BOYER v. CANADA AND 488619 ONTARIO INC.

Federal Court of Appeal, Heald, Marceau and MacGuigan JJ., March 26, 1986

W.B. Henderson, for the appellant
B. Hobson, Q.C., for the respondent Crown
T.F. Baxter, for the respondent 488619 Ontario Inc.

The appellant Indian band applied for a declaration that a lease of reserve land entered into, in December 1983, between the Crown and an Ontario corporation, purportedly under the authority of section 58(3) of the Indian Act, R.S.C. 1970, c.I-6, was void and of no effect. Possession of the reserve land in question had been allotted in 1973 to [C], an Indian, by the band council with the approval of the Minister and a certificate of possession was issued. In 1980 [C] applied to the band council for permission to lease the land, for purpose of development, to a corporation in which he and his wife owned all the outstanding shares. A resolution granting permission was adopted.

The appellants submitted that because neither the band nor the band council had consented to the lease, it was void and of no effect. The respondents disputed the contention that consent was required and in the alternative argued that such consent was, in any event, given by the 1980 resolution.

Held: Appeal dismissed.

1. The 1980 resolution was, at the most, one of principle, which may be taken as a sort of consent to the land being leased, but not a consent to a particular lease. The 1980 resolution cannot be seen as an approval of the lease executed in 1983.

2. The Minister is not required to secure the consent of the band or band council before executing a lease pursuant to s.58(3).

3. The Crown when acting under s.58(3) is not under any fiduciary obligation to the band. The duty of the Minister under s.58(3) is to the Indian in lawful possession of the land and at whose request he is acting.

4. Allotment of a piece of land in a reserve shifts the right to the use and benefit thereof from being the collective right of the band to being the individual and personalized right of the locatee. The interest of the band, in the technical sense, has disappeared or is at least suspended.

MARCEAU J.: This appeal arises from a judgment of the trial division which dismissed an application, brought by an Indian Chief and the other members of his Band, for a declaration that a lease of reserve land entered into between Her Majesty and an Ontario Corporation, purportedly under the authority of the Indian Act, R.S.C. 1970, c.I-6, was void and of no effect. Its scope and difficulty are not immediately apparent, since it presents no real problem as to the facts and involves the construction of only one short subsection of the Act. It so happens, however, that the provision contained in that subsection is not only fundamental from a practical point of view, but it concerns one of the main features of the legislative scheme adopted in the Act and quite surprisingly it has, apparently, never been scrutinized yet by any judicial authority.

This provision of the Act, on the proper understanding of which the solution of the whole controversy herein depends, is contained in section 58(3). It needs to be seen and analysed in relation with the provisions contained in the remainder of the section, so I reproduce it in its entirety:

> 58.(1) Where land in a reserve is uncultivated or unused, the Minister may, with the consent of the council of the band,
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> (a) improve or cultivate such land and employ persons therefor, and authorize and direct the expenditure of so much of the capital funds of the band as he considers necessary for such improvement or cultivation including the purchase of such stock, machinery or material or for the employment of such labour as the Minister considers necessary;
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> (b) where the land is in the lawful possession of any individual, grant a lease of such land for agricultural or grazing purposes or for any purpose that is for the benefit of the person in possession; and

(c) where the land is not in the lawful possession of any individual, grant for the benefit of the band a lease of such land for agricultural or grazing purposes.

(2) Out of the proceeds derived from the improvement or cultivation of lands pursuant to paragraph (1)(b), a reasonable rent shall be paid to the individual in lawful possession of the lands or any part thereof, and the remainder of the proceeds shall be placed to the credit of the band, but if improvements are made on the lands occupied by an individual, the Minister may deduct the value of such improvements from the rent payable to such individual under this subsection.

(3) The Minister may lease for the benefit of any Indian upon his application for that purpose, the land of which he is lawfully in possession without the land being surrendered.

(4) Notwithstanding anything in this Act, the Minister map, without a surrender

(a) dispose of wild grass or dead or fallen timber, and

(b) with the consent of the council of the band, dispose of sand, gravel, clay and other non-metallic substances upon or under lands in a reserve , or, where such consent cannot be obtained without undue difficulty or delay, may issue temporary permits for the taking of sand, gravel, clay and other non-metallic substances upon or under lands in a reserve, renewable only with the consent of the council of the band,

and the proceeds of such transactions shall be credited to band funds or shall be divided between the band and the individual Indians in lawful possession of the lands in such shares as the Minister may determine.

It will be recalled that under the Indian Act a reserve is "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" (s.2); that, although the management of the reserve and moneys arising therefrom is the concern of the Minister of Indian Affairs (hereinafter referred to as "the Minister"), the elected Council of the Band for whose benefit it was set apart, has broad bylaw powers to regulate the use of land and life within the reserve, in more or less the same way as a municipal council (s.81); that only members of the Band are entitled to reside on the reserve (s.28). It will also be recalled that in principle "lands in a reserve cannot be sold, alienated, leased or otherwise disposed of until they have been surrendered to Her Majesty by the Band for whose use and benefit in common the reserve was set apart" (s.37); but that an Indian may be "lawfully in possession of land in a reserve" if, "with the approval of the Minister, possession of the land has been allotted to him by the Council of the Band" (s.20).

To understand and address the issue to be determined on this appeal, there is no necessity to be aware of all of the particular circumstances in which it arose. The case proceeded in the Trial Division on the basis of an agreed statement of facts in which detailed information can easily be found, but I think I can very well limit myself here to an overall review of the factual context even if I have to add some further details later in the course of dealing with the various submissions of the parties.

John Corbiere is a member of the Batchewana Indian Band for the benefit of which Rankin Location Indian Reserve No. 15A was set apart. He has been the Chief of the Band for many years and it is said that under his leadership, conditions on the reserve have considerably improved. Corbiere is in "lawful possession" of a piece of land located within the reserve. It was allotted to him, in 1973, by the Band Council with the approval of the Minister, and a certificate of possession was then issued confirming his rights thereon. At the time of the allotment, the land was wild and swampy, but its location alongside the St. Mary's River was ideal for development. This indeed was the intention of Corbiere from the outset, and, in 1980, he applied to the Band Council for permission to lease the land , for purpose of development , to a corporation in which he and his wife owned all the outstanding shares. That corporation, the numbered company respondent herein, had been formed by him in order to facilitate financing. A resolution granting permission was adopted at the time; however, Corbiere's project was still vague and a lot had to be done before it could proceed. Various feasibility and other studies were required, financing had to be arranged, decisions had to be made as to the extent and type of development. For the next two years, Corbiere worked on his project, keeping in constant contact with officials of the Department of Indian Affairs (hereinafter sometimes referred to as "the Department"), and, finally, in April 1982, feeling he was at last ready, he applied to the Minister for a lease of the land to his company pursuant to s.58(3) of the Act. A lease was drafted and sent to the Band Council for comment. The Band responded by disputing the Minister's authority to enter into such a lease without its formal consent, adding a few objections regarding some aspects of the development of the project. Corbiere decided thereupon to modify his plans by replacing a housing complex with a full service marina, and in September 1983, a revised lease giving effect to the new plans was sent

to the Band Council, with a request that further comment, if any, be made before December 1. On November 24, the Council passed a resolution again disputing the Minister's authority and formally disapproving the lease and then, through its solicitor, it requested a further extension of time in which to respond. The Department felt it was not proper to delay any longer and the lease was executed on December 9, 1983. It was in April 1984 that the proceedings herein were commenced.

As I indicated at the outset, the relief sought in the action is a declaration that the lease entered into, on December 4, 1983, between Her Majesty the Queen as represented by the duly authorized representative of the Minister of Indian Affairs and Northern Development and 488619 Ontario Inc., a Corporation carrying on business as Alcor Developments, is void and of no effect. The lease would be so void and of no effect, in the plaintiffs-appellant's submission, because neither the Band nor the Band Council has consented to it. The defendants-respondents dispute the contention that consent was required and in the alternative argue that such consent was in any event, given.

It may be appropriate, so as to focus on the real issue, to dispose immediately of this alternative position taken by the respondents that consent was in fact given. It is, of course, the 1980 resolution passed by the Band Council purporting to give Corbiere, then still Chief of the Band, permission to lease his land to his company, which is invoked and relied upon. The position, in my view, is untenable. This 1980 resolution was, at the most, one of principle, which may be taken as a sort of consent to the land being leased, but obviously not a consent to a particular lease. If a consent is required, it can certainly not be one limited to principle, it must be an informed and particularized one. The 1980 resolution cannot be seen as an approval of the lease executed on December 4, 1983. I have no doubt that the only question that has to be determined in order to dispose of the case is whether or not the validity of this lease depended on the consent of the Band or its Council.

In support of their contention that consent was indeed required, the appellants advance two alternative arguments which must be considered in turn.

(1) Their first argument is that the only provision of the Act under which a lease such as the one here in question can be executed by the Minister is that contained in s.58(1)(b), which makes the consent of the Band a formal and express requirement. Section 58(3) pursuant to which the Minister purported to be acting in fact had no application.

For convenience, I reproduce again the relevant portions of section 58:

> 58.(1) Where land in a reserve is uncultivated or unused, the Minister may, with the consent of the council of the band,
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> (a) ...
>
> (b) where the land is in the lawful possession of any individual, grant a lease of such land for agricultural or grazing purposes or for any purpose that is for the benefit of the person in possession; and
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> (2) …
>
> (3) The Minister may lease for the benefit of any Indian upon his application for that purpose, the land of which he is lawfully in possession without the land being surrendered.

Section 58(1)(b) and not section 58(3) would be the operative provision, according to the argument, because the land to be leased was unused and section 58(3), by a sort of negative inference, only applies to developed and used land. I fully agree that the land was unused; I do not share the view of the learned trial judge that the clearing work done on part of the land and the feasibility studies conducted thereon constituted use within the meaning of the section; I understand the word "use" therein as implying occupation or utilization or exploitation of some sort. However, I see no reason here to resort to such an extraordinary means of interpretations a so-called negative inference. There is absolutely no need to look behind the words to find the respective sphere of application of the two provisions. Indeed, s.58(3) only governs when there is a request by the Indian who is in lawful possession of the land, while s.58(1)(b) is obviously concerned exclusively with situations where the lawful possessor of the land is indifferent to its use, which is why s.58(2) on the one hand contemplates the possibility that improvements on the land be made by the Minister himself and on the other provides that in all cases only part of the proceeds, to be calculated on the basis of a reasonable rent, will go to the Indian in lawful possession. I have no hesitation in saying that s.58(1)(b) was not applicable here: the lease could only be executed under s.58(3).

The second argument relied on by the appellants in the event that s.58(3) would be found to be applicable is twofold: consent is required under that provision, they say, either by necessary implication resulting from the context or as an effect of the fiduciary obligation of the Crown toward the Band.

a) In the first branch of this second argument, the appellants again plead for a construction of the provision that would disregard the apparent meaning of Parliament's words. There are, it is true, in the cases, a few examples where a court has taken upon itself to correct the wording of a provision by reading into it something missing or deleting something redundant. But these examples are quite rare and present instances where the drafting mistakes were quite obvious and the context made it clear that the words used did not convey accurately or completely what was intended (see: E.A. Driedger, Construction of Statutes, 2nd ed., p.128 et seq.). There is nothing to suggest that a drafting mistake map have been made here. If one looks at the strict context in which the provision was enacted, one is certainly not easily led to believe that failure to refer to the consent of the Band in s.58(3) was due to an oversight. As noted above, three of the four subsections of section 58 deal with various situations where the Minister is empowered to enter into agreements affecting reserve lands, the first, third and fourth, the second being only an addition to the first, and a reference to the consent of the Band is made in two of them: the contrast is so striking that it could not have passed unnoticed. And if one looks at the broader context there is, in my view, no more reason to think that the provision, taken as it is, does not fit into the scheme of the Act, which leads me to the appellants' main point.

Under the scheme of the Indian Act, say the appellants, the interest of a locatee, such as Corbiere, in his or her parcel of reserve land, is subordinate to the communal interest of the Band itself, and the allocation of possessory rights to Band members does not suppress the recognized interest of the Band in the development of allotted lands; besides, the rule is that non-Indians cannot have possession of reserve lands unless these lands have been surrendered by the Band and except for a few limited purposes set out in the Act, the Minister is unable to authorize non-Indian use or occupation of reserve land without consent of the Band or its Council. If, they say, s.58(3) was construed literally and made applicable to any land developed or undeveloped, those principles could be disregarded and the scheme of the Act itself would thereby be defeated, which is precisely the case here, since the lease is made in favour of a corporation, which is a non-Indian entity notwithstanding the status of its shareholders.

I am afraid my understanding of the scheme of the Indian Act does not correspond totally with that of the appellants I have already referred to a few sections of the Act where the words and expressions used in s.58(3) are defined. It is in fact in these sections and a few others that the basic features of the legislation, with respect to reserve lands, are to be found. I see them as follows. The Band for whose use and benefit a "tract of land" has been set apart by Her Majesty no doubt has an interest in those lands, since it has the right to occupy and possess them. It is an interest which belongs to the Band as a collectivity, and the right to occupy and possess, of which it is comprised, is a collective right. This interest can be extinguished by a voluntary surrender by the Band to the Crown or by expropriation for a public purpose, but it cannot be alienated. The Band, however, acting through its Council, has the power to allot, with the approval of the Minister, parcels of land in its reserve to Band members. The right of a Band member in the piece of land which is allotted to him and of which he has "lawful possession", although in principle irrevocable, is nevertheless subject to many formal limitations. The member is not entitled to dispose of his right to possession or lease his land to a non-member (s.28), nor can he mortgage it, the land being immune from seizure under legal process (s.29), and he may be forced to dispose of his right, if he ceases to be entitled to reside on the reserve (s.25). These are all undoubtedly limitations which make the right of the Indian in lawful possession very different from that of a common law owner in fee simple. But it must nevertheless be carefully noted that all of those limitations have the same goal: to prevent the purpose for which the lands have been set apart, i.e., the use of the Band and its member, from being defeated. None of them concerns the use to which the land may be put or the benefit that can be derived from it. The land being in the reserve, its use will, of course, always remain subject to provincial laws of general application and the zoning bylaws enacted by the Band Council, as for any land in any municipality where zoning bylaws ate in force, but otherwise I do not see how or why the Indian in lawful possession of land in a reserve could be prevented from developing it as he wishes. There is nothing in the legislation that could be seen as "subjugating" his right to another right of the same type existing simultaneously in the Band Council. To me, the "allotment" of a piece of land in a reserve shifts the tight to the use and benefit thereof from being the collective tight of the Band to being the individual and personalized right of the locatee. The interest of the Band, in the technical and legal sense, has disappeared or is at least suspended. This being my understanding of the scheme of the Act, not only do I disagree with the contention that the principles embodied therein require that the words "with the consent of the Band" be read into the provision of s.58(3), I think that those

principles would be frustrated by doing so. (On the nature of locatee's right to possession and the scheme of land tenure under the Act, see the comments of both Judson J., and Cartwright J., in R. v. Devereux, [1965] S.C.R. 567, and also those of Le Dain J., in R. v. Smith, [1981] 1 F.C. 346; 34 N.R. 91, at p. 406 F.C. [[1980] 4 C.N.L.R. 29] a decision reversed in appeal but on very different grounds [[1983] 3 C.N.L.R. 161].

b) In the second branch of their argument the consent of the Band was required for a lease under subsection 58(3), the appellants speak of "an incident of the Crown's fiduciary obligations arising out of the inherent nature of Indian title", and they quote the Supreme Court decision in Guerin v. Canada [1984] 2 S.C.R. 335; 55 N.R. 161 [sub nom. Guerin v The Queen, [1985] 1 C.N.L.R 120], as their authority.

I will say first that I have some difficulty in understanding how that submission can have a teal role to play in the context of the action as instituted. The relief sought is not damages but a declaration that the lease is null and of no effect. I fail to see how the breach of a fiduciary duty on the part of the Minister in entering into a contract could have the effect of nullifying the contract itself when all legal requirements for its execution have been complied with. But in any event, I simply do not think that the Crown, when acting under section 58(3), is under any fiduciary obligation to the Band. The Guerin case was concerned with unallotted reserve lands which had been surrendered to the Crown for the purpose of a long term lease or a sale under favourable conditions to the Band, and as I read the judgment it is because of all of these circumstances that a duty, in the nature of a fiduciary duty, could be said to have arisen: indeed, it was the very interest of the Band with which the Minister had been entrusted as a result of the surrender and it was that interest he was dealing with in alienating the lands. When a lease is entered into pursuant to s.58(3), the circumstances are different altogether: no alienation is contemplated, the right to be transferred temporarily is the right to use which belongs to the individual Indian in possession and no interest of the Band can be affected (I repeat that of course I am talking about interest in a technical and legal sense; it is obvious that morally speaking the Band may always be concerned by the behaviour and attitude of its members). In my view, when he acts under s.58(3), the duty of the Minister is, so to speak, only toward the law: he cannot go beyond the power granted to him, which he would do if, under the guise of a lease, he was to proceed to what would be, for all practical purposes, an alienation of the land (certainly not the case here, the lease being for a term of 21 years with no special renewal clause); and he cannot let extraneous consideration enter into the exercise of his discretion, which would be the case if he was to take into account anything other than the benefit of the Indian in lawful possession of the land and at whose request he is acting. The duty of the Minister is simply not towards the Band.

The conclusion to me is clear. Bearing in mind the structure of the Indian Act and the clear wording of s.58(3) thereof, there is no basis for thinking that the Minister is required to secure the consent of the Band or the Band Council before executing a lease such as the one here in question. It seems that the Act which has been so much criticized for its paternalistic spirit has nevertheless seen fit to give the individual member of a Band a certain autonomy, a relative independence from the dicta of his Band Council, when it comes to the exercise of his entrepreneurship and the development of his land.

This appeal has, in my view, no merit and should be dismissed with costs.

MACGUIGAN J.: I agree with the disposition of this appeal proposed by my colleague, Mr. Justice Marceau, and also with his reasons for that disposition. My comments are therefore of a supplementary nature.

This case embodies a new version of the age-old problem of the person and the state, as particularized in the microcosm of an Indian community under the Indian Act ("the Act").

The appellants challenge the validity of a lease entered into between the Crown as lessor and a numbered Ontario corporation as lessee, made for the benefit of the Indian lawfully in possession of the land in question ("the locatee") and upon his application under s.58(3) of the Act. Although the sole shareholders of the numbered corporation are the locatee and his wife, the case was argued on the basis that s.58(3) of the Act allows the Minister to grant a lease to a non-Indian. The challenge to the lease was based solely on whether the Crown was entitled to grant such a lease without the consent of the Indian band, which had not been obtained here.

The locatee received a notice of entitlement to the lands in 1973 and since that time had them cleared and surveyed, and also arranged for feasibility studies for the development of a full service marina. Ministry officials having suggested that a corporate lease was the most appropriate

vehicle for his development purposes, he made an application for a 21-year lease on April 6, 1982, which was approved by the Minister on December 9, 1983.

The appellants admitted in argument that there are two plausible interpretations of s.58(3): the first, for which they contended on the basis of the overall concert of the statute, is that, since s.58(1), which requires the consent of the band council, deals with reserve land that is uncultivated or unused, the powers of the Minister in the absence of consultation under s.58(3) must be limited to reserve land that is cultivated or used; the second, which was adopted by Cullen J., at trial, is that s.58(3) has application in any situation where the locatee makes application as opposed to the ministerially initiated situations covered by s.58(1).

In my view, the appellants are entirely right in contending that the words of section 58 cannot be interpreted outside of the context of the Act as a whole. Turning to the scheme of the Act, then, as the appellants view it, we encounter the fundamental principle that a reserve must be preserved intact for the whole band, regardless of the wishes of any individual Indian as to the disposition of the allotment of which he is a locatee. The Crown has a fiduciary duty with respect to the whole band, which could not be fulfilled if the effect of s.58(3) were to allow the Crown and the locatee to by-pass the band council in all circumstances. Such an unlimited power would fail to protect the Indian collectivity. The appellants also argued that, increasingly, it is accepted that the spirit of native culture is a communal rather than an individualistic one, and that the Act should be interpreted to this effect as fully as possible.

The limitations on individual Indians, in favour of the collectivity, are well set out by Judson J., for the majority in R. v. Devereux, (1965) S.C.R. 567, 572, a decision on which the appellants rely:

> The scheme of the Indian Act is to maintain intact for bands of Indians, reserves set apart for them regardless of the wishes of any individual Indian to alienate for his own benefit any portion of the reserve of which he may be a locatee. This is provided for by s.28(1) of the Act. If s.31 were restricted as to lands of which there is a locatee to actions brought at the instance of the locatee, agreements void under s.28(1) by a locatee with a non-Indian in the alienation of reserve land would be effective and the whole scheme of the Act would be frustrated.
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> Reserve lands are set apart for and inalienable by the band and its members apart from express statutory provisions even when allocated to individual Indians. By definition (s.2(1)(o)) "reserve" means
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> > a tract of land, the legal title to which is vested in Her Majesty, that has Seen set apart by Her Majesty for the use and benefit of a band.
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> By s.2(1)(a), "band" means a body of Indians
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> > (i) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart....
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> By s.18, reserves are to be held for the use and benefit of Indians. They are not subject to seizure under legal process (s.29). By s.37, they cannot be sold, alienated, leased or otherwise disposed of, except where the Act specially provides, until they have been surrendered to the Crown by the band for whose use and benefit in common the reserve was set apart. There is no tight to possession and occupation acquired by devise or descent in a person who is not entitled to reside on the reserve (s.50, subs.(1)).
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> One of the exceptions is that the Minister may lease for the benefit of ally Indian upon his application for that purpose, the land of which he is lawfully in possession without the land being surrendered (s.58(3)). It was under this section that the Minister had the power to make the ten-year lease to the defendant which expired on November 30, 1960. (Emphasis added).

However, even in the course of this analysis, which might otherwise support the appellants' case, Judson J., describes the subsection in question here, 58(3), as an "exception" to the generally communal approach. Admittedly, it was used in the Devereux case to grant a lease for land that had been cultivated and used, so that the conclusion, which I take to be a judgment on fact and law together, is not a binding precedent; but its reasoning is nevertheless not helpful to the appellants in the final analysis, not is the scheme of the statute itself in any way decisive in the appellants' favour.

Moreover, the other cases cited by the appellants ate not determinative of the point in issue. Guerin et al. v. Canada and National Indian Brotherhood, [1984] 2 S.C.R. 335, 55 N.R. 161 [[1985] 1 C.N.L.R. 120], and Kruger et al. V. Canada (1985), 58 N.R. 241, 17 D.L.R. (4th) 591 [[1985] 3 C.N.L.R. 15], both support the notion of an equitable or fiduciary duty in the Crown to deal with Indian lands for the benefit of Indians. But, as words of Dickson J., (as he then was) in the Guerin case supra, at pp.174-175, [p.136 C.N.L.R.] make clear, this is in the context of preventing exploitation of Indians by others:

> The purpose of this surrender [in s.37] is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.

Is there such a danger of exploitation of Indians in a lease for Indian lands, for the benefit and at the request of an Indian locatee, to a corporation with exclusively Indian shareholders that the Crown alone, as opposed to the Crown with the consent of the band council, cannot adequately safeguard against it?

The appellants' analysis of the scheme of the Act can just as easily be turned around. The limitation on alienation by locatees of allotted lands is itself limited to alienation strictly understood. It does not extend to one-year permits to non-Indians “to occupy or use a reserve or to reside or otherwise exercise rights on a reserve" (s.28(2)). It is also common ground that it does not extend to longer leases under s.58(3) where the land is cultivated and used. The most that can be said for the appellants' argument is that the limitation on individual alienation might be extended by analogy. But so might the absence of limitation in the opposite instances. In plain matter a neither the scheme of the Act nor the case law is decisive.

Should analogy then be drawn to the community principle or to the personal principle? In the absence of any clear guide from statute or precedent, a court must I believe look for guidance to the words in the preamble of the Constitution Act, 1867 that Canada is to have "a Constitution similar in principle to that of the United Kingdom".

Rand J., made bold to say in Saumur v. City of Quebec and Attorney-General for Quebec, [1953] 2 S.C.R. 299, 329, that:

> Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are the of the primary conditions of their community life freedoms which are at once necessary attributes and modes self-expression of human beings and it is in the circumscription of these liberties by the creation of civil rights in persons who may be injured by their exercise, and by the original necessary within a legal order circumscription of these sanctions of public law, that the positive law operates. What we realize is the residue inside that periphery.

Abbott J., went further in obiter dicta in Switzman v. Elbling and Attorney-General of Quebec, [1957] S.C.R. 285, 328:

> Although it is not necessary, of course, to determine this question for purposes of the present appeal, the Canadian Constitution being declared to be similar in principle to that of the United Kingdom, I am also of opinion that as our constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate.

This is similar in approach to the Western tradition succinctly expressed by the French philosopher Jacques Maritain, in Man and the State (Chicago, University of Chicago Press, 1951), at p. 13, "...man is by no means for the State. The State is for man"

However, even the more traditional and much more limited view of liberty espoused by A.V. Dicey would in this instance lead to the same result. Although for Dicey the extent of liberty depends upon what is left permissible by law, what is characteristic of the English Constitution is the way in which the Courts maintain the traditional sphere of freedom, Introduction to the Study of the Law of the Constitution (10th Ed. 1959) (E.C.S. Wade), p. 201:

> Where...[as in England] the right to individual freedom is part of the constitution because it is inherent in the ordinary law of the land, the right is one which can hardly be destroyed without a thorough revolution in the institutions and manners of the nation,

Even on this interpretation, the freedom of the individual person in Canada, with the constitution similar in principle to that of the United Kingdom, is prior to the exigencies of the community.

In fact, where group rights are, exceptionally, given priority, the Canadian Constitution so provides specifically. Education rights possessed by "any Class of Persons in the Province at the Union" are maintained by section 93 of the Constitution Act, 1867 and by section 29 of the Constitution Act, 1982. Language rights are protected by section 133 of the 1867 Act and under sections 16-22 of the 1982 Act. In the latter Act affirmative action programs are protected by section 15 and minority language education rights by section 23. The Charter of Rights and Freedoms is itself a fundamental affirmation of the rights and freedoms of the individual person. In sum, in the absence of legal provisions to the contrary, the interests of individual persons will be deemed to have precedence over collective rights. In the absence of law to the contrary, this must be as true of Indian Canadians as of others.

The appellants' final argument was that the Indian Act must be interpreted in the light of the preference of Indian culture for group rights. Unfortunately for this contention, there is no evidence in the record to establish it or indeed with respect to Indian culture at all, and it is not a matter of which a court could simply take judicial notice.

Finally, it is highly material that the valid concerns of the Indian community against adverse land use are well protected by its powers under s.81(g). The fact that the band council did not choose to exercise its zoning powers and probably cannot now do so retroactively is no reason to create a broader alternative right.