Crown lands. Section 102 transferred all "duties and revenues" over which the confederating provinces had power of appropriation prior to the coming into force of the Act, excepting thereout certain "portions thereof" which were reserved by the Act to the further use of the provinces. Their Lordships determined that two such exceptions were made in favour of the provinces and that the second, under section 109, reserved to the provinces the entire beneficial interest in Crown lands within the confederating provinces, so vested at Confederation, subject to the right of the Dominion to section 108 lands or lands required by the Dominion pursuant to section 117. (Section 117 permits the Dominion to assume provincial lands for fortifications or national defense.) The Privy Council rejected the contention that the exclusive power of Parliament to legislate in relation to Indians and lands

²⁹ See *St. Catherine's Milling and Lumber Company v. The Queen*, *supra*, footnote 2, at p. 54.

reserved for Indians carried to the Dominion the patrimonial interest of the Crown in reserve lands. But the Privy Council also rejected the contention of the majority of Canadian judges of the meaning of lands reserved for Indians when it stated:³⁰

... counsel for Ontario referred us to a series of provincial statutes prior in date to the Act of 1867, for the purpose of showing 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 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.

Their Lordships indicated that Dominion power to legislate for Indian lands and provincial ownership of the lands were not in the least degree inconsistent. With respect, this view seems to have at least narrowed the ambit of subsection 92(5) of the Act which assigned to the provinces the management and sale of the public lands belonging to the provinces and of the timber and wood thereon. Their Lordships further indicated that the beneficial interest of the provinces in lands reserved for Indians was available to them as a source of revenue only when the estate of the Crown was disencumbered of the Indian title. In the result, the Privy Council found that the treaty had disencumbered the Crown's title of the Indian interest. Their Lordships thus found for Ontario but in their concluding dicta their Lordships also indicated that the Dominion was left, after the treaty, with the exclusive power to regulate the Indians' privilege of hunting and fishing and that the province should relieve the Dominion of the expenses of the treaty. Their Lordships acknowledged that unresolved questions remained behind the decision.

2. *Indian or Aboriginal Title at Common Law.*

The first case in Canadian jurisprudence to result in the final declaration of an existing Indian or aboriginal title at common law was *The Hamlet of Baker Lake et al. v. The Minister of Indian Affairs and Northern Development et al.*, decided in the Trial Division of the Federal Court by Mahoney J.³¹ In that case, where certain defendant

³⁰ See *St. Catherine's Milling and Lumber Company v. The Queen*, *ibid.*, at p. 59.

³¹ (1980), 107 D.L.R. (3d) 513 (F.C.T.D.), [1980] 1 F.C. 518, [1980] 5 W.W.R. 193.

mining corporations conducted mining related activities authorized by government defendants over certain lands in the Northwest Territories, plaintiff Inuit and Inuit controlled corporations alleged that the activities were invasions of rights pursuant to the Inuit aboriginal title in the lands and in particular, an invasion of an aboriginal right to hunt caribou. The plaintiff Inuit sought amongst other relief, a declaration that the lands were subject to the "aboriginal right and title of the Inuit residing in or near that area to hunt and fish thereon".³² The plaintiffs also sought orders preventing and restraining the further conduct of the alleged offending mining activities.

After a lengthy examination of the factual evidence relating to the pre-historical and historical occupation by Inuit of the lands in suit, Mahoney J. turned to examine the source of the Inuit aboriginal title. The court acknowledged that for the purposes of constitutional law, the term "Indians" includes "Inuit" but the court indicated that it was bound to follow the decision of the Supreme Court of Canada in *R. v. Sigeareak*³³ in which the Royal Proclamation, the source of Indian title in the *St. Catherine's* case, was held not to apply in Rupert's Land, the relevant part of the Territories.³⁴ Yet Mahoney J. stated:³⁵

However, the Proclamation is not the only source of aboriginal title in Canada.

The court referred to *Calder et al. v. A.-G.B.C.*³⁶ as authority for the foregoing proposition as in that case, the court indicated, six members of the Supreme Court had held that an aboriginal title at common law had existed in British Columbia.³⁷ In the *Calder* case, certain Indians in British Columbia had sought a declaration of aboriginal title to certain lands in that province. In the Supreme Court, their appeal was dismissed. While in the *St. Catherine's* case, Strong J. (dissenting) of the Supreme Court had expressly held that aboriginal title existed in the subject lands by virtue of the common law as well as the Royal Proclamation and although, in the Privy Council, Lord Watson had indicated that insofar as the subject lands were concerned, aboriginal title arose only because of the proclamation. in *Calder*, Judson J.

³² *Hamlet of Baker Lake et al. v. Minister of Indian Affairs and Northern Development et al.*, *ibid.*, at pp. 516 (D.L.R.), 524 (F.C.), 197 (W.W.R.).

³³ (1966), 57 D.L.R. (2d) 536, [1966] S.C.R. 645, [1966] 4 C.C.C. 393.

³⁴ *Hamlet of Baker Lake et al. v. Minister of Indian Affairs and Northern Development et al.*, *supra*, footnote 31, at pp. 540-541 (D.L.R.), 555-556 (F.C.), 224 (W.W.R.).

³⁵ *Hamlet of Baker Lake et al. v. Minister of Indian Affairs and Northern Development et al.*, *ibid.*, at pp. 541 (D.L.R.), 556 (F.C.), 224 (W.W.R.).

³⁶ (1973), 34 D.L.R. (3d) 145, [1973] S.C.R. 313, [1973] 4 W.W.R. 1.

³⁷ *Hamlet of Baker Lake et al. v. Minister of Indian Affairs and Northern Development et al.*, *supra*, footnote 31, at pp. 541 (D.L.R.), 556 (F.C.), 224 (W.W.R.).

negated the proposition that Lord Watson's dictum required aboriginal title to fail (at common law) in lands not subject to the proclamation when he stated:³⁸

I do not take these reasons to mean that the Proclamation was the exclusive source of Indian title. The territory under consideration in the *St. Catherine's* appeal was clearly within the geographical limits set out in the Proclamation. It is part of the appellants' case that the Proclamation does apply to the Nishga territory and that they are entitled to its protection. They also say that if it does not apply to the Nishga territory their Indian title is still entitled to recognition by the courts. These are two distinct questions.

Mahoney J. suggested that recognition of aboriginal title at common law in *Calder* might well have been based upon the acceptance of certain reasoning of Chief Justice Marshall in *Worcester v. State of Georgia*.³⁹ The court noted that the American case was referred to in both the judgments of Judson and Hall JJ. in *Calder*. The reasoning of Chief Justice Marshall referred to by Mahoney J. and quoted by Hall J. follows:⁴⁰

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, *having institutions of their own, and governing themselves by their own laws*. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.

With respect, while the remarks of Chief Justice Marshall in *Worcester v. State of Georgia* and *Johnson v. McIntosh*,⁴¹ another leading American case, deserve the consideration accorded to them, the failure of the court to make explicit reference to the leading case, *St. Catherine's* while discussing the source of Inuit aboriginal title is noteworthy. In *Calder*, Hall J. examined the remarks of Marshall C.J. in the *Worcester* case on the basis that the case assisted the appellant Indians in their assertion of aboriginal title at common law. The case was cited in the course of a series of cases quoted from by Hall J. to support the following proposition:⁴²

While the Nishga claim has not heretofore been litigated, there is a wealth of jurisprudence affirming common law recognition of aboriginal rights to possession and enjoyment of lands of aborigines precisely analogous to the Nishga situation here.

³⁸ *Calder et al. v. A.-G. B.C.*, *supra*, footnote 36, at pp. 152 (D.L.R.), 322-323 (S.C.R.), 7 (W.W.R.).

³⁹ *Supra*, footnote 23.

⁴⁰ *Calder et al. v. A.-G. B.C.*, *supra*, footnote 36, at pp. 195 (D.L.R.), 383 (S.C.R.), 55-56 (W.W.R.), italics supplied.

⁴¹ *Supra*, footnote 4.

⁴² *Calder et al. v. A.-G. B.C.*, *supra*, footnote 36, at pp. 190 (D.L.R.), 376 (S.C.R.), 49 (W.W.R.).

The first passage used by Hall J. from such jurisprudence is a long passage by Strong J. in the *St. Catherine's* case.⁴³ Again, the holding by Hall J. (Spence and Laskin JJ. concurring) that aboriginal title could exist at the common law was founded on authorities that included the dissenting opinion of Justice Strong in *St. Catherine's*. Justice Hall went on to indicate, however, that on the point of Indian title there was no disagreement between the majority and minority views in *St. Catherine's* and with respect, this statement may have been too broad, for as noted above, only Strong and Gwynne JJ. were prepared to find that lands subject to Indian title were lands reserved for Indians.

The judgment of Judson J. (Martland and Ritchie JJ. concurring) in *Calder* also held that aboriginal title could exist at the common law but that judgment, rather than being founded on the authorities cited by Hall J., proceeded on a minimal use of traditional jurisprudence in the area. Judson J. did admit that any Canadian inquiry into the nature of the Indian title must begin with the *St. Catherine's* case and that the early decision indicated that the extinction of Indian title enured to the benefit of the province. Judson J. also indicated that the Canadian courts in *St. Catherine's* had been strongly influenced by the judgments of Marshall C.J. in *Johnson v. McIntosh* and *Worcester v. Georgia* and further that the description of the nature of Indian title in the Canadian courts in *St. Catherine's* had been repeated in the Privy Council, but Judson J. then proceeded to minimize the authority of *St. Catherine's* by holding that the Royal Proclamation, the source of Indian title in the early case, had no bearing upon the problem of Indian title in British Columbia. The upshot of this approach was the development of a new definition of aboriginal title when Judson J. stated:⁴⁴

Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the lands as their forefathers had done for centuries. This is what "Indian title" means and it does not help one in the solution of the problem to call it a "personal or usufructuary right". What they are asserting in this action is that they had a right to continue to live in their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was "dependent on the goodwill of the Sovereign".

Given the above, it appears that the use made of *Worcester v. State of Georgia* by Judson and Hall JJ. in arriving at a recognition of

⁴³ *Calder et al. v. A.-G. B.C.*, *ibid.*, at pp. 190 (D.L.R.), 376 (S.C.R.), 49 (W.W.R.). The judgments and authorities cited in order are, *St. Catherine's* (Strong J., Ritchie C.J. and the Privy Council), *Johnson v. McIntosh* and *Worcester v. State of Georgia* (Marshall C.J. U.S.) and Chancellor Kent's *Commentaries on American Law*.

⁴⁴ *Calder et al. v. A.-G. B.C.*, *ibid.*, at pp. 152 (D.L.R.), 322-323 (S.C.R.), 7 (W.W.R.).

common law aboriginal title differed substantially as to method. The judgment of Judson J. cited the case while minimizing, and perhaps essentially displacing established jurisprudence and authority on aboriginal title, thus leaving the constitutional status of lands subject to aboriginal title ambiguous, while Hall J. cited the case with reference to established jurisprudence that included passages from the hitherto leading case that in the result classified aboriginal lands as lands reserved for Indians. In *Baker Lake*, the absence of any explicit reference to *St. Catherine's* while discussing the source of aboriginal title appears to favour the view taken by Judson J. in *Calder*.

After examining the source of aboriginal title in *Baker Lake*, Mahoney J. introduced the following four-barrelled test to be used to prove the existence of an aboriginal title at common law:⁴⁵

1. That they and their ancestors were members of an organized society.
2. That the organized society occupied the specific territory over which they assert the aboriginal title.
3. That the occupation was to the exclusion of other organized societies.
4. That the occupation was an established fact at the time sovereignty was asserted by England.

Further, the court cited *Amadu Tijani v. The Secretary, Southern Nigeria*⁴⁶ as authority for the proposition that the content of any aboriginal title must reflect relevant aboriginal conceptions of land enjoyment. The aboriginal view of land use must, of course, be a communally established notion. On the facts, the court found an aboriginal title in the Inuit to certain lands in the Territories, at the time of the assertion of English sovereignty over the area, between 1610 and 1670. Mahoney J. stated:⁴⁷

An aboriginal title to that territory, carrying with it the right to freely move about and hunt and fish over it, vested at common law in the Inuit.

The court proceeded to determine if the title had been extinguished before or after 1870, the year of the admission of Rupert's Land to Canada. The defendants' contention that the Inuit title in Rupert's Land had been extinguished by the Royal Charter of May, 1670 granting Rupert's Land to the Hudson's Bay Company was rejected because firstly, the charter did not authorize the company to legislate or adjudicate in respect of aborigines although it did establish proprietary government in Rupert's Land, and because secondly, the grant of title to Rupert's Land in favour of the company operated,

⁴⁵ *Supra*, footnote 31, at pp. 542 (D.L.R.), 557-558 (F.C.), 226 (W.W.R.).

⁴⁶ [1919] A.C. 211 (Jud. Ct P.C.).

⁴⁷ *Hamlet of Baker Lake et al. v. Minister of Indian Affairs and Northern Development et al.*, *supra*, footnote 31, at pp. 547 (D.L.R.), 563 (F.C.), 231 (W.W.R.).

as did similar grants to other proprietary governments in North America, only "to define the ownership in relation to the Crown".⁴⁸ Aboriginal title in the granted land remained to be later extinguished by treaty between the natives and the Crown or its surrogate, which in this instance was the company. The court also found that the terms of the transfer of Rupert's Land from the United Kingdom to Canada transferred to Parliament the company's obligations respecting the aboriginal title.

In considering whether the Inuit title had been extinguished since 1870, the court held that where the continued existence of any right of aboriginal occupancy is inconsistent with enacted legislation then that right of occupancy has been extinguished. The legislator need not expressly address extinguishment in order to effect extinguishment. The court then turned to examine the legislation contended to have effected the extinguishment of the Inuit title and in respect of the Territorial Lands Act⁴⁹ and the Northwest Territories Act⁵⁰ the court stated the following:⁵¹

I will merely note, at this point, that the Governor in Council and the Commissioner in Council have acted on their statutory authority in many areas. That fact and the purport of those regulations and ordinances are not material to the question of the complete extinguishment of aboriginal title. Such extinguishment must be effected by Parliament itself enacting legislation inconsistent with the continued existence of an aboriginal title; it cannot depend on the exercise of authority delegated by that legislation. That is not to say that the rights comprised in an aboriginal title cannot be abridged by legislation, delegated or otherwise, without the title being completely extinguished.

This appears to indicate that only Parliament is empowered to extinguish aboriginal title while the delegate of Parliament, or "another" may, by legislation, abridge the rights comprised in the title without extinguishing the title itself. Thus the court recognized that certain provisions of the Territorial Lands Act and the Northwest Territories Act were sufficient to enable delegates to legislate in respect of the subject lands but the court arrived at the conclusion that those statutes had not operated to extinguish the title. Even section 4 of the Territorial Lands Act by which the Governor in Council may authorize the sale, lease or other disposition of territorial lands was held not to extinguish the title. The court stated:⁵²

⁴⁸ *Hamlet of Baker Lake et al. v. Minister of Indian Affairs and Northern Development et al.*, *ibid.*, at pp. 548 (D.L.R.), 564 (F.C.), 233 (W.W.R.).

⁴⁹ R.S.C., 1970, c. T-6.

⁵⁰ R.S.C., 1970, c. N-22.

⁵¹ *Hamlet of Baker Lake et al. v. Minister of Indian Affairs and Northern Development et al.*, *supra*, footnote 31, at pp. 555-556 (D.L.R.), 574 (F.C.), 241 (W.W.R.).

⁵² *Hamlet of Baker Lake et al. v. Minister of Indian Affairs and Northern Development et al.*, *ibid.*, at pp. 557 (D.L.R.), 575-576 (F.C.), 243 (W.W.R.).

However, dispositions of the sort and for the purposes that Parliament might reasonably have contemplated in the barren lands are not necessarily adverse to the Inuit's aboriginal right of occupancy. Those which might prove adverse cannot reasonably be expected to involve any but an insignificant fraction of the entire territory.

Thus in the result, Mahoney J. found that the aboriginal title had not been extinguished. Again, the court did indicate that aboriginal rights that exist pursuant to an aboriginal title can be diminished without extinguishing the title. Mahoney J. left open the question of whether the mining laws enabling the activities of the corporate defendants had diminished the aboriginal rights of the Inuit, but did indicate that the Inuit had no cause of action under section 8 of the Territorial Lands Act, which requires the Governor in Council to compensate holders of surface rights where regulations are made for the leasing of mining rights in territorial lands. The court indicated that the Inuit aboriginal title did not include surface rights and further was not a proprietary right, for, he indicated, if the title were a proprietary right then it would have been extinguished by the grant of Rupert's Land to the Hudson's Bay Company in 1670. The court, in its only explicit reference to *St. Catherine's*, then indicated that the aboriginal title that arose from the Royal Proclamation was also not a proprietary right.⁵³

3. *Are the Baker Lake Lands Reserved for the Indians?*

By declaring an aboriginal title to exist at common law at Baker Lake, did the court also implicitly recognize a new type of lands reserved for Indians? The reader may recall that in the *St. Catherine's* case, Lord Watson in referring to the expression lands reserved for Indians, stated:⁵⁴

. . . 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 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.

In stating that the words lands reserved for Indians were to be given their natural meaning instead of any technical meaning acquired at law, Lord Watson indicated firstly, that the expression has a broader

⁵³ *Hamlet of Baker Lake et al. v. Minister of Indian Affairs and Northern Development et al. ibid.*, at pp. 558 (D.L.R.), 577 (F.C.), 244 (W.W.R.).

⁵⁴ *Regina v. St. Catherine's Milling & Lumber Co.*, *supra*, footnote 2, at p. 59.

meaning than any legislative definition of Indian Reserve, secondly that the manner by which the reservation of land is effected is not critical to holding whether or not those lands fall under subsection 91(24) and thirdly, that lands reserved for Indians are lands reserved upon any terms or conditions, for Indian occupation. The traditional method of reserving Indian lands, whether reserve or aboriginal lands, has been by the encumbrance of the Indian title or interest so that it may be surrendered only to the Crown. In relation to aboriginal lands, the idea is often expressed by indicating that only the Crown may extinguish the aboriginal title. (The difference between surrender and extinguishment may lay in the extent of unilateral Crown or parliamentary action.) It is submitted that where an aboriginal title arises at common law that contains a right to occupy certain lands then the necessary qualification that only Parliament can extinguish or take a surrender of the title operates to bring the lands under subsection 91(24) of the B.N.A. Act. Again, where the common law has provided that only Parliament can extinguish the title then a reservation of the aboriginal interest in the lands is effected against the claims of all non-Indians to the rights granted pursuant to the title, excepting where Parliament or its delegates have provided otherwise.

In the *St. Catherine's* case, Strong J. clearly and plainly stated that lands subject to Indian title at common law should be considered lands reserved for Indians. In that case, the Privy Council accepted the contention of the minority in the Supreme Court when it decided that the subject lands there fell within the meaning of subsection 91(24), although their Lordships did ascribe the origins of the title to the Royal Proclamation and not the common law. If it were to be held that lands subject to aboriginal title at common law were not lands reserved for Indians then it would appear that the plain policy of the B.N.A. Act to ensure uniformity of Indian affairs generally through one central legislative authority would be defeated. In short, the question of whether the Baker Lake lands fall within subsection 91(24) raises many of the same considerations of law and policy explored at all levels in the *St. Catherine's* case about the proclamation lands. For instance, it might be argued that recognition of the Baker Lake lands as lands reserved for Indians would be obsolescent, or that there has been no actual reservation of the lands to the Inuit. It is submitted, however, that the better view is to treat the Baker Lake lands as subject to subsection 91(24), if only for the reason that there appears to be no substantial difference in the content of the Baker Lake title and that of the title provided for by the Royal Proclamation.⁵⁵

⁵⁵ But see *Calder et al. v. Attorney-General of British Columbia* (1970), 80 D.L.R. (3d) 59, at pp. 61-62, where Gould J. of the British Columbia Supreme Court rejected a preliminary objection of counsel that the matter in question pertained to

4. *The Extinguishment of Aboriginal Title and Land Claims.*

In *The King v. Lady McMaster*,⁵⁶ Maclean J. of the Exchequer Court set out the traditional position of the surrender by Indians to the Crown of their interest in their lands, when he stated:

The Proclamation of 1763, as has been held has the force of a statute, and so far therein as the rights of the Indians are concerned, it has never been repealed. The proclamation enacted that no private person shall make any purchase from the Indians of lands reserved to them and that all purchases must be on behalf of the Crown, etc. Throughout the subsequent years all legislation in the form of Indian Acts continued the letter and spirit of the proclamation in respect of the inalienability of Indian reserves by the Indians. . . . The policies of these administrations has been all along the same in this respect, that the Indians have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract duly ratified in a meeting of their chiefs or head men convened for the purpose.

Section 39 of the Indian Act⁵⁷ provides that an Indian band living on a reserve may surrender reserve lands only to the Crown. "Reserve" is defined by the Act⁵⁸ as a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band. Section 36 of the Act⁵⁹ deems special reserves, which are lands set apart for the use and benefit of a band in which the legal title is not vested in Her Majesty, as reserves for the purposes of the Act. Thus, according to the Act, in the instance of a special reserve that existed, the legal title to which was in Her Majesty in right of a province, surrender would have been to Her Majesty in right of Canada. In other words, insofar as Indian reserves are concerned, there can be no question that surrender may be effected only to

Indians, and lands reserved for Indians and that therefore the court had no jurisdiction. He stated: "In my view the essence of this action has nothing to do with the legal status of Indians as persons. The action is not *in personam*, it is *in rem, qua* the state of the title to the lands in question, and such are certainly not lands reserved for Indians. The phrase 'Indian lands' was used in argument in support of the preliminary objection. That phrase occurs from time to time in common usage. I know of only three classifications of land which in law could fit into that generic phrase: lands reserved for Indians (pursuant to the Indian Act), 'special reserves' (s. 36 *idem*), and 'surrendered lands', again pursuant to the Indian Act. The lands here in question are not in any of these classifications. Historically they have existed as lands of the Crown, either provincial or Imperial, and all titles and rights under our law pertaining to the lands have issued from one or other of the two fountainheads, going back in time to when they constituted *terra incognita*." With respect, Gould J. did not recognize that lands subject to native title by right of the Royal Proclamation might fit into the generic phrase, "Indian lands". His comments appear, with respect, as a complete avoidance of the result in *St. Catherine's*. There can be no doubt that proclamation lands are lands reserved for Indians.

⁵⁶ [1926] Ex C.R. 68, at p. 72.

⁵⁷ R.S.C., 1970, c. I-6.

⁵⁸ *Ibid.*, s. 2.

⁵⁹ *Ibid.*

the Crown in right of Canada and may not be effected to the Crown in right of the province. The situation is not so clear in respect of the surrender or extinguishment of aboriginal title pursuant to the Royal Proclamation. In *St. Catherine's*, judicial opinions on the identity of the correct authority to extinguish title or to accept a surrender of title ran the gamut from the Crown in right of Canada to the Crown in right of the province to both. In the Privy Council, Lord Watson stated:⁶⁰

The fact that it still possesses exclusive power to regulate the Indians' privilege of hunting and fishing cannot confer upon the Dominion power to dispose . . . that beneficial interest in the timber which has now passed to Ontario.

The foregoing dictum appears to indicate that the power to deal with the Indian hunting and fishing right, which apparently appertained to the nature of the Indians' personal and usufructuary right, as the lands were reserved as their hunting grounds, was still exclusively with the Dominion. Thus, it is submitted that only the Crown in right of Canada or Parliament can extinguish or accept a surrender of an aboriginal right insofar as proclamation lands are concerned.

In *Dominion of Canada and Province of Ontario*,⁶¹ where the Dominion had sought a declaration in the Exchequer Court entitling it to recover from Ontario a proper proportion of the annuities and other monies paid and payable under the treaty (the Northwest Angle treaty) that had figured in the *St. Catherine's* case, the Dominion argued that Ontario ought to bear the burden of the treaty as the province had substantially benefitted from the treaty. The Dominion relied upon the following dictum of Lord Watson in the *St. Catherine's* case:⁶²

Seeing that the benefit of the surrender accrues to her, Ontario must, of course, relieve the Crown, and the Dominion, of all obligations involving the payment of money which were undertaken by Her Majesty, and which are said to have been in part fulfilled by the Dominion Government.

In delivering the judgment of the Privy Council in *Dominion of Canada and Province of Ontario*, Lord Loreburn found against the Dominion and relied upon the "conclusive reasons against adapting the dictum" stated by Idington J. and Duff J. in the Supreme Court in the same case.⁶³ (Duff J. had indicated there were more facts before the court in *Province of Ontario v. Dominion of Canada* than were before the court in *St. Catherine's* and that it was doubtful that Lord Watson had intended "to pass upon any question of legal right" in making the dictum).⁶⁴ The dictum of Lord Watson aside, in deciding for the province Lord Loreburn stated:⁶⁵

⁶⁰ *Regina v. St. Catherine's Milling & Lumber Co.*, *supra*, footnote 2, at p. 60.

⁶¹ [1910] A.C. 637.

⁶² *Supra*, footnote 2, at p. 60.

⁶³ *Supra*, footnote 61, at p. 647.

⁶⁴ *Province of Ontario v. Dominion of Canada*, [1910] 42 S.C.R. 1, at p. 131.

⁶⁵ *Dominion of Canada and Province of Ontario*, *supra*, footnote 61, at p. 646.

It may be that, as a matter of fair play between the two Governments, as to which their Lordships are not called upon to express and do not express any opinion, the province ought to be liable for some part of this outlay. But in point of law, which alone is here in question, the judgment of the Supreme Court appears unexceptionable.

In arriving at the conclusion that there was no legal liability on Ontario to indemnify the Dominion, Lord Loreburn indicated that the Dominion did not act as the agent of the province in obtaining the surrender and that its role as "treaty maker" was separate from that of the province, when he stated:⁶⁶

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.

So regarding it, there does not appear sufficient grounds for saying that the Dominion Government in advising the treaty did so as agent for the province. . . . They neither had nor thought they required nor purported to act upon any authority from the Provincial Government.

The above passage is part of the *ratio decidendi* of the case and it is submitted that the passage is entirely consonant with the following reasons of Duff J. in the Supreme Court in the same case:⁶⁷

I think Mr. Newcombe's argument mainly rested, however, on his contention that in concluding the treaty, and, therefore, in undertaking the obligations referred to the Dominion acted as the agent of Ontario. This contention was based on those grounds which are: 1st, the acquiescence of Ontario; 2nd, ratification by Ontario; and 3rd, a constitutional agency arising out of the powers and duties with which the Dominion is invested and burdened by the "British North America Act".

Of the first and second of the three grounds it is, I think, enough to say that the Dominion did not in concluding the treaty profess to act as the agent of Ontario

The third ground raises a question of the utmost general importance. It is a question which, I think, must be answered in a sense opposed to Mr. Newcombe's contention. It is, I think true—as Mr. Newcombe argues—the Dominion alone was competent to authorize the treaty in question.

Duff J. concluded the above remarks by indicating that there indeed was no constitutional agency between the Dominion and the province and considering Lord Loreburn's remarks that the judgment of the Supreme Court appeared unexceptionable on the point of law, it is submitted that only the Crown in right of Canada or Parliament can extinguish or take a surrender of Indian title pursuant to the Royal Proclamation.

From the foregoing, it appears that following the Privy Council decision in *Dominion of Canada and Province of Ontario* the Domin-

⁶⁶ *Dominion of Canada and Province of Ontario*, *ibid.*, at p. 645.

⁶⁷ *Province of Ontario v. Dominion of Canada*, *supra*, footnote 64, at p. 126.

ion was left in the position where it was required to extinguish Indian title at its own expense only to substantially benefit, for the good of the country, the existing and future provinces of Canada. In this light, the terms of enactments in 1912 by Canada and Quebec extending the boundaries of Quebec become clear.⁶⁸ Section 2 of the Dominion act provided for the addition of Ungava to Quebec on conditions that included the following:

(c) That the province of Quebec will recognize the rights of the Indian inhabitants in the territory above described to the same extent, and will obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights and has obtained surrender thereof, and the said province shall bear and satisfy all charges and expenditures in connection with or arising out of such surrenders;

(d) That no such surrender shall be made or obtained except with the approval of the Governor in Council;

(e) That the trusteeship of the Indians in the said territory, and the management of any lands now or hereafter reserved for their use, shall remain in the Government of Canada subject to the control of Parliament.

Paragraph 2(c) of The Quebec Boundaries Extension Act purported to transfer or delegate to the legislature of Quebec the power to obtain surrenders of Indian title in Ungava on the condition that the province bear their expense. It was a clear attempt to develop a *quid pro quo* following the results in the *St. Catherine's* case and the *Dominion of Canada and Province of Ontario* case. Any surrender obtained by Quebec, however, was subject to the approval of the Governor in Council by virtue of paragraph 2(d) of the Act. In the light of the *Nova Scotia inter-delegation*⁶⁹ case it appears that the delegation by Parliament to Quebec of the power to obtain a surrender was *ultra vires*. This view was explicitly canvassed by Turgeon J. in *La Société de Développement de la Baie James et autres c. Chef Robert Kanatewat et autres*,⁷⁰ when he said:

On peut soutenir que par les lois de 1912, le Parlement canadien a délégué à l'autorité provinciale son pouvoir d'abolir le droit indien sur le territoire cédé, s'il existe. Le tout serait laissé à la discrétion du gouvernement provincial. Je n'ai pas à me prononcer sur la constitutionnalité d'une telle délégation, si elle existe.

Although paragraph 2(c) of the Act probably created an unconstitutional delegation, paragraph 2(d) provided that the surrenders to be obtained by Quebec were subject to the approval of the Governor in Council. The terms of the section appear too broad to be construed as authorizing Quebec to act only as an administrative agent of the

⁶⁸ S.C., 1912, c. 45, (The Quebec Boundaries Extension Act, 1912) and S.Q., 1912, c. 2., (An Act respecting the extension of the Province of Quebec by the annexation of Ungava.) Similar legislation was enacted respecting the 1912 extension of the boundaries of Ontario.

⁶⁹ *A.-G. N.S. v. A.-G. Can.*, [1951] S.C.R. 31, [1950] 4 D.L.R. 369.

⁷⁰ [1975] C.A. 166, at p. 175.

Dominion. In any event, the 1912 boundary extension legislation of the Parliament of Canada contemplated the existence of aboriginal title in northern Quebec for paragraph 2(e) provided that any lands at that time or thereafter reserved for the use of the Indians should remain under the jurisdiction of Parliament. Paragraph 2(e), as a restatement of Parliament's jurisdiction under subsection 91(24) of the B.N.A. Act, should be considered as having been superfluous and purely informative. However, section 2 of the legislation was indicative of the contemplation if not the recognition by Parliament of native title in the area, of the existence of lands reserved for the Indians in the area and of the future existence of lands reserved for Indians in the area.

No final judicial decision ever resulted in the declaration of aboriginal title in the boundaries extension area. But given the recent Baker Lake decision, it is submitted that any aboriginal title in the extended area most probably existed by virtue of the common law. Prior to 1912 the extension area was part of the Northwest Territories and was known as the District of Ungava.⁷¹ The District of Ungava on the eastern shores of Hudson Bay corresponded to the District of Keewatin (in which the Baker Lake lands are situated) on the western shores of Hudson Bay in that both were created out of Rupert's Land. In the *Baker Lake* case, Mahoney J. followed the *Sigeareak* decision and dismissed the Royal Proclamation as a source of aboriginal title in Rupert's Land, but he did not admit that the claims of the company to Rupert's Land were incompatible with the continued existence of aboriginal title there. Perhaps section 3 of The Quebec Boundaries Extension Act also recognized in an informative manner the co-existence of the company's right and aboriginal title, for it stated:⁷²

3. Nothing in this Act shall in any way prejudice or affect the rights or properties of the Hudson's Bay Company as contained in the conditions under which that company surrendered Rupert's Land to the Crown.

Article 14 of the deed of surrender states:⁷³

14. Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government: and the Company shall be relieved of all responsibility in respect of them.

This article of surrender is also found in the Imperial Order admitting Rupert's Land and the North-Western Territory into the Union.⁷⁴ Given that article 14 of the deed has been given constitutional status, paragraph 2(c) of the Boundaries Extension Act may be further ques-

⁷¹ The remaining districts are styled Franklin, Keewatin and Mackenzie.

⁷² *Supra*, footnote 68.

⁷³ R.S.C., 1970, Appendix II, No. 9.

⁷⁴ *Ibid.*

tioned for, unless the words "lands required for purposes of settlement" receive a very conservative construction, it does appear that Westminster contemplated the disposition by Canada and not a province of Indian claims to compensation for such lands. In any event, it is submitted that if aboriginal title existed in Ungava until extinguished by the James Bay Agreement it did so by virtue of the common law. Given this reasonable assumption, paragraph 2(3) of The Quebec Boundaries Extension Act appears to have treated lands subject to aboriginal title at common law as lands reserved for the Indians and also contemplated that further lands reserved for the Indians would be created as a result of future surrenders of aboriginal title in Ungava. It also appears if the foregoing is correct that the Baker Lake lands are reserved for the Indians.

5. Land Claims.

The traditional method of surrendering land subject to aboriginal title was by treaty. In return for the surrender of their native title, the native peoples were given reserves, money and other considerations. Today, the traditional treaty process is re-enacted in the land claims settlement where aboriginal title is extinguished by the Crown in consideration of land, cash, political and social concessions. In 1977, the Parliament of Canada enacted a statute⁷⁵ to give effect to the James Bay Agreement, the first land claims settlement. The settlement is considered by the Government of Canada as the model land claims settlement. The preamble of the Act is reproduced here in its entirety in order to indicate the scope of a land claims settlement:⁷⁶

WHEREAS the Government of Canada and the Government of Quebec have entered into an Agreement with the Crees and the Inuit inhabiting the Territory within the purview of the 1898 acts respecting the Northwestern, Northern and Northeastern Boundaries of the Province of Quebec and the 1912 Quebec Boundaries extension acts, and with the Inuit of Port Burwell:

AND WHEREAS the Government of Canada and the Government of Quebec have assumed certain obligations under the Agreement in favour of the said Crees and Inuit:

AND WHEREAS the Agreement provides, *inter alia*, for the grant to or the setting aside for Crees and Inuit of certain lands in the Territory, the right of the Crees and Inuit to hunt, fish and trap in accordance with the regime established therein, the establishment in the Territory of regional and local governments to ensure the full and active participation of the Crees and Inuit in the administration of the Territory: measures to safeguard and protect their culture and to ensure their involvement in the promotion and development of their culture, the establishment of laws, regulations and procedures to manage and protect the environment in the Territory, remedial and other measures respecting hydro-electric development in the Territory, the creation and continuance of institutions and programs to pro-

⁷⁵ S.C., 1977, c. 32, (James Bay and Northern Quebec Native Claims Settlement Act).

⁷⁶ *Ibid.*

mote the economic and social development of the Crees and Inuit and to encourage their full participation in society, an income support program for Cree and Inuit hunters, fishermen and trappers and the payment to the Crees and Inuit of certain monetary compensation:

AND WHEREAS the Agreement further provides in consideration of the rights and benefits set forth therein for the surrender by the said Crees, and Inuit of Quebec and the Inuit of Port Burwell of all their native claims, rights, titles and interests, whatever they may be, in and to the land in the Territory and in Quebec: AND WHEREAS Parliament and the Government of Canada recognize and affirm a special responsibility for the said Crees and Inuit:

AND WHEREAS it is expedient that Parliament approve, give effect to and declare valid the Agreement:

NOW THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

As noted in the preamble, the agreement purports to be a land claims settlement with the Cree and Inuit of Quebec. In respect of the settlement with the Inuit, article 7 of the agreement outlines certain "land regimes" that became applicable upon enactment. Article 7.1.1 states:⁷⁷

Upon the coming into force of the Agreement, Quebec shall grant to the Inuit of Quebec and to the Inuit of Port Burwell in ownership for Inuit community purposes tracts of land having an area of 3,130 square miles situated north of the 55th parallel of latitude.

The grant of Category 1 lands shall be subject to the provisions hereinafter set forth in this section.

Article 7.1.2 of the agreement provides for the establishment by special legislation of Quebec of Inuit community corporations while article 7.1.3 provides for the transfer to the community corporations of title to the aforementioned Category 1 lands allocated to each community. In respect of the jurisdiction over and restriction on the transfer of title to these lands, article 7.1.5 states:⁷⁸

Category 1 lands shall be under provincial jurisdiction. Category 1 lands or any portion thereof may not be sold or otherwise ceded except to the Crown in right of Quebec and this shall constitute a prohibition to sell or cede other than to Quebec. Subject to the provisions of this Section, an Inuit Community Corporation shall enjoy the usual rights of an owner, and more particularly, may make with any person, including non-Inuit, agreements in respect of servitudes, leases and other rights of use and occupation respecting such lands.

It will be noted that although the 1912 federal boundaries extension legislation required that management of lands reserved for the use of Indians remain with Canada, article 7.1.5 of the agreement assigns jurisdiction over section 7 lands to Quebec. In order to maintain that section 7 of the agreement stands as enacted, it would be necessary to

⁷⁷ The James Bay and Northern Quebec Agreement (Editeur Officiel du Québec, 1976), p. 95.

⁷⁸ The James Bay and Northern Quebec Agreement, *op. cit.*, *ibid.*, p. 96.

maintain that the lands referred to in section 7, which by Parliament's own legislated admission in the preamble are lands "granted to or set aside for the Inuit",⁷⁹ are not lands reserved for the Indians. The question of whether or not the enacted James Bay Agreement supercedes the 1912 legislation is superfluous, for as indicated above, paragraph 2(e) of the 1912 legislation is a re-statement of Parliament's responsibility under the B.N.A. Act, which responsibility Parliament can neither abdicate nor delegate to a provincial legislature. However, the question is academic as section 7 of the James Bay and Northern Quebec Native Settlement Act expressly repealed paragraphs 2(c), (d) and (e) of The Quebec Boundaries Extension Act, 1912. While the precise value of a provision which purports to repeal informational and, it is submitted, unconstitutional provisions may be questioned, albeit that the 1912 legislation called for orders in council approving surrenders rather than an act extinguishing title, is it the case that the repeal is a tacit recognition that the enactment of the agreement did not, in itself, spend the earlier legislation? In any event, a perusal of the agreement may leave the reader with the impression that the contracting parties believed that jurisdiction in relation to Indians and lands reserved for Indians was capable of transfer to a provincial legislature. The preamble to the agreement hints that such is the case. It includes the following statements:⁸⁰

WHEREAS it is desirable for the Province of Quebec to take measures for the organization, reorganization and good government and orderly development of the areas within the purview of the 1898 Acts respecting the Northwestern, Northern and Northeastern Boundaries of the Province of Quebec and of the 1912 Quebec Boundaries Extension Acts:

WHEREAS the Province of Quebec assumed certain obligations in favour of the Native people inhabiting the said areas (hereinafter referred to as the "Territory"):

WHEREAS the Province of Quebec now wishes to fully satisfy all of its obligations with respect to the Native people inhabiting the Territory and the James Bay Crees, the Inuit of Quebec and the Inuit of Port Burwell have consented to the terms and conditions of an agreement of settlement thereto:

WHEREAS, in particular, it is expedient to agree upon the terms and conditions of the surrender of the rights referred to in the 1912 Quebec Boundaries Extension Acts:

WHEREAS, for such purpose, it is expedient that Canada and Quebec recommend to the Parliament of Canada and the National Assembly of Quebec respectively, that the said 1912 boundaries extension acts be amended by legislation: . . .

The James Bay Agreement clearly recognized that the lands granted to the Inuit or the Cree might be adjudged as lands reserved for Indians. Section 2.10 of the agreement states:⁸¹

⁷⁹ *Supra*, footnote 75.

⁸⁰ The James Bay and Northern Quebec Agreement, *op. cit.*, footnote 77, p. 2.

⁸¹ The James Bay and Northern Quebec Agreement, *op. cit.*, *ibid.*, pp. 10-11.

The Parties hereto recognize and declare that all lands other than Category 1A lands are and shall remain under the exclusive legislative jurisdiction of the Province of Quebec.

In the event that a final judgment of a competent court of last resort declares that the whole or any part of Category II or III lands fall under the legislative jurisdiction of Canada, because of rights granted to the Native people with respect to all or any such lands or because such lands are held to be lands reserved for Indians, then any rights given to the Native people with respect to such lands shall cease to exist for all legal purposes.

Quebec and Canada undertake as of the date of the said judgment both one to the other, as well as individually and collectively, in favour of the Native people to do all things necessary and to introduce such legislative or other measures needed to enable Quebec and/or Canada, in their respective jurisdictions, to grant anew the same rights that ceased to exist but with provincial jurisdiction in the said lands. . . . Should any Category I lands, exclusive of Category 1A lands of the Crees, be held by a final judgment of a competent court of the last resort to fall under federal legislative jurisdiction, none of the rights of the Native people in regard to such lands shall be affected. However, Canada and Quebec undertake to diligently do all things necessary and to introduce such legislative or other measures required so that such lands and rights of the Native people related to such lands fall under provincial legislative jurisdiction.

The termination of any rights in virtue of this paragraph and the circumstances described herein shall not be deemed to be nor be construed as nullifying in any manner whatsoever any other rights or provisions of this Agreement.

In 1976 the National Assembly enacted an Act⁸² approving the James Bay and Northern Quebec Agreement. In 1978, the National Assembly further enacted eleven statutes to carry out the obligations undertaken by Quebec in the agreement. They are found in the Statutes of Quebec, 1977 as Chapters 87 to 98 and include the following: The Cree Villages Act, an Act respecting the Cree Regional Authority, an Act to establish Makivik Corporation, (an Inuit charitable organization), an Act respecting hunting and fishing rights in the James Bay and New Quebec territories, an Act respecting the land regime in the James Bay and New Quebec Territories, an Act to incorporate the James Bay Native Development Corporation and an Act respecting Cree and Inuit Native Persons. It is beyond the purpose of this article to undertake an extensive examination of the complex James Bay Agreement and the lengthy legislation implementing the agreement, yet at first glance, it does appear that enactments of the National Assembly which especially incorporate corporations for Indian and Inuit community purposes and which define those who qualify as beneficiaries of land claims settlements, and so forth are of questionable constitutional validity.

Before turning to examine proposed land claims settlements in the Northwest Territories and Yukon, the question arises as to the nature of the legal basis for land claims negotiations in the north.

⁸² S.Q., 1976, c. 46.

There is no federal or territorial legislation that contemplates the existence of reserved land in the north as there was concerning northern Quebec and Ontario. If the preceding arguments are accepted however (relating to aboriginal title at common law creating lands reserved for Indians) there would appear to be a sufficient legal basis for negotiations. But if the Baker Lake lands are reserved for the Indians then a jurisdictional problem may already have arisen in the Territories. If only Parliament has the constitutional authority to extinguish aboriginal title at common law as it does Indian title by virtue of the proclamation and if only Parliament or its proper delegate may extinguish the rights appurtenant to the title as suggested by Mahoney J. in *Baker Lake*, then with respect, certain statements of the learned judge bear closer examination in light of certain provisions of the Northwest Territories Act. In discussing certain legislation with a view as to whether or not the Inuit aboriginal title had been extinguished since 1970, Mahoney J. stated:⁸³

Under s. 13 of the Northwest Territories Act the Commissioner in Council has been delegated authority to make ordinances in respect, *inter alia*, of property and civil rights, the preservation of game and to open roads on public lands.

I will merely note at this point, that the Governor in Council and the Commissioner in Council have acted on their statutory authority in many areas.

Mahoney J. continued by indicating that only Parliament itself could extinguish aboriginal title, but that rights comprised in an aboriginal title could be abridged by legislation, delegated or otherwise.⁸⁴ If the purpose of the above passage was to suggest that the Commissioner in Council has, as a delegate of Parliament, perhaps abridged rights pursuant to the aboriginal title by virtue of section 13 of the Northwest Territories Act, then with respect, it is submitted, with the exception of legislation pertaining to game, that such is not the case. Section 14 of the Northwest Territories Act states:⁸⁵

14. (1) Nothing in Section 13 shall be construed to give the Commissioner in Council greater powers with respect to any class of subjects therein than are given to legislatures of the Provinces of Canada and under sections 92 and 95 of the *British North America Act, 1867* with respect to similar subjects therein described.

(2) Notwithstanding subsection (2) but subject to subsection (3) the Commissioner in Council may make ordinances for the government of the Territories in relation to the preservation of game in the Territories that are applicable to and in respect of Indians and Eskimos, and ordinances made by the Commissioner in Council in relation to the preservation of game in the Territories, unless the contrary intention appears therein are applicable to and in respect of Indians and Eskimos.

⁸³ See *Hamlet of Baker Lake et al. v. Minister of Indian Affairs and Northern Development et al.*, *supra*, footnote 31, at pp. 555 (D.L.R.), 573-574 (F.C.), 241 (W.W.R.).

⁸⁴ See text accompanying footnote 51, *supra*.

⁸⁵ *Supra*, footnote 50.

(3) Nothing in subsection (2) shall be construed as authorizing the Commissioner in Council to make ordinances restricting or prohibiting Indians or Eskimos from hunting for food, on occupied Crown lands, game other than game declared by the Governor in Council to be game in danger of becoming extinct.

Subsection 14(1) of the Northwest Territories Act indicates that the jurisdiction of the Commissioner in Council is by reference to the B.N.A. Act similar in extent to that of the provinces, although of course, territorial jurisdiction is not sovereign. Subsection 14(2) of the Act indicates that ordinances respecting the preservation of game apply unless they provide otherwise to Indians and Eskimos, subject to the provisions of subsection 14(3). Subsection 14(2) can also be read, it is submitted, as authorizing the enactment of legislation that singles out Eskimos and Indians either by legislating specifically in respect of them or exempting them from game legislation.

If the recognition of aboriginal title at Baker Lake requires a collateral recognition of the subject lands as lands reserved for the Indians, it follows, given section 13 and subsection 14(1) of the Northwest Territories Act, that the Commissioner in Council has no more jurisdiction over reserved lands than that of a province over reserved lands. Thus, any enactment of the Legislative Assembly of the Territories pursuant to section 13 of the Northwest Territories Act would, where it fell within the exclusive ambit of lands reserved for Indians, be void in respect of those lands. In order to ascertain what territorial legislation may have become ineffectual in the Baker Lake area because of the declaration of aboriginal title at Baker Lake it is necessary to examine the ambit of lands reserved for Indians. This will be done later in this article.

Having established that the declaration of aboriginal title in the Territories may pose initial jurisdictional problems, the question then arises as it did in Quebec of the constitutional implications of land claims settlements in the north. In 1978, the Government of Canada entered into an agreement in principle with the Committee for Original Peoples Entitlement to settle the land claims of the Inuvialuit of the Western Arctic. The Inuvialuit Agreement in principle is modelled on the James Bay Agreement excepting that where in the James Bay Agreement the Province of Quebec played a major role, in the Inuvialuit agreement the Northwest Territories has been relegated to a minor status. Canada retains ownership, of course, of the vast northern Crown lands in the Territories and Yukon. If enacted, the agreement in principle would provide various Inuvialuit corporations to be established under federal law with fee simple absolute title to 700 square miles of land near each of six northern communities, including sub-surface rights; fee simple absolute title to a further 800 square miles of land in the Cape Bathurst area, including sub-surface rights; and fee simple absolute title, less sub-surface rights to an additional

32,000 square miles of land that remain to be selected. Article 3(2)(d)(i) of the agreement in principle states:

Inuvialuit lands may not be sold or otherwise transferred except to Inuvialuit individuals or Inuvialuit controlled corporations, or to the Crown. For greater certainty, leases and other rights to use and occupation respecting such lands for any purpose and disposition or rights to explore, develop and produce substances which the Inuvialuit own may be made by the Inuvialuit to such persons or corporations as they may wish in accordance with the laws of general application.

The James Bay Agreement aside, the agreement in principle is unique in providing fee simple absolute ownership of land to aboriginal peoples in settlement for the surrender of aboriginal title but the agreement also provides that the fee simple shall not be alienated except to Inuvialuit individuals, Inuvialuit controlled corporations or to the Crown. In *Canadian Law of Real Property*, Anger and Honsberger state:⁸⁶

The right to freely alienate lands held in fee simple dates back to 1290 when the Imperial Statute *Quia Emptores* (1290, 8 Edw. 1, c. 1) removed all restraint on alienation of land that previously existed.

On the subject of fee simple, Halsbury states:⁸⁷

368. The owner of a fee simple has an absolute right to alienate *inter vivos* and, subject to the provisions of the Administration of Estates Act, 1925 he can dispose of it by will.

The absolute right to alienate an estate in fee simple is an incident of the estate. On first impression, the provision of the agreement in principle against free alienation of the lands granted in fee simple appears contradictory, but Halsbury states:⁸⁸

364. Nature of a fee simple absolute. An estate in fee simple absolute approaches as near to absolute ownership as the system of tenure will allow; when absolute and in possession it is the only estate of freehold which can now subsist at law. In certain cases, however, a fee simple is a fee absolute for the purpose of the Law of Property Act, 1925, notwithstanding that it is liable to be divested or to cease. Thus a fee simple which by virtue of the Land Clauses Acts, the School Sites Acts or any similar statute is liable to be divested, or a fee simple subject to a legal or equitable right of entry or re-entry, is for the purposes of the Law of Property Act, 1925, a fee simple absolute.

The above remarks state the law in England but it is submitted that here also, the estate granted to the Inuvialuit would be called a fee simple absolute even though the right to freely alienate would be encumbered because of those estates of freehold that still exist at law in the Territories, fee simple absolute is the best choice to describe that which will actually be granted.

The agreement in principle, if enacted, would modify traditional government policy respecting dispositions made of Indian lands by

⁸⁶ (1959), p. 21.

⁸⁷ Halsbury's Laws of England, (3rd ed., 1952), vol. 32, p. 263.

⁸⁸ *Op. cit.*, *ibid.*, p. 259.

changing the identity of the authority that may permit the occupation of reserved lands. The Inuvialuit would not require the permission of the Minister, as a southern band is so required, to dispose of their land but it remains the case that the lands could not be alienated to a party other than the Crown or the Inuvialuit.⁸⁹

6. *Summary.*

To date, statute and case law have recognized two kinds or species of lands reserved for the Indians—lands subject to native title by virtue of the Royal Proclamation and Indian reserves. The nature of the Indian interest in these kinds of lands aside, the prohibition of absolute free right in the Indians to alienate their interest except by surrender to the Crown has been the traditional method by which the lands have been reserved. In the *St. Catherine's* case, Lord Watson indicated that the words lands reserved for Indians are sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation. The plain meaning of the word reserved is set apart or set aside for the use of a particular person or persons. In *Baker Lake*, the court clearly found a right in the aboriginal title holders to occupy their aboriginal lands and to hunt and fish thereon, subject to legislated modifications of that title. The declaration of an aboriginal right to occupy Crown lands pursuant to an aboriginal title where the aboriginal title is encumbered so as to allow surrender to or extinguishment by the Crown or Parliament should be treated as a reservation to the Indians of the subject lands. Thus, aboriginal title at common law is another species of lands reserved for the Indians. Further, where an aboriginal title at common law is surrendered or extinguished in exchange for fee simple absolute lands encumbered so that the fee may be fully alienated only to the Crown then even where the surrender is ultimately to the Crown in right of the province if that be allowed, those lands should be treated as another species of lands reserved for Indians.

II. *The Legislative Ambit of Lands Reserved for the Indians.*

1. *The Enclave Theory.*

The proposition that the exclusive power of Parliament to legislate in relation to lands reserved for Indians should be construed broadly is known as the enclave theory. An early formulation of the

⁸⁹ It is not clear whether the agreement contemplates possible alienations to Inuvialuit who are not beneficiaries of the agreement. Also, the agreement does not speak of the "surrender" of Inuvialuit lands, but it does speak of the "purchase or transfer by the Crown" of such lands.

theory came from Prendergast J.A. of the Manitoba Court of Appeal, in *Rex v. Rogers*, when he stated:⁹⁰

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 apply 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.

In other words, provincial laws of general application do not apply, in respect of certain matters, to Indian Reserves.

The foremost exponent of the enclave theory presently sitting on the bench is the Chief Justice of Canada. In *Cardinal v. Attorney General of Alberta*,⁹¹ Justice Laskin as he then was, delivered the dissenting judgment of Hall, Spence and Laskin JJ. while the majority judgment of Fauteux C.J., Abbott, Martland, Judson, Ritchie and Pigeon JJ. was delivered by Martland J. The question was whether or not a game provision of the Wildlife Act⁹² (Alberta) applied to the matter of the sale of moose meat on a reserve by a resident treaty Indian to a non-Indian. The majority held the provision applicable. In the course of his judgment Laskin J. stated the following on the nature of subsection 91(24):⁹³

I think it is important here, no less than in relation to other heads of federal power, to scotch any notion that s. 91(24) exists by subtraction from some larger head of provincial authority, e.g. property and civil rights in the Province, and hence is of limited scope, leaving an area of competence to the Province where there has been no federal legislation.

The real perspective supporting this view is described in the following words of the present Chief Justice.⁹⁴

The significance of the allocation of exclusive legislative power to Parliament in relation to Indian Reserves merits emphasis in terms of the kind of enclave that a Reserve is.

and:⁹⁵

It is a social and economic community unit, with its own political structure as well according to the prescriptions of the Indian Act.

and:⁹⁶

The present case concerns the regulation and administration of the resources of land comprised in a Reserve, and I can conceive of nothing more integral to that land as such. If the federal power given by s. 91(24) does not preclude the

⁹⁰ [1923] 3 D.L.R. 414.

⁹¹ [1974] S.C.R. 695.

⁹² R.S.A., 1970, c. 391.

⁹³ *Cardinal v. Attorney General of Alberta*, *supra*, footnote 91, at p. 718.

⁹⁴ *Cardinal v. Attorney General of Alberta*, *ibid.*, at p. 716.

⁹⁵ *Cardinal v. Attorney General of Alberta*, *ibid.*, at p. 716.

⁹⁶ *Cardinal v. Attorney General of Alberta*, *ibid.*, at p. 717.

application of such provincial legislation to Indian Reserves, the power will have lost the exclusiveness which is ordained by the Constitution.

In evaluating the remarks of Mr. Justice Laskin, a leading authority said:⁹⁷

If the reserve is considered a "social and economic community unit with its own political structure as well", to use a description in the dissenting judgment of Mr. Justice Laskin, then few provincial laws would apply on reserves. Most provincial laws would relate to some aspect of the social, economic, community or political life of the reserve. If the reserve is considered simply as land, then the only provincial laws which would not apply on the reserve are laws dealing with the use of land.

While it has been pointed out that subsection 91(24) of the B.N.A. Act creates two (and not one) subject matters ("Indians and Lands Reserved for Indians" and not "Indians on lands reserved for the Indians"),⁹⁸ the two subject matters are logically inseparable in that there cannot be lands reserved for Indians unless there are Indians while the reverse may not be true. The Indian Act is clearly legislation pursuant to both subject matters but the Indian Act does not define a reserve as a "social and economic community unit with its own political structures". It defines a reserve as land.⁹⁹ It follows that Parliament legislates in relation to reserve by virtue of lands reserved for Indians. If reserves should be considered as social and economic community units with their own political structures as well, it is perhaps too neat to assert that most provincial laws of general application would not apply on reserves because they would touch social and economic spheres. This necessarily assumes that communities differ from each other in a marked and thorough way. This is not always the case.

In the course of his dissenting judgment, Laskin J. said the following:¹⁰⁰

Since federal power in relation to "lands reserved for the Indians" is independent and exclusive, its content must embrace administrative control and regulatory authority over Indian Reserves. Hence, not only provincial game laws but other provincial regulatory legislation can have no application, of its own force, to such Reserves at least where it is sought to subject Indians thereon to such legislation.

It is submitted that this passage creates, as does the dissenting judgment generally, the head, Indians on lands reserved for Indians from the head, lands reserved for Indians. To maintain that there is inherent in lands reserved for Indians a jurisdiction solely applicable to Indians

⁹⁷ D. Sanders, *Hunting Rights—Provincial Laws—Application on Indian Reserves* (1973-74), 38 Sask. L. Rev. 234, at p. 239.

⁹⁸ K. Lysyk, *The Unique Constitutional Position of the Canadian Indians* (1967), 45 Can. Bar Rev. 513, at pp. 514-515.

⁹⁹ *Supra*, footnote 57, s. 2.

¹⁰⁰ *Cardinal v. Attorney General of Alberta*, *supra*, footnote 91, at p. 718.

on Indian reserves is superfluous because the constitution assigns exclusive jurisdiction to Parliament over Indians by the first part of the legislative expression "Indians, and Lands Reserved for the Indians". The ambit to legislate in relation to Indians and lands reserved for Indians can be no greater than the added ambits of "Indians" and "lands reserved for Indians" where those two ambits are considered separately. If a substantially different legal regime can apply to Indians while on the reserve (other than a regime legislated pursuant to "Indians") from that while off the reserve, as Laskin J. would have it, it necessarily follows that this extra special Indian status or jurisdiction is constitutionally derived from lands reserved for Indians. This requires finding that jurisdiction over land can supply a constitutional rationale for legislation that is unique to our land law. In other words, because Parliament may legislate exclusively for reserves as social and economic units, should jurisdiction over public lands as set out in section 92 of the B.N.A. Act confer a similar right on the provinces to legislate for non-natives and natives that live on public lands?

The wide ambit of Parliament's exclusive jurisdiction in respect of reserves as suggested by Laskin J. was predicted on the exclusive jurisdiction of Parliament over lands reserved for Indians. Should other species of lands reserved for Indians such as lands reserved by the Royal Proclamation or lands reserved by virtue of the common law also be enclaves? If so, the validity of much territorial legislation in respect of the Baker Lake lands could be questioned given the present proviso in the Northwest Territories Act that the legislative authority of the territorial assembly is to be construed with reference to the authority of a provincial legislature. The theoretical extension of the enclave theory to aboriginal lands is not inconceivable. In the course of his judgment in *Cardinal*, Laskin J. indicated that Indian reserves were to be distinguished from lands to which Indians have a mere right to access (such as Crown lands subject to a statutory Indian right to hunt and fish) in that "Indians have at least a right of occupancy of Reserves".¹⁰¹ If the existence of an Indian right of occupancy is the test for ascertaining whether or not certain lands are reserved for Indians then it would appear that aboriginal lands might merit consideration as enclaves.

2. *The Narrow Ambit.*

The majority decision delivered by Martland J. in the *Cardinal* case turned on a construction of section 12 of the Natural Resources Agreement which was given constitutional status by the British North America Act, 1930.¹⁰² Martland J. found that the Natural Resources

¹⁰¹ *Cardinal v. Attorney General of Alberta*, *supra*, footnote 91, at p. 721.

¹⁰² 20-21 Geo. V, c. 26 (U.K.); R.S.C., 1970, Appendix II, No. 25.

Agreement bound Indians in Alberta to the provincial law of general application concerning game, whether on or off the reserve, unless the game was hunted for support and subsistence and not for trafficking as in the *Cardinal* case. Although the case was decided on the basis of the Natural Resources Agreement, Martland J. did express an opinion on the constitutional power of a province to enact legislation applicable to lands reserved for Indians, when he said:¹⁰³

. . . It is well established, as illustrated in *Union Colliery Company v. Bryden*, that a Province cannot legislate in relation to a matter exclusively assigned to the Federal Parliament by s. 91. But it is also well established that Provincial legislation enacted under a head of s. 92 does not necessarily become invalid because it affects something which is subject to Federal legislation. A vivid illustration of this is to be found in the Privy Council decision a few years after the *Union Colliery* case in *Cunningham v. Tomey Homma*, which sustained Provincial legislation pursuant to s. 92(1), which prohibited Japanese, whether naturalized or not, from voting in Provincial elections in British Columbia.

A Provincial Legislature could not enact legislation in relation to Indians, or in relation to Indian Reserves, but this is far from saying that the effect of s. 91(24) of the British North America Act, 1867 was to create enclaves within a Province within the boundaries of which Provincial legislation could have no application. In my opinion, the test as to the application of Provincial legislation within a reserve is the same as with respect to its application within the Province and that is that it must be within the authority of s. 92 and must not be in relation to a subject matter assigned exclusively to the Canadian Parliament under s. 91. Two of those subjects are Indians and Indian Reserves, but if Provincial legislation within the limits of s. 92 is not construed as being legislation in relation to those classes of subjects (or any other subject under s. 91) it is applicable anywhere in the Province, including Indian Reserves, even though Indians or Indian Reserves might be affected by it. My point is that s. 91(24) enumerates classes of subjects over which the Federal Parliament has the exclusive power to legislate, but it does not purport to define areas within a Province within which the power of a Province to enact legislation, otherwise within its powers, is to be excluded.

Martland J. did not dispute the notion of the exclusive federal power to legislate in relation to Indians and lands reserved for Indians. He recognized however that both Indians and land reserved for Indians are subject to a double incidence of law, in that provincial laws of general application affecting Indians and their lands (and thus not aimed specifically at Indians or their lands) are valid unless they are repugnant to federal law legislated in relation to subsection 91(24). It is implicit in Martland J.'s judgment that the ambit of the exclusive power of Parliament in relation to subsection 91(24) is drawn more tightly than in Laskin J.'s judgment. According to Martland J., Indian reserves are not enclaves. Professor D. Sanders has stated the following of Martland J.'s judgment:¹⁰⁴

Mr. Justice Martland's judgment is consistent with what may be a dominant Canadian viewpoint that reserves are merely separate geographical areas, separated land.

¹⁰³ *Cardinal v. Attorney General of Alberta*, *supra*, footnote 91, at p. 702.

¹⁰⁴ D. Sanders, *op. cit.*, footnote 97, at p. 241.

Does case law confirm the proposition that the exclusive jurisdiction of Parliament in respect of lands reserved for Indians extends solely to land law? A leading case in the area is *Corporation of Surrey et al. v. Peace Arch Enterprises Ltd and Surfside Recreations Ltd.*¹⁰⁵ In that case, where certain Indians had conditionally surrendered part of a reserve for the purpose of leasing, the plaintiff municipality sought to subject the lessee Peace Arch and appellant Surfside, firstly, to municipal by-laws providing for zoning, specifications for buildings, water services and sewage disposal and secondly, to requirements of the provincial Health Act¹⁰⁶ and regulations thereunder. The municipality had argued in a lower court that provincial and municipal laws applied to the lands in suit because the lands had ceased, upon surrender, to be an Indian reserve within the meaning of the Indian Act but the Court of Appeal held that the surrender was only conditional, within the meaning of the Indian Act and that as such the lands remained, at least, lands reserved for Indians. The finding of the court was stated twice when the following was said:¹⁰⁷

In my view the zoning regulations passed by the municipality, and the regulations passed under the *Health Act*, are directed to the use of lands. It follows, I think, that if these lands are "lands reserved for the Indians" within the meaning of that expression as found in sec. 91(24) of the B.N.A. Act, 1867 that provincial or municipal legislation purporting to regulate the use of these "lands reserved for the Indians" is an unwarranted invasion of the exclusive legislative jurisdiction of Parliament to legislate with respect to "lands reserved for the Indians".

and:¹⁰⁸

My conclusion is that the exclusive legislative jurisdiction over the land in question remains in the Parliament of Canada, and that the provincial legislation (including municipal by-laws) which lays down rules as to how these lands shall be used, is inapplicable.

Peace Arch appears to indicate that the exclusive jurisdiction of Parliament extends at least to laws relating to land use. Also, *Peace Arch* did not narrow down this exclusive jurisdiction to laws relating to land use by Indians of reserved lands.

In *R. v. Sinclair*,¹⁰⁹ the Manitoba Provincial Court expressly adopted the above reasoning in *Peace Arch* when it held sections of the provincial Fire Prevention Act¹¹⁰ that restrict land use in specified areas of the province *ultra vires* in respect of Indian reserves. The

¹⁰⁵ [1970] 74 W.W.R. 380.

¹⁰⁶ R.S.B.C., 1960, c. 170.

¹⁰⁷ *Corporation of Surrey et al. v. Peace Arch Enterprises Ltd and Surfside Recreations Ltd*, *supra*, footnote 105, at p. 383.

¹⁰⁸ *Corporation of Surrey et al. v. Peace Arch Enterprises Ltd and Surfside Recreations Ltd*, *ibid.*, at p. 387.

¹⁰⁹ [1978] 6 W.W.R. 37, [1978] 4 C.N.L.B. 150.

¹¹⁰ R.S.M., 1970, c. F80.

rationale of the court was that the province had no authority to legislate in relation to lands reserved for Indians. The court also indicated that the general prohibition against setting dangerous fires contained in the Manitoba legislation applied to Indians and non-Indians alike for any immunity against the prohibition arose from the special status of reserved lands and not the status of the individual. Thus, section 88 of the Indian Act which on certain conditions subjects Indians (but not Indian lands) to provincial laws of general application was of no assistance to the Crown.

In *Millbrook Indian Band v. Northern Counties Residential Tenancies Board et al.*,¹¹¹ where a non-Indian resident of an Indian reserve was a tenant of a business carried on by the band and had applied to a provincial tenancies board for relief respecting her tenancy, the Supreme Court of Nova Scotia quashed the order of the board granting the relief requested. The order of the board was made pursuant to the provincial Residential Tenancies Act.¹¹² In the opinion of the court, the Nova Scotia Act governed the landlord-tenant relationship which in turn was related to land use. The court adopted the view taken in *Peace Arch* that jurisdiction relating to the land use of Indian reserves remained exclusively within the power of Parliament by virtue of subsection 91(24) and held the Nova Scotia statute inapplicable to the lands in suit. The court took a similar view to the Manitoba court in *Sinclair* in holding section 88 of the Indian Act inapplicable to Indian lands. On appeal to the Court of Appeal the case was decided on an issue not discussed in the lower court and the Court of Appeal elected not to consider the reasons given by the lower court in determining the case.¹¹³ (The Appeal Court held that because the tenant lacked the Minister's permit to reside on the reserve, as required by the Indian Act, her tenancy agreement with the band was void.)

While the applicability of provincial landlord and tenant legislation to reserved lands remains unsettled in Nova Scotia, *Re Park Mobile Home Sales Ltd* and *Le Greely* has established the law in British Columbia.¹¹⁴ There, the Court of Appeal upheld a decision of the County Court that a section of the provincial Landlord and Tenant Act¹¹⁵ restricting the right of a landlord to raise rent on residential premises was not legislation in relation to the use of Indian land. Where reserve lands had been sub-let by a non-Indian landlord to a

¹¹¹ (1978), 84 D.L.R. (3d) 174, [1978] 4 C.N.L.B. 34.

¹¹² S.N.S., 1970, c. 13.

¹¹³ (1978), 93 D.L.R. (3d) 230, [1979] 4 C.N.L.B. 59.

¹¹⁴ (1978), 85 D.L.R. (3d) 618, [1978] 4 C.N.L.B. 31.

¹¹⁵ S.B.C., 1974, c. 45.

non-Indian tenant, a dispute that arose between the landlord and tenant was decided by the provincial rentalsman in accordance with the British Columbia Act. As noted, both courts held the impugned section of the provincial Act applicable and Farris C.J.B.C. indicated that the Act was not directed at any particular class of land but rather was concerned with the contractual rights of landlords and tenants as established under their tenancy agreements. As the court did not characterize the impugned laws in *Park Mobile* as being in relation to reserved lands nor as affecting reserved lands, but recognized the decision in *Peace Arch* as one where the legislation actually affected the land in a direct sense, the only conclusion that can be drawn from comparing the Nova Scotia and British Columbia decisions is that landlord and tenant law in the two jurisdictions appears to belong to two different branches—land law and contract respectively—of the law.

In *Palm Dairies Ltd v. The Queen in Right of Canada et al.*,¹¹⁶ reserve lands were surrendered to the Crown in trust and then leased to Sarcee Developments Ltd., an Alberta corporation wholly controlled by members of the band. Where the plaintiff company, Palm Dairies claimed outstanding payments for improvements made to the lands and sought to register a builder's lien and *lis pendens* (pursuant to the Indian Act) against Sarcee's interest in the land, Primrose J. of the Federal Court upheld the argument accepted in *Peace Arch* that the exclusive legislative jurisdiction of Parliament in relation to Indian lands nullified provincial legislation purporting to lay down rules as to how the lands in suit were to be used. In the absence of any federal legislation imposing a duty on an officer of the federal Crown to file a builder's lien against the subject lands, the court did not grant the mandamus sought by Palm Dairies.

In *Western International Contractors Ltd v. Sarcee Development et al.*,¹¹⁷ on similar facts to the *Palm Dairies* case but where the lien sought to be registered was pursuant to the provincial Builder's Lien Act,¹¹⁸ the Supreme Court of Alberta (Appellate Division) proceeded on the basis that *Peace Arch*, *Cardinal* and certain provisions of the Indian Act invalidated the application of the Alberta statute to the lands in suit. The court was, however, prepared to find the Builder's Lien Act applicable if the actual interest given under the lease to Sarcee Developments could be shown to be divorced and separate from the land itself and the court did find that the nature of the leasehold interest of the company sought to be attached by the plain-

¹¹⁶ (1979), 91 D.L.R. (3d) 665, [1979] 2 C.N.L.R. 43.

¹¹⁷ [1979] 3 W.W.R. 631, [1979] 2 C.N.L.R. 107.

¹¹⁸ R.S.A., 1970, c. 35.

tiff was separate from the residual interest reserved to the Indians. Morrow J. (Haddad J.A. concurring) stated:¹¹⁹

When the provisions of the Builder's Lien Act are placed alongside those of the Indian Act, therefore, the question is whether the provincial legislation can be in any way construed as affecting or purporting to place a charge on the reversionary interest which, being held for the benefit of the Sarcee Band, must be considered as Indian lands within the meaning of s. 91(24) of the B.N.A. Act or whether it only purports to place a charge on the tenants' or lessees' interest, i.e., Sarcee Developments' interest. If the latter, then, Sarcee Developments not being an Indian within the Indian Act and not being Indian lands of itself, can be considered as subject to provincial legislation.

It thus appears that the meaning of lands reserved for Indians can be narrowed so that exclusive federal jurisdiction pertains only to the proprietary or quasi-proprietary beneficial interest that Indians have in their lands. Where a non-Indian proprietary interest in land, such as a leasehold estate, co-exists with an Indian remainder it then appears that the non-Indian interest is an interest in land without being an interest in lands reserved for Indians. But Morrow J. did indicate that any charge, pursuant to provincial legislation, against the reversionary Indian interest would be null and void. The result in *Western International* does not appear to be entirely consistent with that in *Peace Arch* but the court did distinguish *Peace Arch* on the grounds that in the British Columbia case the use of the land was in issue. It is respectfully submitted that if improvements made by a non-Indian in possession by virtue of a lease are not subject to provincial laws respecting land use then it is incongruous that provincial legislation securing such improvements should be applicable. In holding that the lien was not registerable, Prowse J.A. (dissenting) was of the opinion that the Builder's Lien Act would more directly affect lands reserved for Indians than legislation affecting land use. He further indicated that even if the Builder's Lien Act was valid as being *qua* the lands in question then certain provisions of the Indian Act prohibiting the seizure of Indian real property were sufficient to displace the Alberta act which he interpreted as essentially providing a remedy in the form of execution.

In *Bell v. Bell*,¹²⁰ the Ontario Supreme Court was requested by an applicant joint tenant to grant, under the provincial Partition Act,¹²¹ an order for the partition or sale of land situated on an Indian Reserve. The respondent ex-husband objected that the exclusive jurisdiction of Parliament in relation to Indian lands precluded the application of the Ontario act to the lands in suit. The court character-

¹¹⁹ See *Western International Contractors Ltd v. Sarcee Developments et al.*, *supra*, footnote 117, at pp. 649 (W.W.R.), 124 (C.N.L.R.).

¹²⁰ (1977), 78 D.L.R. (3d), 227.

¹²¹ R.S.O., 1970, c. 338.

alized the Partition Act as relating to the property and civil rights of property owners and further stated that the statute was of general application and not aimed at Indians. The court was also of the opinion that section 88 of the Indian Act expressly accommodated the application of provincial laws of general application to Indians. Thus, in the view of the court, the Partition Act validly affected Indian property "owners" even where property was located on a reserve, provided that it did not conflict with provisions of the Indian Act, in which case the latter statute would prevail. The court could find no provision in the Indian Act that purported to occupy the field of partition or sale but did admit that any order made pursuant to section 2 of the Partition Act empowering a partition or sale of reserve land to anyone other than the band or a band member (or to the band or a band member without the approval of the Minister) would be ineffective as a contravention of section 24 of the Indian Act which provides for the transfer of reserve land with the Minister's consent only to Indians or the band. The court distinguished the *Peace Arch* case on the grounds firstly, that the impugned provincial and municipal legislation in that case were not laws of general application and secondly, that federal and provincial legislation in respect of Indian lands were in direct conflict. While the court in *Peace Arch* did indicate that the impugned by-laws and regulations there explicitly spelt out the manner in which the lands in suit were to be used, with respect, there was no explicit holding that the regulations considered were not laws of general application and even if such were the case, there was no finding of a direct conflict between federal and provincial legislation respecting the use of the Indian lands. The case was decided on the grounds that the exclusive authority assigned by Imperial statute to Parliament precluded the operation of provincial legislation purporting to relate to Indian lands even where the Dominion had chosen not to occupy the field.

In *Sandy v. Sandy*¹²² an Indian wife sought the division of a matrimonial home located on a reserve pursuant to provisions of the provincial Family Law Reform Act.¹²³ The home was situated on lands allocated to the husband by the band with the approval of the Minister. In this case, the Ontario High Court held that the land provisions of the Family Law Reform Act were unenforceable without contravening the Indian Act as any order to divide or transfer property would affect the licence of the husband granted pursuant to the Indian Act. The *Peace Arch* case was not referred to in *Sandy v. Sandy*. The case proceeded on the basis that insofar as the law of domestic relations might affect the holding of real property, principles of

¹²² 25 O.R. (2d), 192, [1980] 2 C.N.L.R. 93.

¹²³ S.O., 1978, c. 2.

paramountcy and overlapping jurisdiction were applicable. On appeal,¹²⁴ although the Ontario Court of Appeal affirmed that the Family Law Reform Act is inoperative with respect to lands duly occupied, under the Indian Act, by an Indian, the court did indicate that while a spouse was not entitled to a share of the real property of the husband, she was entitled to a payment in compensation thereof.

The above cases indicate that the courts are prepared to find that the exclusive jurisdiction of Parliament in relation to Indian lands pertains to land use. The cases also indicate that the courts are prepared to find provincial legislation that appears, on first glance, to relate to land use or at least land law, as legislation that only incidentally affects the use of land. This approach allows for the settlement of a maximum amount of equity upon competing interests but may, if carried too far, confuse the state of the law respecting Indian lands. This was hinted at by Mahoney J. in his recent judgment in *Town of Hay River v. The Queen et al.*¹²⁵ In that case, a municipality created pursuant to the territorial Municipal Ordinance¹²⁶ disputed the legality of the creation of an Indian reserve within its municipal boundaries. The order in council creating the reserve purported to be pursuant to the Territorial Lands Act and the Indian Act. Mahoney J. found the order valid on the grounds that the authority to set apart Crown lands for an Indian reserve in the Territories remains based entirely on the Royal Prerogative but then concurred that the location of a reserve within a territorial municipality might prove difficult when he stated the following:¹²⁷

The only basis for complaint in which the plaintiff might conceivably have *locus standi* flows from the fact that lands within its boundaries were chosen at all. This is based on the notion that provisions of the Municipal Ordinance, R.O.N.W.T. 1974, c. M-15, on the one hand, and the Indian Act on the other, dealing with such matters as the legislative authorities vested in the band council and municipal council, the obligation to provide services and liability to and exemption from property taxes are incompatible. I accept that co-existence of a municipality and Indian reserve over the same territory could prove vexing to all concerned but that is not necessarily to say that the arrangement would render the lands unsuitable as a reserve.

Given that the territorial assembly is empowered, subject to any Act of Parliament, to legislate for a list of subject matters roughly equivalent to those assigned to the provinces by the B.N.A. Act, Mahoney J.'s remarks apply equally to a reserve similarly located in southern Canada.

¹²⁴ (1979), 27 O.R. (2d) 248, [1980] 2 C.N.L.R. 101.

¹²⁵ [1980] 1 F.C. 262.

¹²⁶ R.O.N.W.T., 1974, c. M-15.

¹²⁷ See *Town of Hay River v. The Queen et al.*, *supra*, footnote 125, at p. 267.

If lands subject to aboriginal title are also reserved for the Indians then territorial assemblies would lack jurisdiction respecting the land use of aboriginal lands, even in the absence of competing federal legislation such as the Indian Act. For instance, if the Baker Lake lands are reserved, then the territorial assembly and its delegate, the Hamlet of Baker Lake, have no jurisdiction respecting the use of these lands.¹²⁸ Thus, in the absence of a general legislative provision referentially incorporating territorial laws of general application respecting land use, it appears that certain provisions of territorial legislation, such as the Area Development Ordinance,¹²⁹ the Environmental Protection Ordinance,¹³⁰ the Fire Prevention Ordinance,¹³¹ Forest Protection Ordinance,¹³² would probably be invalid *qua* Indian

¹²⁸ The vast majority of lands in the Territories are territorial lands, which is to say that ownership of the lands is vested in the Crown in right of Canada. Territorial lands are governed for the most part by the Territorial Lands Act. Paragraph 13(s) of the Northwest Territories Act does not delegate to the territorial assembly a head equivalent to subsection 92(5) of the British North America Act (management and sale of public lands belonging to the province) but rather only, "the closing up, varying, opening, establishing, building, management or control of any roads, streets, lanes or trails on public lands". Section 46 of the Northwest Territories Act does provide, however, for a class of lands subject to the control of the Commissioner in Council. Section 46 of the act states:

46. The following properties, namely,

- (a) lands acquired before, on or after the 1st day of April, 1955 with territorial funds;
- (b) public lands, the administration of which has before, on or after the 1st day of April 1955 been transferred by the Governor in Council to the Commissioner;
- (c) all roads, streets, lanes and trails on public lands, and
- (d) lands acquired by the Commissioner pursuant to tax sale proceedings,

are and remain vested in Her Majesty in right of Canada, but the right of the beneficial use of the proceeds thereof is hereby appropriated to the Commissioner and is subject to the control of the Commissioner in Council; and any such lands, roads, streets, lanes or trails may be held by and in the name of the Commissioner for the beneficial use of the Territories.

The application of many ordinances respecting land management and land use is thus restricted to paragraph 13(s) lands, Commissioner's lands and privately owned lands. The jurisdiction of the Commissioner in Council relating to privately owned lands derives from paragraph 13(l) of the Act which delegates jurisdiction over property and civil rights in the Territories. It should be noted that if territorial lands were transferred to the control of the Territorial Assembly, and it is only from such a transfer in whole or in part that the Legislative Assembly can hope to finance responsible government, then the problem of territorial jurisdiction *vis à vis* lands reserved for Indians would be of significant importance in the Territories. As lands reserved for Indians are assigned by the constitution to Parliament, control of these lands could not be allocated to the territorial assembly if the Territories were to become a province.

¹²⁹ R.O.N.W.T., c. A-5.

¹³⁰ R.O.N.W.T., c. E-3.

¹³¹ R.O.N.W.T., c. F-5.

¹³² R.O.N.W.T., c. F-8.

lands. It further appears from certain remarks of Lord Watson in the *St. Catherine's* case that the revenues that might arise from such lands would be available only to Parliament. He stated:¹³³

The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered.

It follows that only Parliament could derive revenue by licensing a particular use of such lands.

Finally, it is submitted that the above approach concerning the constitutional status of aboriginal lands and the consequent inapplicability of territorial legislation relating to the use of such lands does have some merit when applied to lands reserved by a land claims agreement. The authors of the Inuvialuit Agreement in Principle may have taken the precaution of ensuring the lands allocated to the Inuvialuit by the final agreement will be subject to applicable territorial laws of general application. Article 7(3) of the agreement states:

Except as otherwise provided in this Agreement, Inuvialuit lands received by the Inuvialuit pursuant to paragraphs 7(1)(a) and 7(1)(b) shall be subject to the laws of general application from time to time in force, particularly those pertaining to environmental protection. Where appropriate, certain federal and territorial laws and regulations which are now applicable only to Crown lands shall be amended in order to make them applicable to Inuvialuit lands as well, and the proposed amendments to such laws and regulations shall be amended in the Final Agreement.

3. Summary.

Modern settlements of land claims whereby aboriginal rights in land are extinguished or surrendered for cash, land and political consideration are fundamentally similar to the traditional treaties whereby similar rights were extinguished but in return for less valuable consideration. Since the *Calder* case, the concept that native title arises at the common law has been accepted by the courts. Where native title is declared to exist and includes a right of occupancy by aboriginal peoples to their aboriginal lands as at Baker Lake, it is submitted that the subject lands have been categorized by implication as lands reserved for Indians. Where aboriginal title at common law is surrendered or extinguished in exchange for lands to be held by aboriginal groups but alienable only to the Crown, whether in right of the Dominion or the province, those lands that have been so set apart should also be treated as lands reserved for Indians. Such lands need not be classified as Indian reserves—their southern counterparts—as the legislation creating them will undoubtedly address

¹³³ See *St. Catherine's Milling and Lumber Company v. The Queen*, *supra*, footnote 2, at p. 60.

the matters relating to reserve lands presently provided for in the Indian Act. The settlement of northern claims does not, of course, require judicial declarations of aboriginal titles before negotiations can be commenced for the surrender of individual aboriginal titles. The James Bay Agreement and the Inuvialuit Agreement in Principle were both concluded without final judicial determinations of aboriginal title in Northern Quebec or the Western Arctic.

If it is the case that aboriginal lands at common law and lands set apart for Indians by statute in consideration of the extinguishment of aboriginal title are both lands reserved for Indians then the consequent effect on the present and future jurisdictions of Yukon and the Northwest Territories should be considered. The jurisdictions of both territorial assemblies while not sovereign resembles those of the provinces as set out in the B.N.A. Act. As lands reserved for Indians is not a subject matter assigned by Parliament to territorial jurisdiction it follows that territorial legislatures may not legislate in relation to such lands. While the Supreme Court did indicate in *Cardinal* that lands reserved for Indians are not enclaves withdrawn from provincial jurisdiction, the *Peace Arch* case indicated that Parliament's exclusive jurisdiction in respect of reserved lands did encompass land use. Thus it would appear that territorial legislation and municipal by-laws respecting land use would be *ultra vires* insofar as such legislation purported to be in relation to Indian lands.

In any event, it is submitted that as settlements of the land claims of northern Canadian aboriginal peoples are now in sight, consideration should be given to the full impact of these settlements on territorial jurisdictions. If vast areas of Canada's north are to be allocated to native peoples then it may appear that any hopes of the territorial assemblies to exercise revenue-producing jurisdiction over such lands will be finally dashed. As aboriginal peoples and lands constitute a relatively small proportion of the populations and territories of southern jurisdictions, the jurisdictional impact of subsection 91(24) in the south is minimal. But in the north and especially in the Northwest Territories where more than one half of the population is aboriginal, subsection 91(24), provided land claims settlements such as the Inuvialuit Agreement in Principle are enacted, is of significant importance. This article has only touched on some legal implications relating to the land regimes contemplated by future settlements. It should be noted that the Inuvialuit Agreement in principle also contemplates provisions affecting such fields as education, health, housing, wildlife management, taxation, economic development and regional government which are all fields partially or wholly under the present delegated jurisdiction of the Territorial Assembly. The real possibility of substantial federal legal regimes in the north based on race is emerging most ironically at the time when the territorial assembly has

come under the control of the northern aboriginal peoples. Should the above suggested circumstances come about, the continued political viability and relevance of the present territorial regime, premised on the traditional Canadian pattern of constitutional development, may well be questioned.
