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INDIANS AND LANDS RESERVED FOR 
THE INDIANS: 
OFF-LIMITS TO THE PROVINCES?

By PATRICIA HUGHES*

Although the federal government has jurisdiction over Indians and reserves, there has been an "area" allocated to the provinces with respect to the application of their laws to Indians; yet, it can be argued, the provinces' area can be so strictly limited by the way in which their legislation may be characterized that it becomes very narrow indeed.

The exclusive power held in relation to "Indians and the Lands Reserved for Indians" by the federal government might have been exercised in a manner designed to protect and enhance native status. Yet section 91(24) of the Constitution Act, 1867 has not served that function; often it has been used to diminish and demean native status. The poverty, high unemployment, low education levels and psychological and political alienation of the majority of the members of our native communities are witness to federal failure. Politically, wardship and independent cultural and political survival are by definition incompatible. Although there are exceptions to this unhappy and disgraceful picture of native life — bands grown rich from the fortuitous placement of their reserves on ground protecting oil or bands who own shopping centres or ski resorts — clearly federal occupation of this field has not been a particularly beneficial one.

The federal-provincial interplay in the application of their respective laws to native peoples symbolizes the conflict which pervades native life: how to combine the native distinctiveness with the reality of surrounding white culture. Put another way, would the reserve immune from provincial regulation be an oasis or a barren island? MacLaren J.A. in R. v. Hill would answer that the latter would be the case: exempt from provincial obligations, Indians would also be exempt from the benefits and would be relegated, except for the "few matters" within federal scope, to "the condition and rights of their ancestors when this country was first discovered." 3

Another observer might note that native peoples would be "relegated" to the status of an independent and self-sufficient peoples. The Natural Parents case, 4 discussed below, 5 seems to echo this argument, albeit in a more

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3 Id. at 411.
5 See text accompanying notes 24-38, 154-172.
sophisticated way, where a concern is expressed that native children be able to benefit from provincial adoption laws. Accepting the view that native people would suffer without the benefits of provincial laws, however, it could be argued that this view would be true only if the federal government did not fill the vacuum: although the federal government could exercise its power in such an instance, it might not find it practical to do so. If nothing else, permitting the application of provincial laws is an expedient way for the federal government to carry out its responsibilities under section 91(24), particularly for Indians off the reserves. For example, the Indian Act contains provision for regulating traffic on the reserve but the federal government has never attempted to create chaos by regulating traffic for Indians off the reserve.

The impact of provincial legislation is seen rather differently by other commentators. Douglas Sanders suggests that the way in which we define "reserve" will help determine whether provincial laws should apply. If the reserve is treated as a distinct social and political community, few provincial laws will apply; if it is considered to be merely a geographical entity, the only non-applicable provincial legislation will be that concerned with land use. It shall be argued that "land use" is a large enough category to swallow provincial legislation whole. From this perspective, the application of provincial law may be the manifestation of the encroachment by white society upon the protected reserve.

Another, more prosaic, aspect to consider is the federal-provincial struggle for power. The federal government appears to be in possession of the elements necessary for success since it has power over "Indians and the Lands reserved for Indians" (both of which go beyond the borders of the specified reserves) and it has proclaimed the operation of that power (at least in regard to reserves) through the Indian Act. Against that show of strength, the provinces must assert their own presence, always conscious of the necessity of overcoming the presumption of federal jurisdiction (and, no doubt, conscious, too, of not taking too much actual responsibility for native rights). Section 88 of the Indian Act formulates the position of the province. It cannot be ignored

7 See, e.g., R. v. Johns (1962), 39 W.W.R. 49, 33 C.C.C. 43, 38 L.R. 148 (Sask. C.A.); R. v. Marshall (1979), 31 N.S.R. (2d) 530, 52 A.P.R. 530 (C.A.); R. v. Two young men (1979), 16 A.R. 413 (C.A.). In the last case, the accused was charged under provincial legislation which the Court held applied to Indians on Reserves, while in the first two cases, the accused was charged under federal legislation. The distinction lies in the Courts' interpretations of the relevant words in the Indian Act Traffic Regulations. The Court in Two young men construed them narrowly in order to exclude incorporation of the provincial legislation by section 88.
9 The federal government has jurisdiction over Indians on and off Reserves, and land reserved for Indians includes at least that territory covered by The Royal Proclamation, 1763 (Imp.), R.S.C. 1970, Appendix II, No. 1: St. Catherine's Milling and Lumber Co. v. The Queen (1887), 13 S.C.R. 577 at 617, aff'd (1888), 14 App. Cas. 46, 4 Cart. 107.
from a political standpoint that section 88 is a statement designed by one adversary to shape the parameters of the other's aggression. Its ultimate meaning remains, of course, with the courts. Section 88 reads as follows:

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

Thus laws of general application in the province are applicable to Indians except as limited by the other provisions of section 88: they are subject to treaties and any federal legislation concerned with Indians and reserves, and void to the extent of any inconsistency with the Indian Act (and regulations and band council by-laws made under it); furthermore, such laws are not valid or are inoperative in their application to Indians if they make provision for anything for which provision is made by or under the Indian Act, whether they are inconsistent or not.

This article will examine the concept of characterization in the interaction between federal and provincial legislation as they apply to Indians and Reserves paying particular, but not exclusive, attention to section 88. The process of characterization lies at the heart of section 88 and thus central to the extent to which provincial legislation is held to apply to Indians. The extent of provincial presence in this area is important, as shown briefly above, from the symbolic perspective of defining reserves, the political perspective of determining the balance of power between the federal and provincial governments and from the legal perspective of interpreting section 88.

II. CHARACTERIZATION: THE ESSENCE OF SECTION 88

The first form of categorization is that which always arises when one level of government complains that its jurisdiction is being invaded by the other level. The test focuses on determining the subject matter or "pith and substance" of the legislation and applies to both federal and provincial legislation. The concern of this paper is less with the normal pith and substance characterization than with other types of categorization to which a piece of provincial legislation passing the pith and substance test will be subject. Assuming a particular piece of provincial legislation passes the pith and substance test, then, it must be examined further to determine whether the subject matter comes within the purview of the Indian Act; how rigidly or liberally the provisions of the Indian Act are interpreted will have a crucial bearing on the outcome at that stage.

It is not suggested here that characterization is not useful in other legislative areas. An indication that it is useful can be seen from attempts at "colouring", for example, when legislation purports to be about a matter within the enacting body's jurisdiction but is actually in relation to a matter within the other government's jurisdiction. Indeed, it could be argued that all constitutional interjurisdictional interpretation is in its essence an exercise in characterization. Rather, here the exercise is being carried out in relation to the interplay between s. 91(24) and relevant s. 92 subject matters; it is done, however, on the premise that characterization is a particularly significant tool in this area.
Beyond the "Indian Act test", provincial legislation may be analyzed to determine whether it can be characterized as "in relation to" land use; if it is, it follows that it may have no application to reserves. Finally, the effect of section 88 itself on the status of provincial legislation must be considered: does it referentially incorporate provincial legislation or give it power to apply *ex proprio vigore*, or its own force? Although this question appears to have been settled in favour of the *ex proprio vigore* position, a substantial minority of the judiciary and commentators are steadfast in the view that section 88 referentially incorporates provincial legislation. As will be discussed below, they consider incorporation "saves" provincial legislation which, without incorporation, would not apply at all.

It is contended here that the "appropriate" application of the characterization principles outlined below could effectively bar the province from virtually any jurisdiction over Indians, especially on Reserves; by "any jurisdiction" is meant any jurisdiction which would flow naturally from the exercise of the province's section 92 powers as an incidental effect (that is, there is no claim here that the provinces have any power over Indians or Reserves comparable to the federal section 91(24) power). The "characterization principles" are as follows:

a) If the particular provincial legislation in dispute can be characterized as "in relation to" Indians or Indian lands, the pith and substance test would, of course, find it *ultra vires* as encroaching directly on s. 91(24);

b) If the provincial legislation is not in relation to Indians or Indian lands, but would "impair" the status of Indians, it will be declared *ultra vires* insofar as it applies to Indians;

c) If the provincial legislation is within the scope of section 92 and if it is of general application, it will be tested against the various limitations in section 88 (that is, is the subject matter dealt with in a treaty or is there extant a band council by-law on the subject, etc?) and it will be declared void to the extent that it is subject to the limitations (or to the extent the questions in parentheses are answered in the affirmative);

d) If the provincial legislation concerns a subject for which provision is made by or under the *Indian Act*, it will be declared void to that extent, both by virtue of section 88 and by the paramountcy doctrine;

e) If the provincial legislation can be characterized as relating to land use, it will be void in its application to Indian Reserves by virtue of section 88; and

f) If the provincial legislation escapes the net of the foregoing tests, it will be applied as federal law if section 88 does in fact referentially incorporate provincial legislation;

g) Finally, even a provincial law which escapes the federal net and is not applied as a federal law must pass the challenge of the Charter of Rights and Freedoms, although this requirement must be met by

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11 See Part E.
That the application of these principles to provincial legislation carries with it the potential usurpation of almost all provincial power in regard to Indians and Reserves is evident in the cases in which the principles are employed, either explicitly or implicitly.

A. The First and Second Principles: The Pith and Substance and Impairment Tests

If the provincial legislation in dispute can be characterized as “in relation to” Indians or Indian lands, the pith and substance test would find it *ultra vires* as encroaching directly on section 91(24).

This first principle is a common principle of constitutional interpretation. When legislation (of either level of government) is impugned as being *ultra vires*, the question addressed is “what is the purpose of this legislation?” If its purpose is within the enacting body’s jurisdiction, it is *intra vires* even if it would have an incidental effect on something within the other government’s competence; at least, this is so assuming that a “singling out” has not occurred behind a veil of general purpose. For example, the provincial legislature may pass a law which deals with the control of property (so that property could not be used to propagate a particular political doctrine); the courts may strike it down as really being in relation to freedom of speech, a federal matter. If its purpose is within the enacting body’s jurisdiction, it is *intra vires* even if it would have an incidental effect on something within the other government’s competence; at least, this is so assuming that a “singling out” has not occurred behind a veil of general purpose. For example, the provincial legislature may pass a law which deals with the control of property (so that property could not be used to propagate a particular political doctrine); the courts may strike it down as really being in relation to freedom of speech, a federal matter. The first principle simply says, then, that any provincial law, the real purpose of which is to legislate in relation to Indians or Reserves will be struck down as *ultra vires*, no matter what its ostensible purpose. Apart from acknowledging the general difficulty of actually determining the “pith and substance” or “real purpose” of any piece of legislation, nothing more need be said specifically about its operation at this point and this first principle can be examined in company with the second principle which concerns impairment of status:

If the provincial legislation is not in relation to Indians or Indian lands, but would “impair” the status of Indians, it will be declared *ultra vires* insofar as it purports to apply to Indians.

To be applicable to Indians, provincial laws must be laws of “general application”, that is, applicable to everyone in the province. If a provincial law affects only Indians, it would intrude on the section 91(24) power, and clearly be *ultra vires* because of that; Mr. Justice Dickson seems to go beyond that in *Kruger and Manuel v. The Queen*¹⁴, however, to state that a provincial law which falls short of affecting only Indians may also be *ultra vires* as it purports to apply to Indians if it “impairs” Indian status.

Mr. Justice Dickson stated that there were two *indicia* of laws of general application: they must apply uniformly throughout the territory and must not be “in relation to” one class in object or purpose.¹⁵ The law might affect one

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¹⁵ *Id.* at 110 (S.C.R.), 304 (W.W.R.), 381 (C.C.C.).
person or group more seriously than it does others, but it cannot impair the status or capacity of a particular group, even if it is an enactment "in relation to" another matter clearly within the enacting body's jurisdiction.\textsuperscript{16} The Court was not provided with "clear evidence" that the status of Indians had been impaired by the \textit{Wildlife Act},\textsuperscript{17} the legislation then under scrutiny, or by the opposition of interests of conservationists and Indians "in such a way as to favour the claims of the former."\textsuperscript{18} The \textit{Wildlife Act},\textsuperscript{19} then, fulfils both criteria of a law of general application as set out by Dickson J. and this, for Mr. Justice Dickson, decides the case.

What is not decided, however, is just what "impairment of status" means. Mr. Justice Dickson's \textit{indicia} can be interpreted to mean that even if a provincial law which is otherwise valid has merely the \textit{incidental} effect of impairing Indian status, it will be held \textit{ultra vires} to that extent, at least. Yet in the earlier case of \textit{Canadian Indemnity Co. v. Attorney-General of British Columbia},\textsuperscript{20} where the provincial Autoplan virtually eliminated federally incorporated insurance companies, the plan was held to be valid because it came within the province's jurisdiction under section 92(13) of the \textit{Constitution Act, 1867};\textsuperscript{21} within its jurisdiction the province can regulate a particular business or activity and a federal coporation is not exempt from that. The concern, said the Court, is with purpose and not effect. Mr. Justice Dickson's \textit{indicia} refer to effect, not purpose, and seem also to go beyond the singling out test; from his perspective, there does not have to be a singling out for the provincial legislation to be invalid, there merely has to be an \textit{impairing} effect on native status.

It should be pointed out, too, that a provincial law which is intended to benefit Indians (or, more neutrally, does not have either the purpose or effect of impairing status) will be declared invalid if it purports to affect Indians specifically. For example, \textit{dicta} in the \textit{Natural Parents}\textsuperscript{22} case made it clear that a provision in the British Columbia \textit{Adoption Act}\textsuperscript{23} which stated that the Act would not affect the Indian status of a native child adopted by white people was either ineffective or \textit{ultra vires};\textsuperscript{24} that provision was intended to protect, and would, if valid, have the effect of preserving, Indian status.

On the other hand, Mr. Justice Beetz suggests in the \textit{Natural Parents}\textsuperscript{25}
case that status could be attacked quite seriously without provincial legislation being declared invalid. He states in *dictum* that:

Even if one assumes that the child would lose his Indian status as a consequence of the adoption order, I fail to see in what respect this would conflict with the *Indian Act*. There could be no conflict either by way of outright repugnancy or by way of occupation of the field since the *Indian Act*, silent as it is on the conditions, formalities and effects of legal adoption, does not even purport to occupy the field.26

Read narrowly, this *obiter dictum* could be seen as referring only to the question of inconsistency with the *Indian Act*, that is, there may be other reasons why affecting Indian status would make the order invalid. Read more broadly, it could mean that impairment of status would not, in Mr. Justice Beetz’s view, automatically render the provincial *Adoption Act*27 *ultra vires* as it purported to apply to Indians, although it should be pointed out that the Court did not find that status was in fact affected by the *Adoption Act*.28 If the broad interpretation of Beetz J.’s *obiter dictum* is the correct one, it will be noted that the impairment/general application test enunciated by Mr. Justice Dickson is a greater threat to provincial legislation than the position intimated by Mr. Justice Beetz in *Natural Parents*29 which deals with the issue more narrowly through the inconsistency with or provision by the *Indian Act* tests explicitly included in section 88.

Beetz J. also refers to the relationship between status and marriage, the solemnization of the latter being within provincial jurisdiction.30 He refers to failure to observe provincial solemnization requirements as affecting Indian status. If it is, in fact, Beetz J.’s point that marriage can affect status, it cannot be considered as an illustration of the ability of provincial legislation to affect status or indeed impair it and yet still be *intra vires*; the impact on status derives directly and explicitly from the *Indian Act* in that case, not from provincial legislation. One wonders, too, whether an incidental effect on one person (or relatively small number of persons) might be considered differently than a wholesale impairment of status, although it is submitted that no such distinction should be made.

The other (and perhaps most basic) question raised in relation to the impairment test is, of course, what constitutes status itself? Is status meant to be legal, political, social or psychological? The Supreme Court has addressed this question, albeit obliquely, and is divided on the matter.31

The issue of impairment of status was central to the *Natural Parents*32 case. In that case, a white couple had applied to adopt an Indian child. The trial judge was willing on the merits to allow the adoption without the consent of the natural parents but he felt constrained by what he saw to be an inconsistency between the British Columbia *Adoption Act*33 and the *Indian Act*:

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26 Id. at 784-85 (S.C.R.), 173 (D.L.R.), 719 (W.W.R.).
29 Supra note 26.
30 Supra note 4, at 786 (S.C.R.), 174 (D.L.R.), 720 (W.W.R.).
31 Id.
32 Id.
33 R.S.B.C. 1960, c. 4, now R.S.B.C. 1979, c. 4.
believed the child’s native status would be obliterated by the operation of the provincial statute which provided for the cessation of all ties between the child and natural parents. The British Columbia Court of Appeal held that Indian status survived despite adoption with the result that the Adoption Act, as a law of general application, applied to the adoption of Indian children and was “blunted” only to the extent of inconsistency with the Indian Act.

All nine members of the Supreme Court held that the child’s status was not lost through adoption by non-Indians, nicely avoiding the impairment issue. Chief Justice Laskin did attempt, however, to make “Indianness” or cultural status the pivot determining whether provincial legislation would apply of its own force, to Indians. Adoption, he said, speaking for Judson, Spence and Dickson JJ., goes to the very important concept of “Indianness”, thereby striking “at a relationship integral to a matter outside of provincial competence.” The Adoption Act could not, therefore, apply to Indians of its own force: “It is difficult to conceive what would be left of exclusive federal power in relation to Indians if such provincial legislation was held to apply to Indians.” This notion of “Indianness” would permit a very wide application of the impairment test and, consequently, of the section 91(24) power.

The same issue was discussed in Four B Manufacturing, the most recent Supreme Court case in the series dealing with the application of provincial law to Indians. It concerned the application of Ontario labour relations legislation to a business on a reserve. Four B was a company incorporated in Ontario, owned by four brothers, all members of the Band on whose Reserve the business operated. The company’s existence on the Reserve was permitted by a three year renewable permit pursuant to the Indian Act and it benefitted from federal loans available to Indians. Although it employed Indians for the most part (forty-eight employees were Indians), it also employed ten former Band members and ten non-Indians. The business had nothing to do with Indian culture or anything similar: it made uppers for Bata shoes. The employees sought certification under the Ontario Labour Relations Act; the company argued that the Act did not apply because the company and its employees were within exclusive federal competence by virtue of section 91(24) of the Constitution Act, 1867. (It is perhaps worth noting, as did the Court, that the Band itself had considered forming the company but had decided against it; only then had the brothers gone ahead with the venture on an individual basis.) There was, then, a great deal of “Indianness” connected with this venture in

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36 Supra note 4, at 761 (S.C.R.), 154 (D.L.R.), 704 (W.W.R.).
38 Supra note 4, at 761 (S.C.R.), 154 (D.L.R.), 705 (W.W.R.).
one way or another; nevertheless, the Court held, with two Justices dissenting, that the Ontario Labour Relations Act applied.

Chief Justice Laskin and Mr. Justice Ritchie were considerably more impressed than were their fellow members of the Court by the notion that the combination of individual “Indian elements” in Four B made it “substantially an enterprise ‘of Indians for Indians on an Indian reserve’.” Incorporation in Ontario was mere convenience but observance of section 18 of the Indian Act (obtaining permission to operate the factory on the Reserve) and other sections of the Act (sections 28, 20(1) and 30) “manifest an exercise of federal legislative authority in maintaining the Reserve for the use and benefit of Indians who are members of the Band for which the Reserve has been set apart.” The federal subsidies and other factors, in their lordships’ opinion, made this a distinctly Indian enterprise and therefore a project which was subject to the Canada Labour Code, not the Ontario Labour Relations Act.

Most activities on the Reserve and most people’s presence there occur with the permission of the federal government or with its tacit acceptance. The minority position in Four B Manufacturing (Laskin C.J. and Ritchie J.) if carried to its logical conclusion, would have the Reserve itself treated as coming under section 91(24) for almost all purposes as long as Indians are involved or the Indian Act is instrumental in the activity’s taking place (that is, that permission is granted for the activity to take place on the Reserve). That is, in fact, the Chief Justice’s position, formulated in his “enclave” theory which he articulated in Cardinal v. A.G. Alberta and which will be discussed below.

The characterization of the matter by Beetz J. for the majority, took a different tack. What is of concern here, he said, was not the civil rights of Indians but “the rights of Indians and non-Indians to associate with one another for labour relations purposes, purposes which are not related to ‘Indian-ness’.” There is, he said, nothing specifically Indian about the employer and since neither Indian status nor rights closely connected with Indian status were at stake, the right to regulate labour relations does not form an integral part of federal jurisdiction over Indians and Indian lands. Four B Manufacturing cannot, from the majority’s point of view, be characterized as a federal undertaking. The requirement of a permit is irrelevant since the company would need one to operate on any Crown land and other companies receive federal subsidies without the federal government regulating their labour relations.

The Four B Manufacturing case is a difficult one. For the minority, the location and ownership (by Indians) is more or less conclusive of the matter;

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43 Supra note 39, at 1039 (S.C.R.), 390 (D.L.R.), 26 (C.L.L.C.) per Laskin C.J.
44 Id. at 1038 (S.C.R.), 3890-90 (D.L.R.), 25 (C.L.L.C.) per Laskin C.J.
47 Supra note 39.
49 See text accompanying notes 190-99, infra.
50 Supra note 39, at 1047 (S.C.R.), 397 (D.L.R.), 21 (C.L.L.C.)
51 Id.
the added factors of the loan and predominance of Indian employees help to make their conclusion firmer. For the majority, those aspects are not sufficient; rather, they are incidental to an otherwise "ordinary" company. For the minority, the unit of analysis is Indians and "Indianness" in a general sense, while for the majority, the unit of analysis is the company, not Indians or Indian land, and there is nothing in the operation of the company which makes it federal. Section 108 of the Canada Labour Code\(^5\) (which would apply if Four B were a federal undertaking) is directed at federal activities, operations or functions, and not at the position of individuals who might be termed "federal".\(^5\)

In Whitebear Band Council v. Carpenters Provincial Council of Saskatchewan,\(^5\) the Saskatchewan Court of Appeal attempts to limit the impact of Four B Manufacturing\(^5\) on the ground that in Whitebear Band Council,\(^5\) the band council itself is the employer. The Council had agreed with the Department of Indian Affairs and Northern Development to embark on the construction of homes (and related service works) on the reserve. The employees, members of the reserve, were paid by the Council. The Saskatchewan Labour Relations Board certified the applicant union to represent the carpenters involved on the project. The Saskatchewan Court of Appeal, in an application for judicial review, quashed the order of the Labour Relations Board. It found that the band council, as a creature of federal legislation, imparted its federal character to its construction project, an activity which could not be "separated from the activity of the band council as a whole."\(^5\) Nor does it matter whether the federal government has legislated on the matter:

[W]here legislative jurisdiction in relation to a business, service, work or undertaking is exclusively conferred on Parliament, the regulation of the labour relations, forming an integral part of the operation of such business, service, work or undertaking, is not only beyond provincial jurisdiction but is immune from the effect of provincial law, irrespective of whether Parliament has legislated.\(^5\)

Although it is not clear that this immunity extends when legislative authority is conferred otherwise than in relation to a business, service, work or undertaking — as in relation to "Indians" or "Lands reserved for the Indians" — Cameron J.A. expresses some confidence that immunity rests on the power over lands, rather than over Indians. But he does not have to decide this point since the basis of his decision is the classification of the operations of the band council, of which the construction project is only a part, as "a federal work, undertaking or business".

Although Whitebear Band Council\(^5\) indicates how easily Four B Manufacturing\(^6\) can be distinguished, it does not help us determine when

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\(^5\) Supra note 39, at 1051 (S.C.R.), 400 (D.L.R.), 23 (C.L.L.C.).
\(^5\) Supra note 39.
\(^5\) Supra note 54.
\(^5\) Id. at 566.
\(^5\) Id. at 567 per Cameron J.A. (emphasis in original).
\(^5\) Id.
\(^6\) Supra note 39.
status is impaired. For the majority in *Four B*, "Indianness" or status must mean something more than a physical involvement by Indians but what that "something more" is, is not clear. For Chief Justice Laskin, at least, "Indianness" has cultural components which allow him to attribute "Indianness" to the very fact of being Indian in the racial sense or, perhaps, of being Indian on a reserve. It almost seems that to apply provincial legislation under the circumstances of *Four B Manufacturing* or, as shall be seen, of *Cardinal* is to detract from "Indianness", to impair status. Similarly, adoption by white people carries with it the potential of loss of cultural ties and an impairment of status, although not the loss of legal status, and therefore the Adoption Act could not apply of its own force.

When we speak of a cultural or political "Indianness", we might well consider that, historically, hunting and fishing rights have been integrally interwoven with Indian status and with Indian culture. Yet it is ironic that in *Kruger and Manuel*, the source of Mr. Justice Dickson's comments on impairment of status with which this section of the paper began, the Court found that provincial legislation which restricted Indians' hunting rights was *intra vires*; that is, provincial game legislation in British Columbia applied to Indians hunting for food during the closed season on unoccupied Crown land off the reserve. The legislation at issue, the *Wildlife Act*, was of general application according to Dickson J.'s two *indicia*. Mr. Justice Dickson held for the Court, saying:

> However abundant the right of Indians to hunt and to fish, there can be no doubt that such right is subject to regulation and curtailment by the appropriate legislative authority. Section 88 of the *Indian Act* appears to be plain in purpose and effect. In the absence of treaty protection or statutory protection Indians are brought within provincial regulatory legislation.

Whatever "impairment of status" means, then, it does not mean derogation from hunting "rights" which have traditionally been considered to be part of Indians' identity.

**B. The Third Principle: Section 88 Limitations**

If the provincial legislation is within the scope of section 92 and if it is of general application, it will be tested against the various limitations in section 88 . . . and it will be declared void to the extent that it is subject to the limitations.

The third principle simply indicates that provincial legislation is subordinate not only to the *Indian Act* and other federal legislation in its application to Indians and Reserves, but also to treaties and to regulations and council by-laws.

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61 Id.
62 Id.
63 Supra note 8.
64 R.S.B.C. 1960, c. 4, s. 10, as am. by S.B.C. 1973, c. 95, s. now R.S.B.C. 1979, c. 4, s. 11.
65 Supra note 14.
67 See text accompanying note 16.
68 Supra note 10 at 111-12 (S.C.R.), 305 (W.W.R.), 382 (C.C.C.).
made under the *Indian Act*. This is an additional test which provincial legislation must pass to be valid as it purports to apply to Indians, regardless of whether it is "in relation to" Indians or Reserves. Until the passage of the *Constitution Act, 1982*, this did not mean that treaties were "sacrosanct" since the federal government was able to abrogate treaties at will. Under section 35(1) of the *Constitution Act, 1982*, however, "existing aboriginal and treaty rights" are "recognized and affirmed"; thus the section 88 test which applied only to the provinces now has the status of a constitutional provision which restricts legislation of both levels of government, federal as well as provincial.

In addition, provincial laws can be overridden by band by-laws; for example, under section 81(o) of the *Indian Act*, a band council may make by-laws with regard to "the preservation, protection and management of fur-bearing animals, fish and other game on the reserve" and such a by-law could override any provincial legislation which might be held applicable to a reserve and hunting thereon. The other limitations in section 88 regarding the *Indian Act* are treated under the next sub-section.

**C. The Fourth Principle: Provincial Laws and the Indian Act**

If the provincial legislation concerns a subject for which provision is made by or under the *Indian Act*, it will be declared void to that extent, both by virtue of section 88 and by the paramountcy doctrine.

It is important to stress that the provincial legislation does not have to conflict with the *Indian Act* in order to be declared *ultra vires* in regard to Indians, it merely needs to cover the same ground. Thus, section 88 extends the paramountcy doctrine which normally applies to a conflict between federal and provincial legislation, whereby the provincial law gives way to the federal. Generally, the courts have not required the province to withdraw its legislation if the federal government has not covered the field or if there is no inconsistency. Section 88 of the *Indian Act*, though, requires the provincial law to make way for the *Indian Act* even if that legislation is not inconsistent with the Act. If the *Indian Act* makes provision for what is covered by a provincial law, that law cannot apply to Indians. There are, therefore, two separate standards which provincial legislation must meet: the first is the traditional one, that it not be inconsistent with federal legislation in the area, the second is a more demanding standard since the provincial law can have no effect if it is concerned with anything in or under the *Indian Act*.

This raises the question of how narrowly or broadly the term "provision" will be defined. In *Natural Parents*, the provincial legislation concerned adoption; the *Indian Act* does refer to adoption (it says that "child" in sec-

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74 *Supra* note 4.
tions 2(1) and 48(16) includes "adopted child") but it does not make reference to adoption procedures. This seems to be too limited a reference to say that the Indian Act makes provision for adoption. The case of R. v. Peters;75 suggests the following standard by which to determine whether the Indian Act has made provision for the subject matter of the provincial legislation: the Indian Act merely has to make provision for the general subject-matter of the legislation; it is not necessary that it make provision for the specific subject-matter.76 In R. v. Peters,77 the specific subject-matter of the case was consumption of alcohol by a minor; the Indian Act did not provide specifically for consumption of alcohol by an Indian minor but it did contain provisions regarding the use of alcohol by Indians in general. The general provision was held to include the specific and the provincial legislation was held to be invalid against Indians.

Two recent Ontario family cases also attack the problem of the scope of the phrase in the Indian Act "for which provision is made by or under this Act".78 In Sandy v. Sandy, the wife had made an application for a division of the matrimonial home under the Family Law Reform Act, 1978.79 Grange J. rejected the application because the home was located on a Reserve. The lands on which the home stood had been allotted to the husband by the Band Council with the approval of the Minister of Indian Affairs under section 20 of the Indian Act. While the wife was entitled to an interest in the home under section 4 of the F.L.R.A.,80 Grange J. held that the division would be in relation to Indian lands upon a reserve, a federal power which only the federal government could exercise, even if it had an incidental effect on a matter under provincial jurisdiction (in this case, division of property between separating spouses). To apply the F.L.R.A.81 would disrupt the scheme devised by the federal government for holding land on a reserve. (Sandy will also be discussed infra in connection with the fifth principle which is concerned with land use).

Grange J. listed several sections of the Indian Act which deal with or make provision for land use, yet none are in relation to the specific issue of division of property between spouses. This is the same approach as that taken in R. v. Peters:82 the Indian Act has only to speak of the general category of the provincial legislation (for example, intoxication or property); it does not have to provide for the specific sub-category which is the actual subject matter of the legislation (for example, intoxication of a minor or property between spouses). Grange J. stated that the court could not make any order without af-

75 (1966), 57 W.W.R. 727 (Y.T.C.A.). For a discussion of this case and the general issue see Lysyk, The Unique Constitutional Position of the Canadian Indian (1967), 45 Can. B. Rev. 513. He also refers to Re Williams Estate (1960), 32 W.W.R. 686 (B.C.S.C.) where Lord J. held that the provincial legislation in issue had only to meet the test of inconsistency with the Indian Act, surely a misreading of s. 88 of that Act.

76 Supra note 75, at 730.

77 Id.


80 S.O. 1978, c. 2, now R.S.O. 1980, c. 152, s. 4.


82 Supra note 75.
fecting the husband's licence under section 20 of the Indian Act. Yet it is not clear that this view is correct. The court could award division of the home and order that the wife's share be satisfied by a lump sum payment; the sale of the home could be to another Indian. This was how Mr. Justice Grange distinguished Re Bell and Bell, a case under the old Partition Act. There the court ordered partition and sale of the home but stated that no sale under the Partition Act would be effective if it contravened the Indian Act. In other words, the court in Re Bell and Bell accommodated the rights of the applicant spouse to the requirements of the Indian Act but did not dispense with those rights because the Indian Act made provision for the sale of property on the Reserve.

Grange J.'s decision was upheld by the Ontario Court of Appeal but in such a way that it "may have reversed the effect of the trial judgment". Jessup J.A., for the Court of Appeal, said that the learned trial judge had gone "unnecessarily far" when he said that the F.L.R.A. had no validity as it affects Indians; he went on to say that the F.L.R.A. is inoperative to the extent only that it affects lands occupied on a reserve by an Indian with the approval of the band and the approval of the Department of Indian Affairs.

We are of the view that an Indian such as the respondent husband in this case has an "interest" in real property within the meaning of s. 8 of the Family Law Reform Act, 1978 and that his spouse is therefore entitled to a payment in compensation for the matters referred to in s. 8 although she is not entitled to an award of a share of the interest of her husband in the real property.

Section 8 of the F.L.R.A. is concerned with non-family assets to which the non-titled spouse might establish a claim. Presumably the Court of Appeal believed that the Indian Act did not make provision for these section 8 assets. The Court declined to list other sections of the Act which would not be in conflict with the Indian Act, but section 45, dealing exclusive possession, appears to be one of them.

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By s. 92 (13), property and civil rights in the Province are subjects concerning which the Province has exclusive jurisdiction. The Patriation Act of Ontario would fall under this heading. The Patriation Act cannot be said to be legislation concerning Indians. It relates to the property and civil rights of those who share ownership of property.

Furthermore, there is no provision under the Indian Act which prevents patriation or sale. At 201 (O.R.), 231 (D.L.R.).
85 R.S.O. 1970, c. 338, s. 2, now R.S.O. 1980, c. 369, s. 2.
87 Supra note 84.
88 Grange J.'s position in Sandy (supra note 78), on the other hand, would have the effect of depriving the applicant spouse of rights which the province has clearly stated belong to spouses. Again, this would be more detrimental to women since it is the female spouse who is likely to be making the application.
89 Supra note 78.
92 Supra note 78, at 249.
In the subsequent case of Hopkins v. Hopkins,93 Clements Co. Ct. J. pointed out that while certain aspects of or concepts in the F.L.R.A. conflict with the Indian Act, section 45 of F.L.R.A., which is concerned with applications for exclusive possession of the matrimonial home, does not. His Honour posits a lower standard than does the Indian Act itself; the latter requires merely that the provisions co-exist, not that they actually conflict. The Indian Act does not preclude an order granting exclusive possession to another Indian, although section 24 of the Indian Act does limit transfer of possession to another band member. If this means that the Indian Act provides for transfer of possession, Hopkins94 must be wrongly decided, for the provincial F.L.R.A. must give way to the Indian Act when the two make provision for the same thing. On the basis of R. v. Peters95 and Sandy v. Sandy96 (the trial decision not being completely overturned by the Court of Appeal), a general provision for transfer of possession of property in the Indian Act will mean that section 45 of the F.L.R.A. cannot apply to Indians on the Reserve; the Indian Act will not have to make specific provision for exclusive possession by a spouse to oust the F.L.R.A.

Looking at the term “provision” in section 88 of the Indian Act in a broad sense, Clements Co. Ct. J. stated in Hopkins97 that the Indian Act does not deal with the “orderly and equitable settlement of affairs of the spouses” on marriage breakdown,98 which is the purpose of the F.L.R.A., and thus where the provincial Act does not actually conflict with the Indian Act, the provisions of the F.L.R.A. prevail.

In Re Baptiste; Director of Maintenance and Recovery v. Potts and Attorney General of Alberta,99 the Indian Act dealt specifically with the situation at issue while provincial legislation dealt with it more broadly. Potts had failed to comply with an agreement he had made with the Director to provide support for his child and the Director sought to enforce the agreement. Potts contended that section 68 of the Indian Act, allowing the Minister to apply any annuity or interest monies due to a male Indian towards child support, covered the field, leaving no room for provincial enactment on the matter. Bracco J. found that since section 68 of the Indian Act referred only to certain payments, the provincial Maintenance and Recovery Act100 which took into account all sources of revenue was not inconsistent with it.

The minister’s discretion is very narrow, being confined to those funds that he may be obliged to pay to the Indian parents. The Alberta legislation is much wider and more comprehensive. Both can stand together.101

The provincial legislation could not “in any way relate to the ‘annuity or interest moneys payable to the Indian parents by the minister.”102

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93 Supra note 78.
94 Id.
95 Supra note 75.
96 Supra note 78.
97 Supra note 78.
98 Id. at 30 (O.R.), 728 (D.L.R.), 271 (F.L.R.).
102 Id. at 205 (A.R.), 568 (W.W.R.), 152 (R.F.L.).
The practical outcome of the decision in *Re Baptiste* is that actions for child support, or enforcing child support, would have to be brought under both pieces of legislation in order to ensure that all sources of revenue were included. Nevertheless, this seems to be a more sensible result than to argue that the *Indian Act*, because it refers to annuity and interest payments as a source of child support, makes provision for "support for illegitimate children" in general terms, thereby foreclosing any provincial enactment relating to the matter of child support for native children.

It can be seen, then, that the way in which "provision" in the phrase in section 88 of the *Indian Act*, "for which provision is made by or under this Act", is interpreted (whether the *Indian Act* must provide specifically for the subject-matter of the provincial legislation or whether it need only provide generally for the subject matter) will be one factor determining whether provincial laws apply to Indians or not. Similarly, how the subject matter itself is characterized is also significant. For example, does provision for a matrimonial home go to spousal relations or to property? The answer will determine whether there is any room for provincial legislation to apply when the spouses also happen to be native persons.

D. *The Fifth Principle: Land Use Characterization*

If the provincial legislation can be characterized as relating to land use, it will be void in its application to Indian Reserves by virtue of section 88 of the *Indian Act*.

Subsection 91(24) of the *Constitution Act, 1982* gives jurisdiction over Indians and lands reserved for Indians; section 88 of the *Indian Act*, on the other hand, refers only to Indians and not to Indian lands. Section 88 will not invalidate provincial legislation which can be characterized as relating to lands reserved to Indians, a power remaining within the exclusive jurisdiction of the federal government. Of all the principles, this one probably has the greatest potential for restricting the effect of provincial legislation.

It is difficult to quarrel with the characterization of some legislation as going to land use. For example, in *R. v. Isaac* hunting rights were characterized as rights relating to the use of land and thus provincial legislation controlling hunting rights was also characterized as in relation to land use and was placed thereby outside the purview of section 88 of the *Indian Act*. In *R. v. Isaac*, an Indian was convicted of contravening the *Lands and Forests Act* of Nova Scotia, by carrying a loaded rifle through a moose resort located on a reserve. The relevant provision of the *Lands and Forests Act* was considered to be a hunting or game law. After a lengthy review of the cases and history, MacKeigan C.J.N.S. found 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 purport-
In other cases, characterizing the particular provincial legislation as being in regard to land use does seem to be stretching the terminology of "land use," to say the least. For instance, in Millbrook Indian Band v. Northern Counties Residential Tenancies Board, Morrison J. characterized the landlord-tenant relationship as one based on real property or land use: "The Residential Tenancies Act basically is legislation dealing with the management, use and control of land by both landlords and tenants." Having characterized the legislation in each case as relating to land use, both the trial judges have sealed the fate of the legislation.

Thus the Residential Tenancies Act, which controls landlord-tenant relations in Nova Scotia, does not apply to Indian landlord-tenant relationships on Indian land. In the case, the landlord was an Indian owned trailer park and the tenant a white woman. The Nova Scotia Court of Appeal, although upholding the decision, did so on the ground that the tenant in question had not obtained the required permit and thus her occupancy of the mobile home park lot was unlawful. Unfortunately, as a result, it did not consider it necessary to decide the constitutional issue.

The land use argument has been made with regard to traffic regulation, as well. In R. v. Johns, Johns had committed a breach of section 6 of the Indian Reserve Traffic Regulations made pursuant to (then) section 72 of the Indian Act when he drove without a licence, contrary to the Saskatchewan Vehicles Act. The important point is that Johns was not in breach of the provincial traffic legislation but of regulations made under the Indian Act. Woods J.A. explained that the provincial legislation was incorporated into the Indian Act Regulations; section 6 of the Indian Act did not make drivers

108 Supra note 104 at 485. See also Sikyea v. The Queen, supra note 28. The Supreme Court of Canada did not take the land use approach in Kruger and Manuel, supra note 14. As an alternate basis for the decision, the Court in Isaac found that hunting rights had been confirmed in Nova Scotia by The Royal Proclamation, 1763 (Imp.), R.S.C. 1970, Appendix II, No. 1.


110 Id. at 181 (D.L.R.), 208 (R.P.R.) (S.C.).

111 Supra note 78.

112 Id. at 197 (O.R.), 317 (R.F.L.) (H.C.).

113 S.N.S. 1970, c. 13.

114 Supra note 78.

115 Supra note 7.


117 Indian Reserve Traffic Regulations, S.O.R. 54-1314, s. 6.
liable under the provincial legislation but merely used the provincial Act’s contents to establish what would constitute a breach of the Traffic Regulations. Johns was not charged as an Indian; the important factor was that the breach occurred on “lands reserved for the Indians” since the highway on which Johns was driving was on a reserve. “Lands reserved for the Indians” were totally within the competence of the federal government and since traffic regulations were in relation to such lands, the regulations also were within the competence of the federal government.

Municipal and provincial health standards legislation has also been held to be in relation to land use. The British Columbia Court of Appeal in Corporation of Surrey v. Peace Arch Enterprises Ltd.\textsuperscript{118} found that reserve land which had been leased to white persons was still considered reserve land. The lessees were planning to build a restaurant and amusement park which would normally be subject to municipal and provincial health standards legislation. The Court of Appeal held that the legislation was in relation to land use on Indian reserves; thus it was not applicable to reserves.

\textit{Peace Arch}\textsuperscript{119} seems to be an abuse of the land use characterization. Health legislation is in pith and substance in relation to the protection of people’s health and safety, not in relation to land use; the fact that such legislation might apply to enterprises on a reserve is merely an incidental effect of valid provincial legislation. The Court did not base its decision on impairment of status or on conflict with, or co-existent provisions in, the \textit{Indian Act}. There is no apparent advantage to removing reserves from the impact of such legislation while there is the disadvantage of no substitute legislation: surely people entering this restaurant and amusement park are entitled to do so in the confidence that their health is being protected in the same way it is in restaurants and parks in other areas of the province.

To put the land use characterization in perspective, it might be useful to analyse \textit{Four B Manufacturing}\textsuperscript{120} using that approach. While the case clearly seems to be about labour relations (both the majority and minority agree about that; they merely disagree about whether the federal or provincial act should apply), it could be characterized as in relation to land use. The minority comes close to that by emphasizing the section 18 requirement of a permit. One wonders whether there really is any difference between \textit{Four B}\textsuperscript{121} and \textit{Millbrook Indian Band v. Residential Tenancies Board}.\textsuperscript{122} In the latter case, the landlord-tenant legislation was characterized as going to land use since the legislation, according to the court, set out how land was to be used and managed. But it is surely more accurate to characterize landlord-tenant legislation as concerned with the regulation of relations between two classes of people,

\begin{itemize}
\item \textsuperscript{118} (1970), 74 W.W.R. 380 (B.C.C.A.).
\item \textit{Id.}
\item \textsuperscript{120} \textit{Supra} note 39.
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} \textit{Supra} note 109. There are similarities between \textit{Four B Manufacturing} and \textit{Millbrook}; both involve Indian owners (of a company in \textit{Four B} and of a trailer park in \textit{Millbrook}); both groups required permits to operate on an Indian reserve; both involved non-Indians (as employees in \textit{Four B} and as a tenant in \textit{Millbrook}); and there is nothing particularly “Indian” about either a factory making uppers for shoes or a trailer park.
\end{itemize}
landlords and tenants; it establishes the obligations and rights existing between those two classes. Those obligations and rights involve property, but they go beyond it.

It also has to be recognized that this property is not land as such and that landlord-tenant legislation also provides redress for problems arising out of the "personal" relationship between the two groups. In addition, such legislation provides for the relations among tenants (they are not to disturb each other, for example).

Similarly, the purpose of the Family Law Reform Act is to regulate relations between separating or divorcing spouses, establishing the rights and obligations between them. It does involve property to a great degree but goes beyond it to consider, for example, custody and support. The same can be said of labour relations legislation. It seems to have as its purpose the regulation of relations between employers and employees; but it, too, involves property: what is to happen or not happen in or in relation to, for example, a factory (just as landlord-tenant legislation sets out what is to happen or not happen in or in relation to, say, an apartment building). The question to be answered is whether renting an apartment or working in a factory constitutes an integral aspect of the use of the land on which the premises are situate, just as hunting has been found to be an integral aspect of the use of the land. Once it becomes possible to characterize landlord-tenant and labour legislation in relation to the use of land, section 88 cannot give the provincial legislation force; it refers only to Indians, not to Indian lands which by virtue of section 91(24) come exclusively within federal jurisdiction. This revives, it is submitted, the early distinction in the case between the application of provincial legislation to Indians on reserves and off reserves.

In the pre-1951 cases (section 87, the predecessor to section 88, was introduced to the Indian Act in 1951), the courts appear to have had some difficulty in applying provincial legislation to Indians on reserves. In a 1944 case, R. v. Groslouis, involving the Quebec Retail Sales Tax Act, Pettigrew J. Sess. commented that:

> It seems to follow from jurisprudence taken as a whole that the Indian, in so far as an Indian inhabiting a Reserve under the control of the Dominion Government, is not amenable to the laws of the Provinces; but as soon as he goes out of that Reserve, he becomes, like any ordinary citizen, subject to the application of provincial laws to which he owes obedience failing which he is liable to the penalties provided in such a case.

But he also warned that the Reserve does not form "a small independent country, enclaved in the Province, subject to the sole directions of the Councils and the Chief of the band." This does not mean that provincial laws apply to the Reserve, of course, but that federal laws do. Finally, he hints at the general

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123 R.S.O. 1980, c. 152, as am. by S.O. 1982, c. 20, s. 3.
124 See R. v. Isaac, supra note 104.
125 S.C. 1951, c. 29.
128 Supra note 126, at 15 (R.L.), 171 (C.C.C.).
129 Id. at 17 (R.L.), 173 (C.C.C.).
theme of section 87 still to be examined: while the Indian lives on the Reserve, he is subject to the Indian Act but "[w]hen the Act respecting the Indian is silent, the problem must be solved in the light of the general law, either federal or provincial."130

The learned judge seized on the particular facts of the Groslouis131 case to treat it as one in which the act in issue took place off the reserve. Groslouis had sold goods to a white man without collecting sales tax; although Groslouis was physically on the reserve, His Honour held that in selling goods to a non-Indian, Groslouis had engaged in "an action which causes him, theoretically, to go outside the Reserve,"132 thus making him liable for not collecting sales tax.133 It was, it should be mentioned, no small part of Pettigrew J.'s Sess. concern that to hold otherwise would condone the white man's evasion of sales tax by purchasing goods on a Reserve.

The majority and minority in R. v. Rodgers,134 another pre-1951 case, clearly outline "the on/off reserve dichotomy" (to use Lysyk's phrase135). Rodgers was a white man who had, in breach of the Manitoba Game Protection Act,136 failed to obtain the permit number of the trapper from whom he had bought a mink pelt; as an Indian, the trapper was exempt from the requirement of obtaining a permit to trap. The pelt was purchased off the reserve but caught on the reserve. The Game Protection Act137 by its provisions did not apply to Indians on reserves in regard to hunting animals and birds used for food, but it did not exempt Indians from the sale or trafficking provisions.

The majority were of the view that "no statutory provision or regulation made by the Province in regard to the hunting of game or fur-bearing animals on an Indian reserve would apply to treaty Indians residing on the reserve."138 The Indian trapper had the right to catch mink on his reserve and, therefore, he also had a right to deal with it as his own property. This seems to contravene the purpose of the legislation which was to allow the Indians to hunt for food unencumbered by licencing requirements but not to allow them to engage in commercial practices with regard to game.139

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130 Id. at 18 (R.L.), 173 (C.C.C.).
131 Id.
132 Id.
133 The facts in Cardinal, supra note 8, are not dissimilar to those in Groslow's in the sense that Cardinal sold meat to a white man on a Reserve, in breach of the provincial Wildlife Act R.S.A. 1970, c. 391, s. 37, now R.S.A. 1980, c. W-9, s. 42. The majority of the Supreme Court supplied the provincial Act to the Reserve and were able to uphold Cardinal's conviction under the Act without manipulating the facts to bring Cardinal "theoretically" off the Reserve (the Supreme Court upheld the Court of Appeal's reversal of Cardinal's acquittal at trial).
135 Supra note 75, at 541.
136 S.M. 1916, c. 44.
137 S.M. 1916, c. 44.
139 Cf. Cardinal v. A.G. Alta., supra note 8. Cardinal was protected by the Natural Resource Agreement between Alberta and the federal government as far as hunting for food in all seasons was concerned, but he was not exempt from provincial trafficking regulations.
In his dissent, Dennistoun J.A. found that since the sale took place off the reserve, the Indian was "subject to the general laws of the Province in respect to property and civil rights." But it is likely that he would have come to the same conclusion even if the sale had taken place on the reserve, for he states that "[i]n the absence of express legislation to the contrary by the Dominion/ [and there was not any such legislation here], an Indian whether on or off his reserve is, I think, subject to the general law of the Province."141

From the post-1951 perspective, Professor Hogg takes the same position as Dennistoun J.A. He states that "[t]he better view of the law is that there is no constitutional distinction between 'Indians' and 'lands reserved for the Indians', and that provincial laws may apply to both subject matters." In light of some of the cases already examined (particularly the traffic case, Johns, and the health legislation case, Peace Arch), it is worth continuing this apparent digression from the discussion of the land use principle to quote rather extensively from Hogg:

It would be astonishing if the provinces lacked the constitutional power to make applicable to Indians and on reserves laws such as that making drivers drive on the right-hand side of the road, or confining the practice of medicine to qualified physicians, or imposing standards of construction for residential housing. The situation of the Indians and of Indian reserves should not be any different from that of aliens, banks, federally incorporated companies, and interprovincial undertakings. These, too, are subjects of federal legislative power, but they still have to pay provincial taxes, and obey provincial traffic laws, health and safety requirements, . . . and the myriad of other provincial laws which apply to them in common with other similarly-situated residents of the province.143

On the face of it, this seems to be a sensible position for one to take; but it is not necessarily the one taken by the courts. R. v. Johns raises the possibility of different traffic legislation on and off the reserve (after all, the federal Regulations do not have to incorporate the provincial traffic legislation, although they do). And the Peace Arch case held that provincial health requirements were not applicable on the reserve, "astonishing" as that may be

140 Supra note 134, at 419 (D.L.R.), 144 (M.R.), 59 (C.C.C.).
141 Id. at 421 (D.L.R.), 146 (M.R.), 59 (C.C.C.).
142 Supra note 20.
143 Supra note 7.
144 Supra note 118.
145 Supra note 20, at 387. See also Lysyk, supra note 75, at 540, where Lysyk rejects the view that the applicability of provincial laws depends on "whether or not the Indian is on a reserve at the material time, or whether the activity sought to be regulated is being engaged upon by an Indian on a reserve." Arguably, Peace Arch, supra note 118, takes the last point one step further in that "the activity sought to be regulated" was being engaged in by white people on a reserve. See Lysyk, supra note 75, at 540, where he suggests that the implications of Rodgers, supra note 134, is that a ban on provincial legislation on the reserve would encompass non-Indians as well as Indians.

Although at 541, on the authority of R. v. McLeod, [1830] 2 W.W.R. 37, 54 C.C.C. 107 (B.C. Co. Ct.) and R. v. Morkey, [1932] 4 D.L.R. 483, 46 B.C.R. 28, 58 C.C.C. 166 (C.A.), he qualifies the territorial theory in respect of applicability of provincial laws to non-Indians on reserves. In these two cases, the courts rejected the idea that a ban on provincial legislation on the reserve would encompass non-Indians as well as Indians.

146 Supra note 7.
147 Supra note 118.
to Professor Hogg. In addition, section 81(h) of the Indian Act allows a Band Council to make by-laws about “the construction, repair and use of buildings” owned by the Band or individual members of the Band; such a by-law would, by section 88 of the Indian Act, override provincial legislation “imposing standards of construction for residential housing”.

Despite the wording of section 88 (which fails to make a distinction between Indians on reserves and Indians off reserves) and the commonsense of the position articulated by Professor Hogg (that there is no reason not to apply, for example, health standards to a reserve and every reason to expect that they would be applied, because they have nothing to do with Indians qua Indians), the land use characterization puts us very neatly back in the lap of Groulouis and R. v. Rodgers. Using their characterization, there is a difference in the way provincial laws are applied to Indians on and off reserves. Under the rubric of “lands reserved for the Indians”, the land use characterization allows an intrusion by the federal government into areas which normally would not be within its jurisdiction and which are very clearly within the provincial government’s competence. In other words, this approach would allow the federal government to legislate for “lands reserved for the Indians” whether or not the particular legislation were “in relation to” such lands (as opposed to any other lands). This constitutes an unjustified incursion into the provincial power of property and civil rights.

In any case, provincial legislation faces a bleak future as an independent entity should the referential incorporation argument, discussed in the next section, be successful.

E. The Sixth Principle: Independence or Subordination?

If the provincial legislation escapes the net of the foregoing tests, it will be applied as federal if section 88 does in fact referentially incorporate provincial legislation.

The Supreme Court of Canada considered this question in the Natural Parents case. Unfortunately, the outcome was less than decisive: four members of the Court held that section 88 of the Indian Act referentially incorporated the Adoption Act of British Columbia and four held that section 88 is a statement of the extent to which provincial laws apply to Indians. Mr. Justice Beetz did not rule on this point.

It would seem, however, that even the “referential incorporationists” would not apply their theory to all provincial legislation. Chief Justice Laskin, speaking for Judson, Spence and Dickson JJ., made a distinction between legislation such as traffic regulations which can, presumably, apply of their own force and legislation such as adoption legislation which cannot apply of its own force. The difference between the two types of legislation is that the latter involves “Indianness”. In R. v. Isaac, Chief Justice MacKeigan interpreted the position of the “Laskin faction” in Natural Parents:

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148 Supra note 128.
149 Supra note 118.
150 Supra note 4.
152 Supra note 104.
153 Supra note 4.
[They] found that the Adoption Act encroached on a federal legislative area in affecting the status of the adopted child as an Indian but that the Act was preserved by section 88, which applied it, as legislation affecting Indians, to all Indians.\footnote{154} It is difficult to accept this interpretation. MacKeigan C.J. says that Laskin C.J. and Judson, Spence and Dickson JJ. found that the Adoption Act affected Indian status but was saved by referential incorporation under section 88. It is hard to understand why the Adoption Act would affect status as provincial legislation but not do so as federal legislation, which is the implication of MacKeigan C.J.'s view. The better position is that a referentially incorporated Adoption Act\footnote{157} would continue to affect status (if it did so as provincial legislation) but would do so validly since the federal government, unlike the provincial legislation, has the power to affect status. Yet Chief Justice Laskin states explicitly that the Adoption Act\footnote{159} does not actually affect the child's legal status as an Indian.

The better view of the Laskin position seems to be this: the child's legal Indian status derives from section 11(1)(d) of the Indian Act and depends on whether his father was registered as an Indian under the Indian Act; the child's entitlement to registration is not destroyed by the cessation of the child's relationship with his natural parents "for all purposes" for which the Adoption Act\footnote{160} provides in section 10(2). Rather, adoption of Indian children by non-Indians does interfere with the cultural upbringing of the child as an Indian and does separate the child from the locus of his heritage, even though it does not affect his legal status as an Indian under the Indian Act. There is, then, a risk of impairment to status in this broad cultural sense. A provincial statute cannot have that effect; a federal statute, which the Adoption Act\footnote{161} becomes through incorporation, can.

Mr. Justice Martland, speaking for Pigeon and de Grandpré JJ. on section 88 of the Indian Act, held that provincial legislation applies of its own force as long as it passes muster under section 88.\footnote{162} Mr. Justice Ritchie, in a separate opinion, took the same view.\footnote{163} The Adoption Act,\footnote{164} said Martland

\footnote{154} Supra note 104, at 472. It is assumed here that the Chief Justice means legal status under s. 11 of the Indian Act.
\footnote{155} R.S.B.C. 1960, c. 4., now R.S.B.C. 1979, c. 4.
\footnote{156} R.S.B.C. 1960, c. 4., now R.S.B.C. 1979, c. 4.
\footnote{157} R.S.B.C. 1960, c. 4., now R.S.B.C. 1979, c. 4.
\footnote{158} R.S.B.C. 1960, c. 4., now R.S.B.C. 1979, c. 4.
\footnote{159} Supra note 4, at 765 (S.C.R.), 158 (D.L.R.), 709 (W.W.R.).
\footnote{160} R.S.B.C. 1960, c. 4., s. 10(2) reads:
For all purposes an adopted child ceases upon adoption to be the child of his existing parents (whether his natural parents or his adopting parents under a previous adoption), and the existing parents of the adopted child cease to be his parents.
Now R.S.B.C. 1979, c. 4., s. 11(2).
\footnote{161} R.S.B.C. 1979, c. 4.
\footnote{162} Supra note 4, at 775 (S.C.R.), 165 (D.L.R.), 717 (W.W.R.).
\footnote{163} Id. at 781 (S.C.R.), 170 (D.L.R.), 716 (W.W.R.).
\footnote{164} R.S.B.C. 1960, c. 4., now R.S.B.C. 1979, c. 4.
J., does not restrict the rights of Indians (as does, for example, provincial minimum wage legislation restrict enterprises within exclusive federal jurisdiction). He found that when the Adoption Act speaks of the child's relationship with the natural parents ceasing "for all purposes", it can include only those purposes within the competence of the British Columbia legislature; that does not, of course, include Indian status.

For the Chief Justice, the onus is on those who believe provincial legislation should apply to Indians to show that the legislation does not touch on "Indianness". He states that provincial legislation should not apply to Indians "unless the inclusion of Indians within the scope of the provincial legislation touches them as ordinary persons and in a way that does not intrude on their Indian character or their Indian identity and relationship." His lordship further states that:

When section 88 refers to 'all laws of general application from time to time in force in any province', it cannot be assumed to have legislated a nullity but, rather, to have in mind provincial legislation which, per se, would not apply to Indians under the Indian Act unless given force by federal reference.

To argue that section 88 is declaratory other than in relation to the opening provisions is to say that "it is wholly declaratory save perhaps in its reference to 'the terms of any treaty', a strange reason, in my view, to explain all the other provisions of section 88." His lordship points to the concluding words of section 88 which "indicate clearly that Parliament is indeed effecting incorporation by reference." For the Chief Justice the power of the federal government under section 91(24) is extensive so that provincial legislation which affects Indians or applies on a Reserve can readily be characterized as "in relation to" Indians or lands reserved for Indians. To allow the provincial legislation to apply of its own force would be "to treat the distribution of legislative powers as being a distribution of concurrent powers." Referential incorporation is the way in which to avoid a concurrent powers situation and save the provincial legislation at the same time: the substance of the legislation applies, but through the federal instead of a provincial mechanism.

The words that the Chief Justice looks to in section 88 as evidence of his position that the section referentially incorporates provincial legislation are "except to the extent that such laws make provision for anything for which provision is made by or under" the Indian Act. It is not clear why these words do in fact show that section 88 is meant to incorporate provincial legislation. After all, if provision were made by or under the Indian Act for the subject matter of a piece of provincial legislation, it would be redundant to then apply that provincial legislation as incorporated into federal law. It is clear from Natural Parents, at least, that the Chief Justice does not find the alternative

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166 Supra note 4, at 763 (S.C.R.), 156 (D.L.R.), 706 (W.W.R.).
167 Id.
168 Id. at 763 (S.C.R.), 156 (D.L.R.), 707 (W.W.R.).
169 Id.
170 Id. at 764 (S.C.R.), 156 (D.L.R.), 707 (W.W.R.).
palatable: he has no desire in that case, for example, to deprive Indian children of the opportunity of adoption by non-Indians.\textsuperscript{172}

The Chief Justice's approach seems to be directed more towards expanding the federal government's already extensive jurisdiction under section 91(24) rather than towards protecting Indian rights. It is difficult to see why provincial legislation within the usual areas of provincial competence would pose more of a threat than the federal government's capacity to derogate from Indian rights. Surely a sufficient buffer is placed between the Indians and provincial legislation that they need not feel abnormally endangered by it — even structurally, in its phrasing, provincial legislation lies as an island in a sea of qualifications.

Professor Hogg suggests that the legislation will apply, either as provincial or as federal law; what really matters is our view of reserves:

For those who assert a substantial degree of immunity from provincial laws for Indians or Indian reserves, section 88 operates as a federal adoption, or incorporation by reference, of provincial laws, making the provincial laws applicable as part of federal law. For those who assert that provincial laws of general application will apply to Indians and on reserves of their own force, section 88 is mainly declaratory of existing law.\textsuperscript{173}

Probably it is true to say that our perception of the characterization process as described in the foregoing pages will be in large part influenced by the philosophical framework we bring to the issue of Indians and Indian reserves. This point will be discussed after a brief analysis of a final test to which provincial legislation and federal legislation will be subject, that of compliance with the \textit{Constitution Act, 1982}.\textsuperscript{174}

\section*{F. Principle Seven: The Challenge of the "New" Constitution}

Even if a provincial law escapes the net of all the preceding tests, it must also pass the challenge posed by the \textit{Constitution Act, 1981}.

Before plunging further into the murky waters of the "new" Constitution, it must be pointed out that this test or principle differs from the other six in that it applies equally to federal legislation. Nevertheless, since provincial legislation must conform, it seems appropriate to treat it as a final barrier to the applicability of provincial legislation to Indians and reserves. Bearing in mind that point and the speculative nature of any discussion regarding the \textit{Constitution Act, 1982}\textsuperscript{175} at this time, this section will deal briefly with two relevant sections of that Act:

\texttt{s.25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:}

\textsuperscript{171} The alternate view is that if the provincial legislation does make provision for anything provided for under the \textit{Indian Act}, the provincial legislation will be void to that extent.
\textsuperscript{172} \textit{Supra} note 4, at 766 (S.C.R.), 158 (D.L.R.), 709 (W.W.R.).
\textsuperscript{173} \textit{Supra} note 20, at 388. See also Lysyk, \textit{supra} note 30, at 538.
Indian Lands

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

s.35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, ‘aboriginal peoples of Canada’ includes the Indian, Inuit and Métis peoples of Canada.

The first point to note about these sections is their respective placements in the Constitution Act, 1982.\textsuperscript{176} Section 25 is placed within the Canadian Charter of Rights and Freedoms;\textsuperscript{177} it is not vulnerable to the provincial override under literal interpretation of section 33 since only sections 2 and 7 to 15 are included in section 33; however, insofar as native persons cannot be treated differently than other persons on the basis of their status as native persons, they enjoy the protection of section 15, the “equality provision”, which is subject to the provincial override. It must be sufficient merely to mention in the context of this paper that the entire Indian Act may offend against section 15 when that section comes into force in 1985.\textsuperscript{178}

Section 25, as part of the Charter, is apparently subject to section 1 which subjects the rights set out in the Charter to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” The wording of section 25, however, might well be considered an “interpretation” section rather than a section which guarantees or sets out substantive rights. All the section really says is that other rights and freedoms guaranteed by the Charter shall not be interpreted so as to diminish treaty or other rights involving aboriginal peoples. It seems that section 25 operates only in the context of a conflict between an aboriginal right and some other right; in other words, it does not make a statement about aboriginal rights \textit{in themselves} but only addresses a situation involving conflict with other rights.

The positive guarantee of aboriginal rights appears in section 35 which constitutes a Part of the Constitution independent of the Charter. Presumably this section is therefore free from either the section 1 or section 33 qualification.

A second point to be noted is the reference to time in each section. Among the section 25 rights (but not constituting the totality of the section 25 rights) are rights which have been recognized in the past by the Royal Proclamation, 1763\textsuperscript{179} and rights which might be recognized in the future, as long as they are “acquired” in relation to land claims or through land claims settlement, but not necessarily in relation to land claims (both interpretations appear possible on the basis of the wording of section 25(b) ). Section 25 refers to aboriginal and treaty rights but it also refers to “other rights or freedoms”; section 35 refers only to treaty and aboriginal rights.

The only rights guaranteed in section 35 are "existing" rights; does this mean that rights which are acquired in the future, through land claims settlement, for example, will have no independent guarantee and yet cannot be derogated from, should a conflict arise between such a right and some other right? The measure of "existing" is not specified: are these only judicially recognized rights or is there some other reference point? Section 37(2) of the Constitution Act, 1982 provides a mechanism, or at least a tentative beginning, by which to answer such questions: it provides for a constitutional conference to be held within a year after Part IV comes into force at which shall be considered, inter alia, the definition of aboriginal rights. This conference was held during the week of March 14th, 1983, without any resolution of these difficulties being achieved. If anything, the conference emphasized the intensity experienced in regard to ambiguous terms such as "aboriginal rights" and "title".

Even this brief deviation has indicated the difficulties inherent in assessing the impact of the Constitution Act, 1982 on the applicability of provincial legislation to Indians and reserves. If hunting, fishing and trapping rights are included in the definition of "existing" rights, for example, there can be no provincial incursion on them. It would no longer be possible to subject an action of a native person to provincial legislation and find that the action breaches the legislation; the legislation would have to be changed to conform to the right recognized by section 35. Again, however, it is not yet known how rights are to be defined; "existing" rights might be held to find their reference point in legislation, in judicial decisions or in some quite autonomous list of rights established at the constitutional conference.

One specific illustration should suffice to show the complex nature of the constitutional provisions relating to aboriginal rights. In Kruger and Manuel, the Supreme Court of Canada dismissed appeals from the decision of the British Columbia Court of Appeal which had been based in part on the effect of the Royal Proclamation, 1763. Since the Proclamation was neither a treaty nor an act of the Parliament of Canada, it could not serve to restrict, through the operation of section 88, the effect of the Wildlife Act on Indians hunting for food. While the Proclamation is specifically referred to in section 25 of the Constitution Act, 1982 it is not referred to in section 35. It may develop that rights deriving from the Proclamation are found to be "existing" rights at the constitutional conference; in that case, a Kruger and Manuel situation would have to be decided in the opposite way to that in which it was in fact decided by the Supreme Court. On the other hand, if the effect of the Proclamation is restricted to section 25 of the Constitution Act, 1982 Kruger and Manuel would stand as good law, unless one could find another right

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182 Supra note 14.
186 Supra note 14.
188 Supra note 14.
guaranteed by the Charter against which to oppose hunting rights deriving from the Proclamation.

At this point any prediction as to the effect of the Constitutional Act, 1982 is so highly conjectural that it either requires an article of its own or is hardly worth mentioning. To heed this admonition suggests ceasing this already prolonged discussion. What can be said, however, is that federal powers are more likely to suffer curtailment under the Act than are already restricted provincial powers in this area; section 88, as part of the Indian Act, might fall victim to the equality provision of the Charter, thus releasing provincial legislation from the manacles of prior judicial pronouncements and re-opening the entire question for analysis.

III. THE ENCLAVE THEORY

Although section 88 was not dealt with by the majority in Cardinal v. A.G. of Alberta, the case serves to present clearly the two predominant views of reserves.

Cardinal was a treaty Indian who had sold a piece of moose meat on the Reserve to a non-Indian; he was charged with unlawful trafficking in big game contrary to the Wildlife Act of Alberta. Section 12 of the Natural Resource Agreement entered into by Alberta and the federal government (given force of law by incorporation into the Constitution Act, 1930) guaranteed to the Indians their right to hunt, fish and trap for food at all seasons, but provided that otherwise Indians were subject to provincial laws in relation to hunting. Since trafficking is not a right exempted from the operation of section 12 (or, to put it another way, is not a right protected by section 12), the trafficking provisions of the Wildlife Act applied to Cardinal.

For the purposes of this article, the important aspect of Cardinal is the enclave theory enunciated by Mr. Justice Laskin, as he then was. The essence of the enclave theory is that the exclusive power in Parliament to regulate activities on 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 thereon." Laskin J., Hall and Spence JJ. concurring, classifies the reserve as an entity far more significant than a piece of land:

Indian Reserves are enclaves which, so long as they exist as Reserves, are withdrawn from provincial regulatory power.

... [A Reserve] is a social and economic community unit, with its own political structure as well according to the prescriptions of the Indian Act... and is no more subject to provincial legislation than is federal Crown property; and it is no more

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190 Supra note 8.
193 S.B.C. 1966, c. 55, s. 4 (1)(c), now R.S.B.C. 1979, c. 433, s. 3(1)(c).
194 Supra note 8, at 710 (S.C.R.), 564 (D.L.R.) 11-12 (C.C.C.) per Martland J. and at 720 (S.C.R.), 571 (D.L.R.), 19 (C.C.C.) per Laskin J. (as he then was).
195 Id.
196 Id. at 715 (S.C.R.), 568 (D.L.R.), 15 (C.C.C.).
subject to provincial regulatory authority than is any other enterprise falling within exclusive federal competence.\textsuperscript{197}

The majority of the Court explicitly rejected this doctrine, holding that reserves are not enclaves. The test of applying provincial legislation to reserves is the same as that determining the applicability of provincial legislation under any circumstances:

\[\text{II}t\text{ must be within the authority of section 92 and must not be in relation to a subject matter assigned exclusively to the Canadian Parliament under section 91. Two of those subjects are Indians and Indian Reserves, but if Provincial legislation within the limits of section 92 is not construed as being legislation in relation to those classes of subjects \ldots it is applicable anywhere in the Province, including Indian Reserves, even though Indians or Indian Reserves might be affected by it.}\textsuperscript{198}

The principles of constitutional interpretation provide no justification for treating the section 91(24) power any differently than any other section 91 power nor any reason for placing a greater onus on the application of provincial laws because they happen to apply to Indians or reserves than when they apply to any other easily identifiable group in the province. Where the federal government intends to place the Indians in a different legal position than other peoples with respect to the application of provincial legislation, it can be provided for specifically, as is done in the case of education by sections 114-123 of the \textit{Indian Act}.

The enclave theory does not postulate that Indians are to govern themselves, although the \textit{Indian Act} does permit some self-government along the lines of a municipality (with the difference that provincial laws will be subservient to by-laws passed by a Band council), the theory does, however, give to the federal government a scope of legislative and administrative power it does not enjoy in other areas.

Beyond the legal basis for the enclave doctrine (that is, the scope awarded section 91(24) of the \textit{Constitution Act, 1867})\textsuperscript{199}, there is a politically-based perception that native peoples are a distinct social and political entity and should, therefore, be accorded distinct treatment. There is an implicit assumption that provincial laws will somehow disturb that distinctiveness if they apply to Indians or Reserves and that Indian rights are best protected if they are left almost solely to the federal government's jurisdiction. It is suggested that the enclave theorists have allowed constitutional interpretation principles to take second place to their view of the uniqueness of Indian reserves.

\section*{IV. CONCLUSION}

This analysis of the application of provincial legislation to Indians and Reserves has shown that there is considerable potential in the characterization

\textsuperscript{197} \textit{Id.} at 716-17 (S.C.R.), 569 (D.L.R.), 16 (C.C.C.). The implications of the enclave theory for other federal undertakings is explored in \textit{Gibson, The Federal Enclave Fallacy in Canadian Constitutional Law} (1976), 14 Alta. L. Rev. 167. Gibson argues that the theory can be read down to apply only when proprietary rights are involved. Since then, \textit{Natural Parents}, \textit{supra} note 4, has shown that the dissent in \textit{Cardinal}, \textit{supra} note 8, did not have such a limited approach in mind.

\textsuperscript{198} \textit{Id.} at 703 (S.C.R.), 560 (D.L.R.), 7 (C.C.C).

principles for the almost complete elimination of a provincial presence from those areas; this is particularly so in relation to Reserves. It is true that on four occasions, the Supreme Court of Canada has held that provincial legislation in three different areas — game laws, adoption and labour relations — have applied of their own force to Indians and Reserves. It must also be acknowledged, however, that the dissent in three of those same cases has been determined and has spoken with great persuasiveness.200

Of the seven characterization principles discussed in this article, perhaps that involving the "land use doctrine" poses the greatest threat to a provincial presence on the Reserve. Admittedly, that doctrine has not yet been accepted by the Supreme Court of Canada; nevertheless, a case such as Peace Arch201 provides illustration of how far the doctrine can be extended. It should also be noted that Peace Arch202 was referred to uncritically by Mr. Justice Martland in Cardinal.203 The discussion of the closing words of section 88 of the Indian Act — provincial legislation is void to the extent it makes provision for anything for which provision is made by or under the Indian Act — has shown that they, too, can be a powerful instrument in the derogation from provincial autonomy204 depending on how broadly the courts draw the term "provision". Taken together, the characterization principles constitute a potentially severe assault on provincial jurisdiction when it crosses the boundaries of the Indian Reserve.

It is tempting to argue that the well-being or independence of native peoples should be the criterion determining whether any particular legislation, provincial or federal, be applied. Ideally, it would be desirable to assess all legislation, whether affecting Indians or not, by criteria which show concern for and sensitivity to the groups involved. Given a different system, that might be possible. Canada is, however, a system with political — and in this context, particularly constitutional — restraints which cannot be ignored. The treatment of provincial legislation by the minority of the Supreme Court in Cardinal,205 Four B Manufacturing206 and Natural Parents207 and by the Nova Scotia Court of Appeal in Millbrook Indian Band208 (by its failure to approach the constitutional questions) and the British Columbia Court of Appeal in Peace Arch209 threatens to the ever tenuous balance between the interplay of provincial and federal legislative autonomy within the jurisdictions allotted to those governments under sections 91 and 92 of the Constitution Act, 1867.210

200 The Court in Kruger and Manuel, supra note 14, was unanimous.
201 Supra note 118.
202 Id.
203 Supra note 8, at 704 (S.C.R.), 560-61 (D.L.R.), 8 (C.C.C.).
204 By "autonomy", it is meant the autonomy constitutional principles accord each level of government within its designated jurisdiction.
205 Supra note 8.
206 Supra note 39.
207 Supra note 4.
208 Supra note 109.
209 Supra note 118.
Ultimately, we are faced with a choice between two values: maintenance of the integrity of our federal system or decent treatment for our minority groups. One might be tempted to forego the first to some extent if the second were enhanced; or, in other words, to tolerate some diminishing of provincial power if that would lead to greater protection of native rights. In fact, however, allowing the federal government an extremely broad scope of action in regard to Indians and Reserves is no guarantee of protection for native rights. Constitutionally, the federal government has been able to derogate from rights and practically, it has done so.\(^{21}\) It is to be hoped that the Constitution Act, 1982\(^{22}\) will serve to put a brake on legislation emanating from either level of government, federal or provincial, which threatens traditional rights and protections to which Indians can lay claim. Until then, it is submitted that a constriction of provincial competence through the characterization principles discussed in this paper as they have been applied in the Courts and as they have the potential to be applied, is not justified by any benefits which are purported to have accrued to native peoples and reserves as a consequence of that constriction.\(^{23}\)

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\(^{23}\) No particular benefits are in mind here. Exemption from provincial game laws (as in R. v. Isaac, supra note 104) might legitimately be considered a benefit, but it is difficult to place exemption from zoning, serves requirements and health standards (as in Peace Arch, supra note 118) in that category, unless it is considered to be in the Indians' long-term interest to be exempt from provincial standards applicable to the rest of the province.