REGINA v. ISAAC

(1975), 13 N.S.R. (2d) 460 (also reported: 9 A.P.R. 460)

Nova Scotia Supreme Court, Appeal Division, MacKeigan C.J.N.S., Coffin, Cooper and Macdonald JJ.A., 19 November 1975

FISH AND GAME - TOPIC 884

INDIAN AND ESKIMO RIGHTS - HUNTING BY INDIANS ON RESERVES - VALIDITY OF PROVINCIAL REGULATORY LEGISLATION - AN INDIAN WAS CHARGED AND CONVICTED OF POSSESSION OF A RIFLE CONTRARY TO S.150 OF THE NOVA SCOTIA LANDS AND FORESTS ACT - THE INDIAN HAD POSSESSION OF THE RIFLE ON THE CHAPEL ISLAND INDIAN RESERVE, CAPE BRETON, NOVA SCOTIA - THE NOVA SCOTIA COURT OF APPEAL STATED THAT S.150 OF THE LANDS AND FORESTS ACT WAS A LAW REGULATING LAND USE - THE NOVA SCOTIA COURT OF APPEAL STATED THAT THE PROVINCE OF NOVA SCOTIA DID NOT HAVE THE LEGISLATIVE POWER TO REGULATE THE USE OF LAND ON INDIAN RESERVES - THE NOVA SCOTIA COURT OF APPEAL STATED THAT HUNTING WAS A USE OF LAND AND ITS RESOURCES - SEE PARAGRAPHS 20 AND 141 - THE NOVA SCOTIA COURT OF APPEAL DECLARED THAT S.150 OF THE LANDS AND FORESTS ACT DID NOT APPLY TO AN INDIAN WHILE PRESENT ON AN INDIAN RESERVE AND QUASHED THE CONVICTION OF THE INDIAN.

CONSTITUTIONAL LAW - TOPIC 6354

ENUMERATION IN S.91 OF THE BRITISH NORTH AMERICA ACT, 1867 - INDIANS AND LANDS RESERVED FOR INDIANS - USE OF LAND IN RESERVES - THE NOVA SCOTIA COURT OF APPEAL STATED THAT A PROVINCE DOES NOT HAVE THE LEGISLATIVE POWER TO REGULATE THE USE OF LAND IN INDIAN RESERVES - SEE PARAGRAPH 14 - THE NOVA SCOTIA COURT OF APPEAL STATED THAT INDIANS RAVE A RIGHT TO USE RESERVE LAND AND ITS RESOURCES AND REFERRED TO SUCH A RIGHT AS A USUFRUCTUARY RTGHT - SEE PARAGRAPHS 18 AND 140.

This case arose out of a charge against an Indian of possession of a rifle contrary to s.150 of the Nova Scotia Lands and Forests Act. The Indian had possession of the rifle on the Chapel Island Indian Reserve, Cape Breton, Nova Scotia. The trial court convicted the accused.

On appeal to the Nova Scotia Court of Appeal by way of stated case the appeal was allowed and the conviction of the accused was quashed. The Nova Scotia Court of Appeal stated, that s.150 of the Nova Scotia Lands and Forests Act did not apply to an Indian while present on an Indian reserve. The Nova Scotia Court of Appeal referred to s.91(14) of the British North America Act, 1867, the Royal Proclamation respecting Indians 1763, and the historical hunting and fishing rights of Indians on Indian reserves. The Nova Scotia Court of Appeal stated that hunting by Indians on Indian reserves was a use of land and its resources and that the Province of Nova Scotia did not have the legislative power to regulate the use of land on Indian reserves.

CASES JUDICIALLY NOTICED:

R. v. McPherson, [1971] 2 W.W.R. 640 (Man. C.A.), ref'd. to. [para. 9].
Daniels v. White and The Queen, [1968] S.C.R. 517, ref'd to. [para. 9].
Prince and Myron v. The Queen, [1964] S.C.R. 82, ref'd to. [para. 9].
Cardinal v. The Attorney General of Alberta, [1974] S.C.R. 695, folld. [para. 10] & ref'd to. [para. 93].
R. v. Jim (1915), 26 C.C.C. 236, ref'd to. [para. 11].
R. v. Rodgers (1923), 40 C.C.C. 51 (Man. C.A.), ref'd to. [para. 11]
Corporation of Surrey v. Peace Arch Enterprises Ltd. (1970), 74 W.W.R. 380 (B.C.C.A.), ref'd to. [para. 11]
R. v. Peters, 57 W.W.R. 727 (Y. Terr. C.A.), folld. [para. 15].
The Natural Parents v. The Superintendent of Child Welfare et al., 6 N.R. 491, folld. [para. 15 & 132].
R. v. Sikyea, [1964] S.C.R. 642, refd to. [para. 16]
R. v. George, [1966] 3 C.C.C. 137 (S.C.C.), ref'd to. [para. 16 & 104 & 106].
Daniels v. White, [1968] S.C.R. 517, ref'd to. [para. 16]
Madden v. Nelson and Fort Sheppard Ry. Co., [1899] A.C. 626, ref'd to. [para. 22]
Re Birth Registration No. 67-09-022272, [1974] 3 W.W.R. 363, ref'd to. [para. 33]
Calder et al. v. The Attorney-General of British Columbia, [1973] S.C.R. 31-3, ref'd to. [para. 40].
Johnson and Graham's Lessee v. McIntosh (1823), 3 Wheaton 543 (21 U.S.), refd to. [para. 41].
Worcester v. Georgia (1832), 6 Peters 515 (31 U.S.), ref'd to. [para. 41].
United States v. Santa Fe Pacific Ry. Co. (1941), 314 U.S, 339, ref'd to. [para. 44].

St. Catharines Milling and Lumber Company v. The Queen (1889), 14 App. Cas. 46 (P.C.), refd to. [para. 45].
R. v. Wesley, [1932] 4 D.L.R. 774 (Alta. C.A.), ref'd to. [para. 50].
R. v. White and Bob (1965) 50 D.L.R. (2d) 613, ref'd to. [para. 56] & folld. [para. 121 & 113].
R. v. Syliboy (1928), 50 C.C.C. 389 (N. S . Co. Ct.), ref'd to. [para. 64 & 129].
R. v. Simon (1958), 124 C.C.C. 110 (N.B.C.A.), ref'd to. [para. 65].
R. v. Francis (1969), 10 D.L.R. (3d) 189 (N.B.C.A.) ref'd to. [para. 65].
Cardinal v. Attorney-General of Alberta (1973) 40 D.L.R. (3d) 553: [1974] S.C.R., folld. [para. 118].
District of Surrey v Peace Arch Enterprises Ltd. (1970) W.W.R. 380 (B.C.C.A.), dist. [para. 122].
Spooner Oils Ltd. et al. v. Turner Valley Gas Conservation Board, [1933] 4 D.L.R. 545, [1933] S.C.R. 629 dist. [para. 123].
Decks McBride Ltd. v. Vancouver Associated Contract Ltd., [1954] 4 D.L.R. 844, dist. [para. 123].
Western Canada Hardware Co. Ltd. v. Farrelly Bros. Ltd., [1922] 3 W.W.R. 1017, 70 D.L.R. 480, dist. [para. 123].
R. v. Lady McMaster, [1926] Ex.C.R. 68, folld. [para. 130].
Calder v. Attorney General of B.C., [1973] S.C.R. 3 folld. [para. 130].
St. Catherine's Milling and Lumber Company v. The Queen (1888), 14 App. Cas. 46, folld. [para. 132]
Isaac et al. v. Davey et al. (1975), 5 O.R. (2d) 610 folld. [para. 142].
Corporation of Surrey v, Peace Arch Enterprises Ltd. (1970), 74 W.W.R. 380, ref'd to. [para. 100].
R. v. Jim (1915), 26 C,C.C. 236, ref'd to. [para. 104].

STATUTES JUDICIALLY NOTICED:
Lands and Forests Act, R.S.N.S. 1967, c.163, s.150 [para. 5].
British North America Act, 1867, s.91(24) [para. 102].
Indian Act, R.S.C. 1970, c.I-6, s.88 [para. 31].
Royal Proclamation Respecting Indians 1763, R.S.C. 1970, Appendices 123 to 129 [para. 130].

BRUCE E. WILDSMITH, for the appellant,
MARTIN E. HERSCHORN, for the respondent,

This appeal was heard by the Nova Scotia Court of Appeal on March 21, 1975. Judgment was delivered by the Nova Scotia Court of Appeal on November 19, 1975, and the following opinions were filed:

MacKEIGAN, C.J.N.S. - see paragraphs 1 to 87,
COFFIN, J.A. - see paragraphs 88 to 112,
COOPER, J.A. - see paragraphs 113 to 133,
MacDONALD, J.A. - see paragraphs 134 to 144.

PART I

1. MacKEIGAN, C.J.N.S.: A question not previously determined by this Court or by the Supreme Court of Canada here falls to be decided. Does a provision of a Nova Scotia Act regulating the hunting of game apply to an Indian hunting on an Indian reserve? In my opinion we should answer "no" to that question.

2. The matter comes to us by stated case following the conviction of the appellant by His Honour Judge Leo McIntyre, Q.C., in Provincial Magistrate's Court at Port Hawkesbury on a charge that he unlawfully had in his possession a rifle upon a road at or near Barra Head, Nova Scotia, contrary to s.150(1)(b) of the *Lands and Forests Act.,* R.S.N.S. 1967, c.163.

3. The parties agree that the appellant committed the act described in the charge, that the road passed through or by a resort of moose or deer (a fact which should have been alleged in the charge), that the road was within the bounds of the Barra Head or Chapel Island Indian Reserve, Richmond County, Cape Breton, and that the appellant was an Indian. The learned magistrate asked:

> Was I correct in holding that the provisions of the *Lands and Forests Act.,* and in particular s.150(1)(b) thereof, apply to an Indian while present upon a reserve as defined by the *Indian Act*, R.S.C. 1970, c.I-6?

4. The question asked is wider in scope than the charge and should be amended to read:

> Was I correct in holding that s.150(1)(b) of the *Lands and Forests Act* applies to an Indian while present upon an Indian reserve?

5. Section 150(1)(b) is undoubtedly a hunting or game law. It appears in Part III of the Act, a part entitled "Game - Moose, Caribou and Deer". Subsections (1) and (2) of s.150 (as amended by Statutes of 1969, c.55, s.3) read:

> (1) Except as provided in this Section, no person shall take, carry or have in his possession any shot gun cartridges loaded with ball or with shot larger than AAA or any rifle,
>
> (a) in or upon any forest, wood or other resort of moose or deer; or
>
> (b) upon any road passing through or by any such forest, wood or other resort; or
>
> (c) in any tent or camp or other shelter (except his usual and ordinary permanent place *of* abode) in any forest, wood or other resort.
>
> (2) Any person may hunt with a shotgun using cartridges loaded with ball or with one rifle during the big game season for which he holds a valid big game license.

6. Should the Nova Scotia Act be treated as if it contained an unwritten clause exempting Indians hunting on Indian reserves? The Act on its face applies to all persons and all places in Nova Scotia and is manifestly within the province's legislative power under s.92 of the *British North America Act, 1867.* If such an exemption is to be implied, it must come from Parliament's exclusive authority over "all Matters" coming within the class of subject described in s.91(24) as "Indians, and Lands reserved for the Indians". Putting the question slightly differently - does the federal exclusivity of power over Indians and their lands exclude this provincial game law from applying to an Indian reserve?

7. If, as I shall suggest, the game law is a law relating to the use of land and is so excluded by the federal exclusivity respecting reserve land, I must then consider whether s.88 of the *Indian Act* strengthens the provincial position, or whether it is merely declaratory of the application of provincial laws to Indians, as distinct from their non-application to reserve land and its use. Section 88 decrees, with significant exceptions, that "all laws of general application from time to time in force in any province are applicable to and in respect of Indians".

8. The issue was settled for Manitoba, Saskatchewan and Alberta by constitutional amendment when natural resources were transferred to those provinces in 1930. Almost identical agreements between Canada and the three provinces were made part of the constitution by the *British North America Act, 1930* (which, with the agreements, appears in R.S.C. 1970, Appendix No. 25, pp. 365 ff.). Section 12 of the Alberta and Saskatchewan Agreements (s.13 of the Manitoba Agreement) provides:

> 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

9. The scope of the hunting rights thus confirmed to Indians by the Agreements was defined in cases such as:

> *Regina v. McPherson*, [1971] 2 W.W.R. 640 (Man. C.A.);
> *Daniels v. White and the Queen*, [1968] S.C.R. 517;
> *Prince and Myron v. The Queen*, [1964] S.C.R. 82.

10. Recently in *Cardinal v. The Attorney General of Alberta,* [1974] S.C.R. 695, a majority of the Supreme Court of Canada, per Martland, J., held that the Agreement applied game legislation to Indian reserves, subject only to the exception as to 'hunting and fishing for food. Mr. Justice Martland based his opinion squarely on his interpretation of the Agreement, as did Mr. Justice

Laskin (as he then was) who, speaking for Hall and Spence, JJ., and himself, strongly dissented. Both judges, however, by dicta expressed definite views about how, apart from the 1930 Agreements, s.91(24) of the *British North America Act, 1867*, should be interpreted and applied. Mr. Justice Martland at pp. 702-3 said:

> … Section 91(24) of the *British North America Act, 1867*, gave exclusive legislative authority to the Canadian Parliament in respect of Indians and over land reserved for the Indians. Section 92 gave to each Province, in such Province, exclusive legislative power over the subjects therein defined. It is well established, as illustrated in *Union Colliery Co. of B.C. v. Bryden*, [1899] A.C. 580, that a Province cannot legislate in relation to a subject-matter exclusively assigned to the federal Parliament by s.91. But it is also well established that provincial legislation enacted under a heading of s.92 does not necessarily become invalid because it affects something which is subjected to federal legislation.
>
> 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 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 legi6lation 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.

11. He discussed, apparently with approval, cases in which the 1930 Agreements did not apply, including three involving use of reserve land, of which two are themselves strong authorities holding provincial game laws inapplicable to Indians on a reserve. These three are:

> *R. v. Jim*, (1915), 26 C.C.C. 236, where Hunter, C.J.B.C., held a charge of hunting deer without a provincial licence would not lie against an Indian hunting on an Indian reserve.
>
> *R. v. Rodgers* (1923), 40 C.C.C. 51 (Man. C.A.), which was a decision "to the like effect, involving the trapping of mink on an Indian Reserve without a Provincial licence" - Martland, J., p. 704.
>
> *Corporation of Surrey v. Peace Arch Enterprises Ltd.* (1970), 74 W.W.R. 380 (B.C.C.A.), which held that non-Indians building on reserve lands (under lease) were not subject to provincial or municipal zoning and health laws.

12. Turning to the main issue, he held that s.12 of Alberta Agreement applied to Indians on a reserve. At 708 he said that:

> Canada ... in order to achieve the purpose of the section, agreed to the imposition of Provincial controls over hunting and fishing, *which, previously, the Province might not have had power to impose.* (italics added)

13. Mr. Justice Laskin referred in his dissenting opinion to the applicability to Indians of the *Wildlife Act* of Alberta and said (pp. 714-715):

> In its generality, it extends to them but, as in other situations where generally expressed provincial legislation must be construed to meet the limitations of provincial authority *because* of *exclusive federal competence or because of precluding or supervening federal legislation,* the inquiry is whether the *ex facie* scope of the Act must be restricted in recognition of federal Dower, whether unexercised or exercised.
>
> I propose to deal first with the effect of s.91(24) upon the reach of provincial game laws. Apart entirely from the exclusive power vested in the Parliament of Canada to legislate in relation to Indians, its exclusive power in relation also to Indian Reserves puts such tracts of

land, albeit they are physically in a Province, *beyond provincial competence to regulate their use or to control resources there* on. (italics added)

14. Mr. Justice Martland declared ((p. 703), supra) that valid provincial legislation "is applicable anywhere in the Province, including Indian Reserves, even though Indians or Indian Reserves might be affected by it", if the particular legislation "is not construed as being legislation in relation to those classes of subjects", viz., "Indians or Lands reserved for the Indians". I take it that, conversely, if a particular provincial law, in this case a game law, is construed as being legislation relating to the use of Indian reserve land, then such legislation does not apply to Indian reserves, or, as Mr. Justice Martland said (p. 705) in commenting on *Peace Arch, supra:*

> Once it was determined that the lands remained lands reserved for the Indians, Provincial legislation relating to their use was not applicable.

This parallels the dicta of Mr. Justice Laskin just quoted and emphasizes that provincial legislation cannot validly regulate the reserves as land, cannot regulate the use of that land and cannot control the resources on that land. Accordingly, if, as I contend, a provincial game law is clearly a land use law, it cannot apply on a reserve.

15. Two principles appear: (1) a provincial law may be precluded from operation if it is supervened by a federal law, or a valid pre-1867 law, dealing with Indians as to the same subject-matter, either on a reserve (e.g., motor vehicle offences covered by the *Indian Reserve Traffic Regulations* - *Regina v. Johns*, 133 C.C.C. 43 (Sask. C. A.)), or off a reserve (e.g., Yukon liquor law not applicable to Indians because of *Indian Act* provisions re intoxicants - *Regina v. Peters*, 57 W.W.R. 727 (Y. Terr. C.A.)); (2) a provincial law is *excluded* from operation if it deals with an Indian qua Indian, or with Indian reserve land qua land, or perhaps, more accurately, if it is "legislation in relation to Indian status or Indian land rights" (Ritchie, J., in *The Natural Parents v. The Superintendent of Child Welfare et al*., October 1, 1975, unreported). [now reported 6 N.R. 491].

16. I can find no supervening law made by or under an Act of Parliament since 1867 that directly affects hunting on a Nova Scotia reserve, except the *Migratory Birds Convention Act,* R.S.C. 1970, c. M-12 - *Regina v. Sikyea,* [1964] S.C.R. 642; *Regina v. George*, [1966] 3 C.C.C. 137, (S.C.C.); and *Daniels v. White,* [1968] S.C.R. 517; which cases have been mercifully modified in their effect on Indians and Inuit by the *Migratory Bird Regulations* of 1971, P.C. 1971-1465, July 21, 1971, as amended by S.O. & R, 75-436, July 22, 1975. Section 73(1) and s.81 of the *Indian Act* authorize regulations by Order in Council or band by-laws to be made for the protection and preservation of
fish and game on reserves. No such regulations have been passed, and, at least in Nova Scotia, no band bylaws, although regulations and bylaws have been enacted on many other subjects, e.g., traffic, timber, oil and gas, sanitation, dogs running at large, etc. The only Chapel Island Reserve band bylaws enacted deal with oyster farming ((October 30, 1973), S.O. & R. 73-696).

17. Support for the proposition that game laws on reserves are laws relating to the use of Indian land with the exclusive federal domain is found in the delegation of regulatory power effected by Sections 73(1) referred to above. The legislative history confirms that Parliament has always considered regulation hunting on reserves as its prerogative. The *Indian Act* as it was before the 1951 revision delegated no regulatory power as to hunting, except that the Superintendent General of Indian Affairs was given "the control and management" of all Indian lands (R.S.C. 1927, c.98, s.4(1)). It did, however, restrict hunting on a reserve by anyone other than a band member (e.g., Sections 34-36, 115) and contemplated a band leasing to outsiders "shooting privileges" on reserves (Sections 117 and 156). By s.69 of the Superintendent General could declare game laws applicable in whole or in part to Indians - but only within any of the Prairie Provinces, the Northwest Territories or the Yukon.

18. In Part II of these reasons I conclude that Indians on Nova Scotia reserves have a usufructuary right in the reserve land, a legal right to use that land and its resources, including, of course, the right to hunt on that land. In my opinion that right arises in our customary or common law, was confirmed by the *Royal Proclamation* of 1763 and other authoritative declarations, was preserved in respect of reserve lands when they were originally set apart for the Indians, and is implicit in the *Indian Act* which continues reserves "for the use and benefit of the respective bands" (s.18(1)). That legal right is possibly a supervening law which in itself precludes the application of provincial game laws in a reserve, but it is, I think, more properly considered as an "Indian land right" which is inextricably part of the land to which the provincial game law cannot extend.

19. That right, sometimes called "Indian title" is an interest in land akin to a *profit a prendre.* It arose long before 1867 but has not been extinguished as to reserve land and, being still an incident of the reserve land, can be controlled or regulated only by the federal government. his stresses legalistically the perhaps self-evident proposition that hunting by an Indian is traditionally so much a part of his use of his land and its resources as to be for him, peculiarly and specially, integral to that land.

20. We need not, however, rely on aboriginal right theories or "Indian title" concepts to establish that hunting is a use if land and its resources. To shoot a rabbit, deer or grouse on land especially Indian reserve land, is as much a use of that land as to cut a tree on that land, or to mine minerals, extract oil from the ground, or farm that land, or, as in the *Peace Arch* case, supra, erect a building on that land - all of which are activities unquestionably exclusively for the federal government to regulate.

21. To hold otherwise would require us to disregard the strong authority of *R. v. Jim*, *R. v. Rodgers, supra*, and the *Peace Arc*h case.

22. *Jim* and *Rodgers* directly held that provincial game legislation does not apply to an Indian on a reserve. In the former, Hunter, C.J.B.C., based his decision on the ground, as Mr. Justice Martland points out in *Cardinal* at p.704, that the *Indian Act*:

> … had provided that all Indian lands should be managed as the Governor-in-Council directs and that management included the regulation of hunting on a Reserve.

He found himself unable to distinguish *Madden v. Nelson and Fort Sheppard Ry. Co*. [1899] A.C. 626, which held that provincial law as to fencing did not apply to a railway because of the federal exclusive authority over railways.

23. In *Rodgers* Perdue, C.J.M., in the Manitoba Court of Appeal, said (40 C.C.C. 51 at pp. 53-54):

> By sec.91(24) of the *B.N.A. Act*, the Parliament of Canada is given exclusive legislative authority over 'Indians, and lands reserved for the Indians.' It would, therefore, seem clear that no statutory provision of regulation made by the Province in regard to the hunting of game or furbearing animals on an Indian reserve would apply to treaty Indians residing on the reserve. …
>
> I do not think that the Provincial Legislature has any power to pass laws interfering with the rights of treaty Indians to hunt, fish and trap on their own reserves. …
>
> The right of an Indian to hunt or fish on his reserve without restraint or interference is often essential to the well-being of himself and of those dependant upon him. Any legislation, therefore, affecting this right would naturally come under sec.91(24) of the *B.N.A. Act*. From an expression used by Lord Watson in *St. Catherines Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, I would take it that this was the view adopted by that eminent authority. He said at p.60:-
>
> > 'The fact that is still possesses exclusive power to regulate the Indians' privilege of hunting and fishing, cannot confer upon the Dominion power to dispose, by issuing permits or otherwise, of that beneficial interest in the timber which has now passes to Ontario.'

24. In the *Peace Arch* case the British Columbia Court of Appeal held that zoning and health regulations did not apply to non-Indians erecting a building on reserve land. MacLean, J.A., for the British Columbia Court, said ((1970) 74 W.W.R. 380 at p.383):

> In my view the zoning regulations passed by the municipality, and the regulations passed under the *Health Act*, are directed to the use of the land. It follows, I think, that if these lands are 'lands reserved for the Indians' within the meaning of that expression as found in s.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'.

25. I am considerably persuaded by the analogy of other exclusively federal activities or enterprises which provincial laws of general application similarly cannot touch. As Mr. Justice Laskin said in *Cardinal* at p.717:

> I do not wish to overdraw analogies. It would strike me as quite strange, however, that when provincial competence is denied in relation to land held by the Crown in right of Canada (see *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629 at 643), or in relation to land upon which a federal service is operated (see *Reference re Saskatchewan Minimum Wage Act*, [1948] S.C.R. 248 at 253), or in relation to land integral to the operation of a private enterprise that is within exclusive federal competence (see *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd*., [1954] S.C.R. 207), there should be any doubt about the want of provincial competence in relation to lands that are within s.91(24).

26. In Natural Parents, supra, nine members of the Supreme Court of Canada unanimously agreed that the *Adoption Act* of British Columbia applied to authorize adoption of an Indian child by non-Indian adopting parents. The majority, represented in separate opinions by Martland, J., Ritchie, J., and Beetz, J., held that the provincial Act applied to Indians, that it was not legislation pointed at Indians *qua* Indians, and that it did not restrict Indian rights. Their comments on s.88 of the *Indian Act*, which I shall shortly discuss, did not affect their primary conclusion.

27. The minority, represents by Chief Justice Laskin, found that the *Adoption Act* encroached on a federal legislative areas in affecting the status of the adopted child as an Indian but that the Act was preserved by s.88, which applied it, as legislation affecting Indians, to all Indians.

28. Mr. Justice Martland, in finding that the *Adoption Act* did not restrict Indian rights and thus did not invade the federal areas, contrasted the Act with statutes which had "the effect of restricting an enterprise or activity within exclusive federal jurisdiction". In the latter category he placed the *Campbell-Bennett* and *Saskatchewan Minimum Wage* cases referred to by Chief Justice Laskin in the extract from *Cardinal* just quoted. He also cited two other similar cases, saying:

> The case of *Minimum Wage Commission v. The Bell Telephone Company of Canada*, [1966] S.C.R. 767, held that a company which had been declared to be a work for the general advantage of Canada was not subject to having its employer-employee relationships affected by a provincial minimum wage statute. …
>
> *McKay v. Her Majesty the Queen*, [1965] S.C.R. 798, held that a municipal zoning regulation governing the erection of signs on residential properties could not preclude the erection of a sign to support a candidate in a federal election.

29. Mr. Justice Ritchie agreed with Mr. Justice Martland and specifically rejected Chief Justice Laskin's suggestions that the *Adoption Act* was prima facie invalid as invading the exclusive field of "Indians" or that it was preserved only by s.88 incorporating it by reference into federal law. Mr. Justice Ritchie positively emphasized that:

> In my view, when the Parliament of Canada passed the *Indian Act* it was concerned with the *preservation of the special status of Indians and with their rights to Indian lands*, but it was made plain by s.88 that Indians were to be governed by the laws of their province of residence except to the extent that such laws are inconsistent with the *Indian Act* or relate to any matter for which provision is made under the Act. (italics added)

He went on to answer negatively the key question as to

> … whether s.10 of the *Adoption Act* is *legislation in relation to Indians so as to affect Indian status or Indian land rights.*

30. The majority opinions in *Natural Parents* clearly distinguish between, on the one hand, provincial laws of general application to individuals which *prima facie* apply to everyone, including Indians, and which are *intra vires*, and, on the other hand, provincial laws which by their nature necessarily "affect Indian status or Indian land rights" (to use Mr. Justice Ritchie's phrase) and which the federal exclusivity of power *pro tanto* renders *ultra vires*.

31. The provincial game law in the present case necessarily affects Indian land rights and is thus excluded from applying to the appellant on the reserve. Does s.88 of the *Indian Act* override

that principle and subject the appellant to a law which without that section would not apply? Section 88 reads:

> Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulations or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

32. Chief Justice Laskin in his dissent in *Cardinal* ([1974] S.C.R. at pp.727-8) and again in *Natural Parents* expressed the view that s.88 by reference incorporated provincial legislation into the *Indian Act* and thus applied to Indians provincial laws which without s.88 would not apply.

33. The majority in *Natural Parents* specifically rejected the referential incorporation interpretation of s.88 and held that s.88 did not make applicable to Indians provincial legislation which without s.88 would not have validly applied to tem. Mr. Justice Martland stated:

> The section is a statement of the extent to which provincial laws apply to Indians.

He specifically approved, as did Mr. Justice Ritchie, the British Columbia Court of Appeal per Farris, C.J.B.C. (now reported *sub nom. Re Birth Registration No. 67-09-022*72, [1974] 3 W.W.R. 363, at pp.366-7), which had said:

> In my opinion, Sec. 88 does not have the effect of converting provincial legislation to federal legislation whenever it applied to Indians. Sec. 88 simply defines the obligation of obedience that Indians owe to provincial legislation. Parliament is neither delegating legislative power to the province nor adopting provincial legislation as its own by declaring in Sec. 88 what was true before Sec. 88 existed, namely, that Indians are not only citizens of Canada but also are citizens of the province in which they reside and are in general to be governed by provincial laws.

34. Mr. Justice Ritchie also approved the following from Chief Justice Farris' opinion at p.364:

> It [s.88] defines the extent to which laws of general application of a province are applicable to Indians.

Mr. Justice Ritchie's agreement that s.88 is merely declaratory of the existing law is confirmed by his conclusion:

> … I am of opinion that s.88 of the *Indian Act* should be construed as meaning that the provincial laws of general application therein referred to apply of their own force to the Indians resident in the various Provinces.

35. This authoritative interpretation of s.88, which I unhesitatingly adopt, does not make applicable the game law in the present case. Section 88 gave it no added vitality and no widened scope.

36. Section 88 merely declares that valid provincial laws of general application to residents of a province apply also to Indians in the province. It does not make applicable to Indian reserve land a provincial game law which would have the effect of regulating use of that land by Indians. It does not enlarge the constitutional scope of the provincial law which is limited by the federal exclusivity of power respecting such land.

37. The question asked by the learned magistrate in the stated case should be answered in the affirmative. I respectfully think he erred in holding that s.150(1) of the *Lands and Forests Act* applied to an Indian while present on a reserve. In my opinion the appeal should be allowed and the appellant's conviction quashed.

Part II

38. This Part is a historical review which assembles and summarizes data from many sources not readily available. It will confirm, perhaps unnecessarily, that an Indian has a special right to hunt on reserve lands.

39. The review begins with the original rights of Indians to the use of the land when the white man came, and then examines to what degree those rights have been modified, affirmed or extinguished in Nova Scotia.

40. *Calder et al. v. The Attorney-General of British Columbia*, [1973] S.C.R. 313, confirmed that such rights existed in law and that "Indian title" to land was a legal reality. The Nishga Indians of British Columbia sought a declaration "that the aboriginal title, otherwise known as the Indian title, of the Plaintiffs to their ancient tribal territory … has never been lawfully extinguished". The provincial Court of Appeal held (13 D.L.R. (3d) 64) that no Indian title could be recognized unless it had been incorporated into provincial law by executive or legislative authority, and that no such incorporation could be found. The Supreme Court of Canada, on equal division on this issue, dismissed the appeal, three of seven judges per Judson, J., finding that any Indian title that existed originally had been extinguished and three other judges per Hall, J., finding that title had existed but that it had not been extinguished.

41. Both Mr. Justice Judson and Mr. Justice Hall agreed that the "Indian title" or rights flowed from basic principles authoritatively expressed by Chief Justice Marshall of the United States Supreme Court in *Johnson and Graham's Lessee v. McIntosh* (1823), 8 Wheaton 543 (21 U.S.), and *Worcester v. Georgia* (1832), 6 Peters 515 (31 U.S.), and adopted by many other American, Canadian and English courts. Those rights were rights to use and occupy the land, rights which overlay the basic Crown title but which could be extinguished by the Crown.

42. Mr. Justice Hall at pp.381-2 quoted at length from Chief Justice Marshall's opinion in the *Johnson* case, including the following at p.574:

> … They were admitted to be *the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion* … (italics added)

43. Mr. Justice Judson at p.321 also quoted extensively from *Johnson*, including the following at p.588:

> … All our institutions recognize the absolute title of the crown, *subject only to the Indian right of occupancy*; and recognize the absolute title of the crown to extinguish that right. (italics added)

44. It will be noted that the Indian title or right could be extinguished by the sovereign power. Statements are found in some of the cases (notably in *Worcester v. Georgia* and see Hall, J., in *Calder* at p.389) implying that the extinction of the right could only occur with the consent of the Indians, by purchase, treaty or otherwise. Bearing in mind the scant evidence in Nova Scotia, or indeed in New England, Quebec or New Brunswick, of any recorded transaction or explicit consent, I must prefer Mr. Justice Judson's view (p.329) that extinction may occur by prerogative acts, e.g.,, by setting apart reserves and opening the rest of the land for homestead grants and settlement, however unfair that may sometimes have been. He quoted (p.374) the United States Supreme Court in *United States v. Santa Fe Pacific Ry. Co*. (1941), 314 U.S. 339, at 347, as follows:

> As stated by Chief Justice Marshall in *Johnson v. McIntosh*, 'the exclusive right of the United States to extinguish' Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts.

45. *Calder* adopted *St. Catherines Milling and Lumber Company v. The Queen* (1889) 14 App. Cas. 46 (P.C.), which were discussed at length in the courts below (13 S.C.R. 577 (S.C.C.), 13 Ont. App. R. 148 (Ont. C.A.), and 10 Ont. R. 196 (Boyd, C.)). *St. Catherines* held that lands originally occupied by Indians became completely owned by the Provincial Crown, after the Indian right had been extinguished by an 1873 treaty between the tribe and the federal government. The Privy Council held that once the lands were by the surrender "disencumbered of the Indian title" (p.59), they became again fully provincial Crown property, subject only to the federal government's "exclusive power to regulate the Indians' privilege of hunting and fishing" (P.60).

46. The Judicial Committee per Lord Watson at p.54 held that "the tenure of the Indians was a personal and usufructuary right, dependant upon the good will of the Sovereign", and said:

> There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominion whenever that title was surrendered or otherwise extinguished.

And at p.58 stated:

> The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden.

47. In 1921 the Privy Council (per Duff, J., as he then was) applied the *St. Catherines* case to an Indian reserve which in 1882 had been surrendered by the Indians to the federal government. The title was held to be vested in the provincial Crown "freed from the burden" of the Indian interest, which was described as:

> … a usufructuary right only and a personal right in the sense that it is in its nature inalienable except by surrender to the Crown.
>
> (*Attorney-General for Quebec v. Attorney-General for Canada*, [1921] A.C. 401 at p.408 - the *Silver Chrome* case).

48. (The *St. Catharines* and *Silver Chrome* cases are doubtless the two Privy Council cases referred to in the Canada-Nova Scotia agreement of April 14, 1959, whereby the province transferred to Canada all its interest in "reserve lands", consisting of the existing Nova Scotia reserves, including the Chapel Island reserve. The agreement also confirmed any grants previously made by the federal government to any person of former reserve lands surrendered by the Indians since 1867. The agreement was ratified by Statutes of Canada, 1959, c.50, and Statutes of Nova Scotia, 1959, c.3.)

49. A "usufructuary right" to land is, of course, merely a right to use that land and its "fruit" or resources. It certainly must include the right to catch and use the fish and game and other products of the streams and forests of that land. For the primitive, nomadic Micmac of Nova Scotia in the 18th Century, no other use of land was important.

50. The original Indian rights as defined by Chief Justice Marshall were not modified by any treaty or ordinance during the French regime which lasted until 1713 in Acadia, and until 1758 in Cape Breton, and must be deemed to have been accepted by the British on their entry. Such acceptance is shown by the British *Royal Proclamation* of October 7, 1763, (R.S.C. 1970, Appendices, pp.123-129), which has been perhaps a little extravagantly termed the "Indian Bill of Rights" (Gwynne, J., in *St. Catharines*, 13 S.C.R. at p.652), or the "Charter of Indian Rights" (McGillivray, J.A., in *Rex v. Wesley*, [1932] 4 D.L.R. 774 (Alta. C.A.) at p.784). It had, however, the legislative effect of a statute. Hall, J., in *Calder*, supra, at p.394 said:

> This Proclamation was an Executive Order having the force and effect of an Act of Parliament …

MacLean, J. (as he then was) in *The King v. Lady McMaster*, [1926] Ex. C.R. 68 at p.72 said the Proclamation "has the force of a statute, and … has never been repealed".

51. The Proclamation was clearly not the exclusive source of Indian rights (Judson, J., in *Calder* at p.322) but rather was "declaratory of the aboriginal rights" (Hall, J., in *Calder* at p.397).

52. I am of the opinion that the Proclamation in its broad declaration as to Indian rights applied to Nova Scotia including Cape Breton. Its recital (p.127) acknowledged that in all colonies, including Nova Scotia, all land which had not been "ceded to or purchased by" the Crown was reserved to the Indians as "*their Hunting Grounds*". Any trespass upon any lands thus reserved to the Indians was forbidden (p.127).

53. A long provision (p.128) prohibited any purchase of land by whites from Indians or any sale by Indians of their land except by a public assembly of Indians and then only to the Crown. It applied to "Lands reserved to the said Indians, within those parts of out Colonies where, We have thought proper to allow Settlement".

54. The "lands reserved" apparently included all lands in Nova Scotia which the Indians had not ceded or sold to the Crown, "Ceded" land presumably included lands then occupied with the assumed or forced acquiescence of the Indians, such as those at Halifax, Lunenburg, Liverpool and Yarmouth and the former Acadian lands taken over by New England "planters". Later the "lands reserved" as "Hunting Grounds" were, of course, gradually restricted by occupation by the white man under Crown grant which extinguished the Indian right on the land so granted. Indeed, the land where that right exists may have in time become restricted in Nova Scotia to the reserved lands which were now know as "Indian reserves".

55. I shall now review how the Indian land rights, confirmed by the Proclamation of 1763, were further confirmed, modified or extinguished in Nova Scotia between 1713 and 1867.

56. A basic distinction exists between treaty Indians and non-treaty Indians. In most of Ontario, the Prairies, the Northwest Territories, and eastern British Columbia, treaties were made with Indian tribes, in the west between 1871 and 1921, and earlier in Ontario, whereby the Indians formally ceded lands to the Crown, which in return set aside specific lands as "reserves" for the Indians. The Indians often retained a specific right to hunt and fish on the land they had ceded, so long as it remained unoccupied Crown land. (Examples of such treaties are Treaty No. 3, in the *St. Catharines* case, and Treaty No. 8, in *Regina v. White and Bob* (1964), 50 D.L.R. (2d) 613. See, generally, "*Native Rights in Canada*", 2nd ed., by P. Cumming and N. Mickenburg, 1972, chapters 9 and 4.)

57. In the rest of Canada, including Nova Scotia, the treaties or arrangements were quite different. No Nova Scotia treaty has been found whereby Indians ceded land to the Crown, whereby their rights on any land were specifically extinguished, or whereby they agreed to accept and retire to specified reserves, although thorough archival research might well disclose record of informal agreements especially in the early 1800's when reserves were established by executive order.

58. Agreements with the Indians in the Maritimes were primarily treaties of peace, informal and sometimes oral. They were pledges of peace, often soon broken prior to 1758, and between 1775 and 1784 when many Indians in New Brunswick fought for the American rebels. They usually provided for exchange of prisoners. They often acknowledged gifts to the Indians and sometimes specifically assured hunting and fishing rights to the Indians.

59. The Micmacs of Nova Scotia, like related tribes in New Brunswick and Maine, were not highly developed socially and politically. The tribe consisted of many loose clans and nomadic groups, over which the so-called chiefs had little authority, and which had no clear territorial jurisdictions. They were a poor, disorganized race, decimated by disease and famine in 1746, and demoralized after the fall of Louisbourg in 1758. (As to the nature of the early Micmac society, see: "*The Native People of Atlantic Canada*", H.F. McGee, ed., 1974, Carleton Library, No. 72: "*The Micmac Indians of Eastern Canada*", W.D. and R.S. Wallis, 1955: Reports of Joseph Howe, as Commissioner for Indian Affairs, 1843-4, Appendices to Journal, N.S. Legislative Assembly.)

60. Nova Scotia until 1784 included New Brunswick and much of Maine and from 1763 to 1784 included Prince Edward Island and Cape Breton Island. The latter was a separate colony from 1784 to 1824.

61. The earliest treaty was made in 1713 with Indians of the eastern part of the then Massachusetts Bay Colony, including tribes in most of what is now New Brunswick. The treaty (*Native Rights in Canada*, supra, pp.296-8) promised peace and confirmed to the English rights of land in their settlements, "saving unto the said Indians their own Grounds, & free liberty for Hunting, Fishing, Fowling …"

62. A treaty of December 15, 1725 (*Native Rights*, supra, pp.300-306) purportedly covered all tribes of Nova Scotia, but specifically named only the Cape Sable Indians. It pledged peace and saved unto the Indians all lands "not by them convey'd or sold or possessed by" the English, "As also the privilege (sic) of fishing, hunting, and fowling as formerly".

63. Next is the treaty of November 22, 752, made by Governor Hopson of Nova Scotia with representatives purportedly acting for all Micmacs on the eastern coast of Nova Scotia, and in the Shubenacadie area. It was agreed "the said Tribe of Indians shall ... have free liberty of hunting and fishing as usual". (*Native Rights*, supra, pp.307-308).

64. The 1752 treaty was held in *Rex. v. Syliboy* (1928), 50 C.C.C. 389 (N.S. Co. Ct.), not to apply to Cape Breton or to protect a Cape Breton Micmac from conviction for having muskrat skins in his possession contrary to provincial law (apparently not on a reserve); aboriginal rights were not mentioned and the 1763 Proclamation was, wrongly in my opinion, held not applicable to Cape Breton.

65. Both the 1725 and 1752 treaties were found in *Regina v. Simon* (1958), 124 C.C.C. 110 (N.B.C.A.), not to apply to Micmac Indians from the parts of New Brunswick involved. The treaties were unsuccessfully invoked to avoid application of regulations under the federal *Fisheries Act*. The courts properly held that valid federal law may over-ride any Indian "rights".

66. Many other "treaties" of peace were made with groups of Nova Scotia Micmacs of which no copies have been produced. Beamish Murdoch, Q.C., in his *History of Nova Scotia*, 1866, Vol. 2, refers to many, including April 1753 for LeHave (p.219); November 1753 for Cape Sable (p.225); February 1755 for the Amherst area (p.407); November 9, 1761, for LaHave (p.407); and August 1763 again for LaHave (p.431).

67. Murdoch refers also to treaties during the American Revolution, when Michael Francklyn reported in June 1779 (p.599) that he had succeeded in re-establishing peace with "all the tribes who inhabit this province". This probably referred mainly to New Brunswick Indians who had been supporting the American rebels (p.595). Francklyn, who was the Nova Scotia deputy of Sir William Johnson, who was then Indian Commissioner for all the colonies of Virginia, worked assiduously to maintain peace, meeting with and writing many groups of Indians.

68. In the meantime, important "Royal Instructions" were issued on December 9, 1761, to the Governor of Nova Scotia. I assume they were in the form of the draft instructions printed in *Native Rights in Canada*, supra, pp.285-6, and there erroneously called a Proclamation, but I note Lieutenant-Governor Belcher in his 1762 report describes them (p.286) as dealing with encroachments upon the Indians, "to the interruption of their hunting, Fowling and Fishing", a subject not specifically mentioned in the draft.

69. The draft instruction anticipated the 1763 Proclamation in directing the Governor to protect the Indians "in their just Rights and Possessions", to prevent persons buying lands from the Indians, and to require trespassers to vacate any land "reserved to or claimed by the said Indians".

70. Belcher on May 4, 1762, issued a proclamation (*Idem*, pp.287-8). He recited the Indian claim of land along the relatively unsettled eastern coast "for the more special purpose of hunting, fowling and fishing". He enjoined all persons to avoid molestation of the Indians, and to vacate and lands possessed "to the prejudice of the said Indians in their Claims".

71. Belcher in a report of July 2, 1762 (*Idem*, pp.286-7) explained why he had implied that the coastal claim of the Indians was the only one about which anyone need be concerned. He said the only complaint received from the Indians had been respecting interference with fishing along the coast. He said:

> This claim was therefore inserted in the Proclamation, that all persons might be notified of the Reasonableness of such a permission, whilst the Indians themselves should continue in Peace with Us, and that this Claim should al least be entertained by the Government, till his Majesty's pleasure should be signified. After the Proclamation was issued no Claims for any other purposes were made. If the Proclamation had been issued at large, the Indians, might have been issued at large, the Indians, might have been incited by the disaffected Acadians and others, to have made extravagant and unwarrantable demands, to the disquiet and perplexity of the New Settlements in the Province. Your Lordships will permit me humbly to remark that no other Claim can be made by the Indians in this Province, either by Treaties or long possession (the Rule, by which the determination of their Claims is to be made, by Virtue of this His Majesty's Instructions) since the French derived their Title from the Indians and the French ceded their Title to the English under the Treaty of Utrecht.

72. Belcher, of course, was right as to basic title to the land having been received by Britain from France, but erred in not recognizing the "burden of Indian rights" overlying that title. Neither the French not British had extinguished the Indian rights in Nova Scotia. Belcher, although not recognizing that Indians had a general right to use land not occupied by settlement, did recognize the "reasonableness" of the Indian claim to hunt and fish freely, at least in most of the province,

and recognized that Indians justly complained about “interruptions in their hunting grounds” by Acadians.

73. I have been unable to find any record of any treaty, agreement or arrangement after 1780 extinguishing, modifying or confirming the Indian right to hunt and fish, or any other record of any cession or release of rights or lands by the Indians.

74. The history of the next eighty-seven years discloses little concern for the Indians. The incoming settlers pushed them back to poorer land in the interior of the province. The government gradually herded them into reserves and made sporadic and unsuccessful attempts to convert them into an agricultural people.

75. In 1773 the Executive Council had issued a proclamation forbidding land negotiations with Indians and stating that tracts of land would be set aside for their use (*Indians of Quebec and the Maritime Provinces; and Historical Review*, Department of Indian Affairs, Ottawa, 1971, p.12). A two mile square reserve was established at Shubencadie in 1779 (*Idem*). The Crown is 1786 granted 500 acres to Indians in St. Margaret’s Bay (“*Indian Affairs in Nova Scotia*, 1760-1834,” by Elizabeth A. Hutton, in *The Native Peoples of Atlantic Canada*, supra, p.76). (See also: *The Canadian Indian – A History Since 1500* by E. Palmer Patterson, 1972, pp.62-65.)

76. During 1819 and 1820 eight additional reserves of 1,000 acres each were established in mainland Nova Scotia. They were placed in trust for the Indians “to whom they are to be hereafter considered as exclusively belonging” (*Idem*, p.78). The separate colony of Cape Breton had by 1824, when it rejoined Nova Scotia, similarly set aside six Indian reserves, totalling over 12,000 acres.

77. The Indian problem was first given statutory attention by c.16 of the Statutes of 1842, which provided for a Commissioner for Indian Affairs, who was to survey the reserves, and “preserve them for the use of the Indians”. He was “to put himself in communication with the Chiefs of the different tribes of the Micmac Race throughout the Province … and to invite them to co-operate in the permanent settlement and instruction of their people”.

78. The Indian Commissioner for the first two years was the Honourable Joseph Howe. His first report (Assembly Journal, 1843, Appendix No. 1) spoke eloquently of the neglected condition of the Micmacs. He found not more than 1,300, of whom 500 lived in Cape Breton, a drastic decrease sine 1798. He inspected most reserves and found the land “sterile and comparatively valueless”. In this and his 1844 report (Assembly Journal, 1844, Appendix No. 50) he gave many instances of extreme poverty and of reserve land being taken by white trespassers.

79. A few years later Commissioner Crawley complained in his 1849 report about Scots settlers trespassing on the reserves at Margaree and Whycocomagh (M.G. 15, Vol. 4, No. 70):

> Under the present circumstances no adequate protection can be obtained for the Indian property. It would be in vain to seek a verdict from any jury in this Island against the trespassers on the reserves: nor perhaps would a member of the Bar be found willingly and effectually to advocate that cause of the Indians, inasmuch as he would thereby injure his own prospects, by damaging his own popularity.

80. Apparently little improvement was effected before 1867. Howe himself in 1873 condemned policies in the Maritimes as compared to those in Ontario and Quebec, where the “crowning glory” was the treatment of Indians. (Sess. Papers, 1873, Vol. 6, No. 5, Paper No. 23, quoted by Boyd, C., in the *St. Catharines Milling* case, 10 Ont. Rep. At p.216) (See: *The Canadian Indian – A History Since 1500*, supra, pp. 115-119.)

81. Pre-Confederation fish and game laws occasionally recognized that Indians were in a special position. The first game act, providing for closed seasons for partridge and black duck, 1794, c.4, exempted “any Indian or other poor settler who shall kill any partridge or black duck … for his own use”. A like exemption respecting snipe and woodcock appeared in 1816, c.5, and, as to trout, in 1824, c.36. An Act of 1843, c.19, prohibiting the use of moose snares, did not specifically exempt Indians, but seemed to presume they were excluded. It noted that the use of snares would “lead to the destruction of all the Moose … thereby depriving the Indians and poor Settlers of one of their means of subsistence”.

82. The exemptions as to partridge, duck, snipe and woodcock were continued in the Revised Statutes of 1851 (c.92) and 1859 (c.92), but were dropped by the commissioners compiling the

Revised Statutes of 1864. Similarly, no exemptions as to Indians appeared in the consolidations respecting river fishing which appeared in the Revised Statutes of 1851 and subsequently.

83. The pre-Confederation statutory record as to the application of fish and game laws to the Indians is thus spotty and ambiguous and we do not know how they were in fact administered. The legislature at no time, however, either revoked any Indian exemption or dealt specifically with the use of reserve land.

84. I would here apply the comments of Norris, J.A., in *Regina v. White and Bob*, who, referring to colonial game laws in British Columbia, said ((1964) 50 D.L.R. (2d) at p.662):

> In none of these statutes was there any prohibition applying specifically to Indians. It would have required specific legislation to extinguish the aboriginal rights, and it is doubtful whether Colonial legislation, even of a specific kind, could extinguish there rights in view of the fact that such rights has been confirmed by the *Royal Proclamation of 1763*.

85. This Part has established that Indians in Nova Scotia had a usufructuary right to the use of land as their hunting grounds. That right was not extinguished for reserve land before Confederation by any treaty, or by Crown grant to others or by occupation by the white man. It has not been extinguished or modified since 1867 by or under any federal Act. (We are not concerned whether the right may still exist for any land other than reserves. It would appear that in Nova Scotia, apart from reserves, only a few thousand widely scattered acres have never been granted, placed under mining or timber licences or leases, set aside as game preserves or parks, or occupied prescriptively.)

86. The review has confirmed that Indians have a special relationship with the lands they occupy, not merely a quaint tradition, but rather a right recognized in law. Hunting by Indians is and always has been a use of land legally integral to the land itself. A provincial law purporting to regulate that use on a reserve must be therefore *pro tanto* constitutionally ineffective.

Part III

87. In summary, I repeat that we should inform the learned magistrate that he erred in applying s.150(1)(b) of the *Lands and Forests Act* to an Indian on a reserve. The appeal should accordingly be allowed and the appellant's conviction quashed.

88. COFFIN. J.A.: The question for the opinion of the court is:

> Was I correct in holding that the provisions of the *Lands and Forests Act*, R.S.N.S. 1967, c.163, as amended, and in particular section 150, subsection (1)(b) thereof, apply to an Indian while present upon a reserve as defined by the *Indian Act*, R.S.C. 1970, c.I-6, as amended?

89. The Chief Justice in his reasons for judgment has suggested that we should amend the question to read:

> Was I correct in holding that s.150(1)(b) of the *Lands and Forests Act* applies to an Indian while present upon an Indian reserve?

90. It was submitted in the argument before the trial judge, referring to s.88 of the *Indian Act*, that there one has in mind the Federal Government dealing with Indians and not lands reserved for Indians.

91. The respondent took the position that in the *George* case and the *Cardinal* case the majority of the Supreme Court of Canada held that the meaning of s.88 was that provincial laws of general application apply to Indians and to lands reserved to Indians. The respondent acknowledged that had there been by-laws and regulations, they would have taken precedence under the federal law, but there being none, the decisions under s.88 apply.

92. The trial judge found the appellant guilty in a very brief decision, in which he said:

> … I am bound by the most recent, 1974 case, of Charlie Cardinal and the Attorney General of Alberta, and Mr. Justice Martland in writing the majority decision there makes no bones about it – as a matter of fact he uses the simple illustration of saying, 'to hold otherwise

would be to say that by the creation of Reservations, the Government split Canada up into little enclaves where Provincial Laws did not apply.'

93. In *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695, as the Chief Justice has indicated in his reasons, it was held that an agreement between the Government of Canada and the Government of Alberta was effective to make applicable provisions of the *Wildlife Act* of the Province to Indians including those on a reserve.

94. Section 12 of that agreement is as follows:

> 12. I order to secure to the Indians of the Province, the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

95. Martland, J. at p.669 pointed out that:

> Sections 10 and 12 of the Agreement were, therefore, given the force of law, notwithstanding anything in the *British North America Act, 1867*.

96. He expressed the opinion at p.703 that provincial legislation enacted under a heading of s.92 does not necessarily become invalid because it affects something which is subject to federal legislation.

97. He disagreed with the philosophy that s.91(24) of the British North America Act created "enclaves within a Province within the boundaries of which Provincial legislation could have no application." It was his view that if Provincial legislation within s.92 is not construed as being in relation to a subject matter assigned exclusively to Parliament under s.91, it is applicable anywhere in the Province. It matters not under these circumstances that Indians or Indian Reserves might also be affected.

98. The Chief Justice has quoted Martland, J. on this point.

99. The position of Martland, J. in *Cardinal* was that s.91(24) enumerates classes of subjects for exclusive Federal power of legislation, but did 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."

100. He distinguished *Corporation of Surrey v. Peace Arch Enterprises Ltd*. (1970), W.W.R. 380 because here were lands in an Indian Reserve and the question was whether they were subject to municipal by-laws and to regulations under the *Provincial Health Act*. This was clearly legislation relating to the use of land reserved for Indians.

101. The basic issue with which we are faced in this appeal is whether s.150(1)(b) of the *Lands and Forests Act* is effective to support a conviction against an Indian while present upon a Reserve, having in mind particularly s.91(24) of the *British North America Act*.

102. I quote the sections:

> 150(1) Except as provided in this Section, no person shall take, carry or have in his possession any shot gun cartridges loaded with ball or with shot larger than AAA or any rifle,
>
> (a) in or upon any forest, wood or other resort of moose or deer; or
>
> (b) upon any road passing through or by any such forest, wood or other resort; …
>
> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Province's; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative

> Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, --
>
> …
>
> 24. Indians, and Lands reserved for Indians.

103. It seems clear that the section of the *Lands and Forests Act* is not legislation relating to Indians per se, the question is whether or not it is legislation relating to lands reserved for Indians within the reasoning of Martland, J, in *Cardinal*.

104. I can follow the argument that there is a distinction between *Peace Arch* case and the one before us, but I am not satisfied that we can dismiss the reasoning in *Rex v. Jim* (1915), 26 C.C.C. 236, and *Regina v. George*, [1966] 3 C.C.C. 137.

105. In *Rex v. Jim*, Hunter, C.J.B.C. stated briefly that the defendant who was charged under the *Game Protection Act* was an Indian who killed a two-year old buck on a Reserve upon which he was entitled to live, and was using the meat for his household use. At p.237 he said that by s.91(24), "Indians and lands reserved for the Indians are reserved for the exclusive jurisdiction of the Dominion Parliament." And at p.238 he concluded that:

> … the proper course for the local authorities is not to attempt to pass legislation affecting the hunting by Indians on their reserves or to apply general legislation regarding game to such Indians, but if necessary to apply to the proper law-making authority and make any representations that they may see fit.

106. *Regina v. George*, [1966] 3 C.C.C. 137, dealt with s.87 of the *Indian Act* making all laws of general application in force in any province subject to the terms of any treaty and any Act of Parliament.

> 87. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all have laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

107. Martland, J. at p.150 said that he understood the object and intent of the section was to make Indians who were under the exclusive legislative jurisdiction of Parliament of Canada, by virtue of s.91(24) subject to provincial laws of general application.

108. In his opinion the incorporation of the restrictive words in the section made it clear that when the section referred to "laws of general application from time to time in force in any province", the statute law of Canada was not included in that expression. He said at p.151:

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

109. He rejected the idea that the section was intended to be declaration of the paramountcy of treaties over Federal legislation. The section was merely included to prevent any interference with rights under treaties "resulting from the impact of provincial legislation".

110. Section 87 dealt with in *Regina v. George* is identical with s.88 as it appears in c.I-6 of the 1970 Revision.

111. I agree with the comments made by the Chief Justice on the judgments in *The Natural Parents v. The Superintendent of Child Welfare et al*.

112. I also agree that the appeal should be allowed and the appellant's conviction quashed.

113. COOPER, J.A.: I have had the privilege of reading the reasons for judgment of the Chief Justice and agree with him that this appeal should be allowed but as my reasons differ from his I wish to set them out separately.

114. The charge against the appellant was that on or about October 2, 1974 he did unlawfully have in his possession a rifle upon a road contrary to s.150(1)(b) of the *Lands and Forests Act*, R.S.B.C. 1967, c.163. Section 150 of that Act, as amended by c.55 of the *Statutes of 1969*, reads in part:

> 150(1)(b) Except as provided in this Section, no person shall, take, carry or have in his possession any shot gun cartridges loaded with ball or with shot larger than AAA or any rifle,
>
> (a) in or upon any forest, wood or other resort of moose or deer; or
>
> (b) upon any road passing through or by any such forest, wood or other resort; or
>
> (c) in any tent or camp or other shelter (except his usual and ordinary permanent place of abode) in any forest, wood or other resort.
>
> (2) Any person may hunt with a shotgun using cartridges loaded with ball or with one rifle during the big game season for which he holds a valid big game license.

It is obvious that these provisions are aimed at the prevention of hunting big game by a person without a license and out of season.

115. The admitted facts are that the appellant is an Indian a member of the Micmac Band, Chapel Island Reserve, Cape Breton Island, Nova Scotia, that he was carrying a rifle on a road passing through a resort of deer, that the road was within the geographical boundaries of the Reserve and that he resided within the reserve. It also appears to be common ground that the appellant did not have a big game license and that October 2, 1974 was not a date within the big game season for that year.

116. The question put to us by the Judge of the Provincial Magistrate's Court, who convicted the appellant, is:

> Was I correct in holding that the provisions of the *Lands and Forests Act*, R.S.N.S. 1963, c.163, as amended, and in particular section 150, subsection (1)(b) thereof, apply to an Indian while present upon a reserve as defined by the *Indian Act*, R.S.C., 1970, c.I-6, as amended.

117. Section 91(24) of the *British North America Act, 1867*, provides that the Parliament of Canada has exclusive legislative authority over "Indians, and Lands reserved for the Indians". The exercise of this authority is to be found in the *Indian Act*, R.S.C. 1970, Chap. I-6.

118. The first question which arises here is whether the *Lands and Forests Act* is *ultra vires* of the Legislature of the Province of Nova Scotia because of the provisions of s.91(24). I am satisfied that this question must be answered in the negative. In *Cardinal v. Attorney-General of Alberta* (1973), 40D.L.R. (3d) 553; [1974] S.C.R. Mr. Justice Martland, speaking for the majority, said at pp.559, 60 D.L.R.; pp.702, 3 S.C.R. in a passage which the Chief Justice has quoted in full that a Province cannot legislate in relation to a subject-matter exclusively assigned to the federal Parliament by s.91:

> But it is also well established that provincial legislation enacted under a heading of s.92 does not necessarily become invalid because it affects something which is subject to federal legislation.

It is common ground that the *Lands and Forests Act* was enacted under one or more headings of s.92. Its subject-matter is not Indians or lands reserved for Indians and the fact that it may affect Indians does not render it invalid. Section 150(1)(b) applies to all persons in the Province. In my opinion it includes in its ambit persons who are Indians and whether on or off a reserve. I quote again from Mr. Justice Martland's judgment in *Cardinal* – p.559, 60 (D.L.R.):

> 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 reserves 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, it to be excluded.

119. I now direct my attention to s.88 of the *Indian Act* which reads:

> Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulations or bylaw made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

This section was first enacted as s.87 of the *Indian Act*, 1951, (Can.), c.29. Mr. Justice Martland referred in *Cardinal* to s.88 but in the end found it unnecessary in resolving the issue there before the Court to determine its meaning and effect.

120. It should be first noted that although s.91(24) of the *British North America Act, 1867*, refers not only to “Indians” but also to “Lands reserved for the Indians” s.88 refers only to Indians in the phrase “to and in respect of Indians in the province”. The Chief Justice has found that hunting is a use of the land and of its resources integral to the land and that the absence of the words “Lands reserved for the Indians” in s.88 results in that section not being applicable to the charge against the appellant.

121. I am, with respect, unable to accept this conclusion. The act of hunting is one personal to the hunter, in this case the appellant. Section 88 makes laws of general application (subject to the prefatory words and the exceptions therein contained) applicable “to and in respect of Indians in the “province”. It is obvious that a hunter “uses” land in the sense of walking or driving over it but the act of hunting with which s.150 of the *Lands and Forest Act* is concerned is that of the *person* engaged in that activity. I find support for this view in *Regina v. White and Bob* (1965), 50 D.L.R. (2d) 613 (B.C.C.A.) and on appeal to the Supreme Court of Canada in (1966), 52 D.L.R. (2d) 481. It was held there that a certain document was a “treaty” within the meaning of that term as used in s.87 (now s.88) of the *Indian Act* and that the operation of s.25 of the *Games Act*, R.S.B.C. 1960, c.160, was excluded by reason of the terms of that treaty. The charge was that the accused, native Indians, had possession of six deer more than nine days after the close of the open season, contrary to the said s.25. The judgments make no reference, in applying s.87, to the absence in that section of the words “lands reserved for the Indians”. Nor have I found any other hunting cases where such reference has been made. In fairness it might be contended that this point was not raised in White and Bob and other cases but in my opinion the absence of the words “Lands reserved for the Indians” in s.88 is not a valid ground for allowing this appeal.

122. I should add that reliance in support of the argument that hunting by Indians is in essence use of the land itself and its resources was placed by the appellant upon *District of Surrey v. Peace Arch Enterprises Ltd*. (1970), 74 W.W.R. 380 (B.C.C.A.). The facts in that case were markedly different from those in this appeal. The subject matter there was very clearly use of lands in an Indian reserve. The lands had been surrendered in trust to the federal Crown for the purpose of leasing. The issue was, as expressed by Mr. Justice Martland in *Cardinal* at p.561 (D.L.R.), whether the lands were subject, in their use by the lessees who were non-Indians, to certain municipal by-laws and to Regulations made under the provincial *Health Act*. The court found that the lands in question were still “lands reserved for the Indians” and that being so, only the federal Parliament could legislate as to the use to which they might be put. The *Surrey* case therefore was concerned with the very land itself as being the subject of surrender and lease. There are no such circumstances here when the provincial legislation applies, in my opinion, to persons including Indians, and not to land as such.

123. The appellant also referred to cases where a federal statute has conferred a certain status and powers upon a corporation or institution and provincial legislation was held not to apply to them. The appellant cited *Spooner Oils Ltd. Et al. v. Turner Valley Gas Conservation Board*,

[1933] 4 D.L.R. 545 at p.557, [1933] S.C.R. 629; *Deeks McBride Ltd. v. Vancouver Associated Contractors Ltd*., [1954] 4 D.L.R. 844 at p.848; *Western Canada Hardware Co. Ltd. v. Farrelly Bros. Ltd*., [1922] 3 W.W.R. 1017, 70 D.L.R. 480 at p.486. I find it unnecessary to review these cases in detail. I consider them inapplicable here. They stand in my opinion for the proposition that if an enterprise or activity is within federal jurisdiction a province may not legislation derogation of the status and powers conferred upon a person or company to carry on such enterprise or activity so as to nullify or impair what had been authorized under federal legislation. Here the federal Parliament itself in enacting s.88 has invoked provincial laws of general application.

124. It is perhaps unnecessary for me to deal further with s.88 in view of my conclusion expressed later on that this appeal should be allowed and of my person for deciding but I nevertheless add my further observations with respect to that section.

125. Section 88 is expressly made "Subject to the terms of any treaty and any other Act of the Parliament of Canada" and there are limitations upon its application expressed as being "except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act."

126. In the first place I do not think that either exception is applicable here. I find no inconsistency between the provisions of the *Lands and Forests Act* with which we are concerned and the *Indian Act*. Section 73(1)(a) of the latter Act empowers the Governor-in-Council to make regulations for the protection of fur-bearing animals, fish and other game on reserves and an Indian band has like power to make by-laws under s.81(o) of the Act. No such regulation or by-laws were brought to out attention and it appears to be common ground that none have been made. That being so I do not think that the exceptions affect the issue in this appeal.

127. There remains the provision set out by the opening words of the section making it subject to the terms of any treaty and any other Act of the Parliament of Canada. I know of no other such Act, but is there any treaty the terms of which prevent the application of s.88 in this appeal?

128. In certain other parts of Canada treaties were entered into with Indians by which the Indians who were parties to the treaties ceded land to the Crown in return for certain rights and privileges. As pointed out by the Chief Justice the Indians by such land cession treaties often retained a specific right to hunt and fish on the ceded land so long as it remained unoccupied Crown land. Such treaties were effective to bring into operation the opening words of s.88 to which I have referred. This was the situation in *White and Bob*, supra. The document there in question was one by which the ancestors of a tribe of Indians on Vancouver Island had sold lands to the Hudson's Bay Company on the understanding, *inter alia*, that "we are at liberty to hunt over the unoccupied lands, and to carry on our fishing as formerly". The document was, I have said, held to be a treaty within the meaning of that term as used in s.88 of the *Indian Act* with the result that the right of the respondents to hunt over the lands in question reserved to them by the treaty was preserved by s.87 (now s.88) and remained unimpaired by the *Game Act*, supra.

129. There do not appear to have been any land cession treaties in Nova Scotia but rather "treaties" or agreements of another character – see, App. III to *Native Rights in Canada*, 2nd ed., Cumming and Mickenberg. These have been comprehensively reviewed by the Chief Justice in his reasons for judgment. I will not repeat that review. It is sufficient for me to say that I do not find in any of them hunting rights reserved to the Indians on Cape Breton Island so as to overcome the application of s.88 in respect of the appellant. I should perhaps mention the "treaty or Articles of Peace and Friendship Renewed" of 1752. It does state that the Tribe of Indians there referred to "shall not be hindered from, but have free liberty of hunting and fishing as usual…" Cape Breton Island was held by the French in 1752 and the Tribe of Micmac Indians referred to in the *Treaty* are those inhabiting the eastern coast of Nova Scotia. The *Treaty of 1752* was considered in *Rex v. Syliboy* (1928), 50 C.C.C. It was there held by Patterson, Acting C.C.J., that it did not extend to Cape Breton Indians and further that it was not in reality a treaty. I have doubt as to the second finding and express no opinion on it, but I have no doubt as to the correctness of the first finding.

130. I now turn to my reason for agreeing that this appeal should be allowed. Following the *Treaty of Paris* in 1763 there was issued on October 7, 1763 a *Royal Proclamation* – see, R.S.C. 1970, appendices 123-129. This *Proclamation*, as pointed out by the Chief Justice, has been held to have the legislative effect of a statute – see, *The King v. Lady McMaster*, [1926] Ex.C.R., where Maclean, J., said at p.72:

> 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.

and see also *Regina v. White and Bob* (1965), 50 D.L.R. (2d) 613 at p.616 and *Calder v. Attorney-General of B.C.*, [1973] S.C.R. 313 at p.394. The *Proclamation* has also been held in Calder at pp.396,7 to have been declaratory of the aboriginal rights of Indians and it is beyond dispute that such rights included the right to hunt.

131. The *Proclamation* recites that:

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of the,, as their Hunting Grounds.

And declares, *inter alia*, that no Governor or Commander in Chief "do presume for the present, and until our further Pleasure be known" to grant Warrants of Survey or pass any Patents "upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them."

132. I respectfully agree with the Chief Justice that the *Proclamation* extended to and included the Indians on Cape Breton Island. There is no evidence before us that the rights of the Indians to the reserve lands here in question have been surrendered to or purchased by the Crown. The Federal Crown holds legal title to the lands in trust for the use and benefit of the Indians concerned but their interest remains. That interest has been characterized as a personal and usufructuary right which in my opinion must include the right to hunt. It remains until it has been surrendered to the Crown or otherwise extinguished by the federal power: neither of which has happened – see, *St. Catharine's Milling and Lumber Company v. The Queen* (1888), 14 App. Cas. 46 at pp.54,5. Section 88 does not have the effect of converting the *Lands and Forests Act* into federal legislation by referential incorporation. That Act remains provincial legislation and as such cannot be held to have extinguished hunting rights of the Indians confirmed by the *Royal Proclamation* – see, *Natural Parents v. The Superintendent of Child Welfare et al*. (S.C.C.) October 7, 1975, as yet reported. [now reported 6 N.R. 491].

133. I conclude, therefore, that s.150 of the *Lands and Forests Act* in the circumstances of this case does not apply to the appellant on the ground that he had, pursuant to the terms of the *Royal Proclamation*, the right to hunt and this right has not been surrendered or extinguished. It follows that this appeal should be allowed. I respectfully agree, however, with the Chief Justice that the question should be amended to encompass s.150(1)(b) of the *Lands and Forests Act* only.

134. MacDONALD, J.A.: I have had the opportunity of reading the reasons for judgment prepared by the Chief justice and agree entirely with his conclusions. However, because of the importance of the issue raised I wish to set forth my views on the land use aspect.

135. There can be no question that legislative competency with respect to the use of reserve lands is vested solely in the federal parliament and it is equally clear in my opinion that s.88 of the *Indian Act* does not delegate legislative power to the province. In my opinion the provisions of s.150 of the *Lands and Forests Act*, as amended, relevant to the matter in issue in this appeal is provincial legislation of general application dealing with hunting.

136. The core of the problem here is whether such legislation can be termed *in personam* as distinct from *in rem* legislation. In other words, is it legislation dealing with the use of land or is it legislation of a regulatory nature directed at and affecting individuals only. At first blush it would appear that such legislation affects individuals only and is in effect a licensing or regulatory provision and consequently has nothing to do with land use.

137. With deference to those who may hold a contrary view, I think that a real distinction exists in law between the status of an Indian hunting on reserve lands and an Indian or non-Indian hunting on non-reserve lands. In addition to what the Chief Justice has said I believe that one basis for this distinction lies in the historical background of Indian reserves.

138. Prior to their conquest the Indians possessed this province. After conquest and with the expansion of the white immigrant population the position of the Indians was compromised and as a

result of treaties and governmental policy they were literally forced to live in and on certain designated tracts of lands which were called reserves.

139. This action resulted in the Indians being stripped of many of their rights, but the one right that was never taken away from them by treaty, or otherwise, was the right to hunt and fish on reserve land. Although such right could be taken away by amendments to the *Indian Act* or by regulations made thereunder, this has not been done.

140. In consequence is my opinion that the historical and traditional right of an Indian to hunt on a reserve in this province remains to this day unhampered and unimpeded by the relevant provisions of s.150 of the *Lands and Forests Act*. No such right is vested in Indians or non-Indians hunting on non-reserve lands. What I am saying is that historically, reserves were created for the use of Indians: not only as their place of residence but also as their exclusive hunting and fishing grounds. Thus, hunting and fishing on reserves are so inextricably bound up with land and land use as to constitute a usufructuary right – a legal right that has never been taken away.

141. The distinction I have drawn may be considered artificial in this day and age but I believe that so long as Indian reserves remain in this province those Indians engaged in hunting on such reserves are exercising a land use right which has been theirs since the conception of reserves. In consequence, in my opinion, those provisions of s.150 of the *Lands and Forests Act* with which we are concerned have no application to Indians on reserves.

142. In addition to the reasons expressed by the Chief Justice I find support for my opinion in the judgment of the Ontario Court of Appeal in *Isaac et al. v. Davey et al.* (1975), 5 O.R. (2d) 610, wherein Arnup, J.A., said at p.620:

> For the purposes of this case, it is sufficient to say that Indian title in Ontario has been 'a personal and usufructuary right, dependant upon the good will of the Sovereign'. *Indian lands were reserved for the use of the Indians, as their hunting grounds, under the Sovereign's protection and dominion*. The Crown at all times held a substantial and paramount estate underlying the Indian title. The Crown's interest became absolute whenever the Indian title was surrendered or otherwise extinguished. There are the words of the Privy Council (per Lord Watson) in *St. Catharines Milling & Lumber Co. v. The Queen*, at pp.54-5, and this statement of the legal position has been followed ever since. (my italics)

143. This statement in my opinion is equally applicable to Indians on reserves in this province and is not affected by the fact that reserve lands in Nova Scotia are owned by the Government of Canada.

144. I would dispose of this appeal in the manner proposed by the Chief Justice.

Appeal allowed.