SURVEY OF NATIVE RIGHTS AS THEY RELATE TO FISH AND WILDLIFE PROTECTION IN BRITISH COLUMBIA

by

K. KRAG

PROTECTION SERVICES – ENFORCEMENT SECTION

REPORT

B.C. FISH AND WILDLIFE BRANCH

DEPARTMENT OF RECREATION AND CONSERVATION

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INTRODUCTION

In its efforts to properly manage our wildlife resource for perpetuity and secondly for the benefit of all British Columbians, the Fish and Wildlife Branch has been involved over the years with prosecutions of native people. Yet, due to the pressure of other priorities, no thorough review of the many legal aspects of wildlife taken by Indians has been possible.

The spring of 1975 presented opportune temporary staff financing for important undertakings through the Department of Labour and its program known as "Wig 75" (Working In Government).

Under limited supervision from this office, Mr. Ken Krag, a second year law student has produced this most comprehensive report, based upon his careful research. Particularly commended for the reader's benefit are his introductory words of caution, emphasizing "overview" and that some native matters remain "unresolved".

This Branch report provides not only useful reference material, but it should also create a broader understanding of the involved native situation relative to wildlife.

C. E. Estlin
Chief of Enforcement
Fish and Wildlife Branch

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FOREWORD

This report is intended to give an overview of certain areas of the law relating to Indians in British Columbia. If any prior warning is required, it should be emphasized that the legal rights of natives is a complex, relatively new area of the law, and many important issues are presently unresolved.

This report has been written on the assumption that it will be read by people not acquainted with legal research. As such, emphasis has not been placed on every intricacy of the legal reasoning involved. Furthermore, a detailed, step-by-step approach would have been impossible given the number of issues involved and limited time available. Nevertheless, it is believed that the report is an accurate reflection of the <u>current</u> legal position of the issues discussed.

A final caveat is offered: this report has been compiled by a law student and it is suggested that, before the opinions expressed herein are accepted, formally qualified advice be sought from the Department of the Attorney-General.

Lastly, I would like to acknowledge the assistance of Mr. Norm Prelypchan of the Department of the Attorney-General.

K. Krag

August 22, 1975

A. CONSTITUTIONAL OUTLINE

Canada's constitutional charter, the British North America Act, maps out the legal areas where either the Provincial Crown or Federal Crown have jurisdictional sovereignty. Section 91 of the British North America Act lists the various heads of Federal jurisdiction. Section 91(24) grants exclusive legislative authority over "Indians and Lands reserved for Indians" to the Federal government. The Federal government has enacted the Indian Act (RSC 1970, c I-6). Because of Section 91(24), British North America Act, Federal law relating to Indians is valid throughout Canada, on or off reserves without distinction. For instance, the validity of the Federal Fisheries Act restrictions pertaining to Indians was upheld in R vs Francis 10 DLR (3d) 189.

Section 92 of the British North America Act lists the various areas of Provincial jurisdiction. Control over wildlife is granted to the Provinces by virtue of Section 92(13) "Property and Civil Rights" and Section 92(16) "Matters of a Local Nature". This was affirmed by R vs Robertson (1886) 3 MANITOBA REPORTS 613 and R vs Boscowitz (1895) 4 BCR 132.

Put in its simplest terms, it is a canon on constitutional law that, given jurisdiction under the British North America Act, it is legally incompetent (ultra-vires) for one Crown to encroach upon the other's jurisdiction. For example, the British Columbia government could not validly pass their own Indian Act as this would be a usurpation of a Federal field. However, just what the particular boundaries are in any given situation is often a complex issue and no attempt will be made in this paper to cover all of the constitutional implications. It is sufficient to keep in mind the Federal-Provincial division of power when dealing with the legal position of natives and this is especially so when topics such as Section 88 of the Indian Act are discussed.

B. THE ISSUE OF ABORIGINAL RIGHTS IN BRITISH COLUMBIA

Note: Aboriginal Rights are a distinct and separate claim. The reader is warned that other claims, such as Treaty Rights, are not dependent on Aboriginal Rights for their validity.

The issue of Aboriginal Rights in Canada is complex. The following abbreviated discussion is intended as a mere overview only and reference as to the extensive and historical-legal basis of the theory of Aboriginal Rights is omitted here so as to avoid further clouding an already complicated picture. However, for a good reference source to the underlying detail of the theory, see Native Rights in Canada (2nd edition), chapters 3 to 8, edited by P. A. Cumming and N. H. Mickenberg.

Aboriginal Rights have been defined simply as those rights which accrue to native peoples because of their use and occupation of certain lands from time immemorial. There has been almost no judicial interpretation of the meaning of "Aboriginal Rights" so far. St. Catherine's Milling vs The Queen (1889) 14 AC 46 variously described them as a right to "absolute use and enjoyment of their lands" and "a personal and usufructuary right". Black's Law Dictionary, H. Black (4th edition, West Publishing Company St. Paul, 1951) page 1712 defines a usufruct as:

> "the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility and advantage which it may produce, providing it be without altering the substance of the thing".

For Fish and Wildlife purposes it would appear that Aboriginal Rights at least contains the right to hunt and to fish. The Royal Proclamation of 1763 provides for this as do some cases: i.e. R vs Sikyea (1964) 43 DLR (2d) 158 and R vs Wesley (1932) 4 DLR; R vs Dennis and Dennis (1975) 2 WWR 636, where the Court says that at the least Aboriginal Rights includes the right to hunt for food for themselves and dependents.

The most vital component of Aboriginal Rights argument to date has been the Royal Proclamation of 1763. The Royal Proclamation of 1763 was mainly concerned with establishing a new territorial policy for lands acquired from the French but it also contained important provisions relating to Indians and Indian Lands. That is, it has been argued, the Royal Proclamation operated to legally confirm or create Aboriginal Rights. Thus it follows as Norris J. A. in R vs White and Bob (1964) 50 DLR (2d) British Columbia Court of Appeal points out, that unless these rights have been extinguished they still are of binding legal effect. The extent and limitations of an argument for Aboriginal Rights based on the Proclamation of 1763 has not yet been fully determined in Canada, specifically by the Supreme Court of Canada. Therefore it will take further Court decisions to determine whether such an argument will be recognized and until that time the degree to which the doctrine of Aboriginal Rights provides protection to native hunting and fishing rights will remain unclear.

Even if it is decided that the Proclamation operates to insure to natives usufructuary interest in the land there still remains the important question of whether the Royal Proclamation of 1763 applied to British Columbia and if it did, whether subsequent legislation extinguished such a usufruct. The final decision could have far-reaching consequences for fish and wildlife management in British Columbia because relatively little of British Columbia's land is covered by treaty and, therefore, a judicial recognition of Aboriginal Rights would extend native rights to hunt to most of the province. Other western provinces would not be similarly affected because a large proportion of their land is under treaty--a treaty operating to cede any claim of Aboriginal Rights to the Crown. The question whether the Royal Proclamation applies to British Columbia arises because the Proclamation itself is silent as to its western boundary. Cumming and Mickenberg state that there is historical evidence which shows that at the time that the Proclamation was created it was suggested that it be made to apply only as far west as the Mississippi River. However, this was not included in the Proclamation itself and it has therefore been argued that it applies to all of western Canada.

The existence of Aboriginal Rights in British Columbia has been subject to inconsistent treatment by the British Columbia Courts--again emphasizing the degree of uncertainty surrounding the topic. British Columbia cases dealing with the issue in chronological order are: R vs White and Bob (1964) 50 DLR (2d) 613 (British Columbia Court of Appeal); R vs Discon and Baker (1968) 67 DLR (2d) 619 (British Columbia County Court); Calder vs Attorney-General of British Columbia (1969) 13 DLR (3d) 64 (British Columbia Court of Appeal), (1973) 34 DLR (3d) 145 (Supreme Court of Canada); R vs Derriksan (1975) 1 WWR 56 (British Columbia Supreme Court); R vs Dennis and Dennis (1975) 2 WWR 630 (British Columbia Provincial Court); and R vs Kruger and Manuel unreported (1975) (British Columbia Court of Appeal).

In R vs White and Bob, Norris J. A. decided to acquit the accused on the grounds that Aboriginal Rights existed in favour of the native peoples from time immemorial and these rights were confirmed by the Royal Proclamation of 1763. Norris was the only Judge on the majority side who argued for acquittal on these grounds. Thus his decision stands opposed by the dissenting minority opinion of Sheppard J. A., who stated the Royal Proclamation did not apply to Vancouver Island because Vancouver Island was at that time unknown to the Crown. The result was that the Court was divided as to whether the Royal Proclamation of 1763 extended to British Columbia.

In R vs Discon and Baker the Court held that the Royal Proclamation did not apply to the Squamish Valley because it was at that time unknown to the British Crown. (Again, [note page 6] this case may be of limited authority).

The cases of Calder vs Attorney-General of British Columbia in both the British Columbia Court of Appeal and the Supreme Court of Canada could have provided a definitive answer to the question of Aboriginal Rights. This was particularly so with respect to the Supreme Court of Canada decision because the issue was at last being squarely faced by Canada's highest Court. The British Columbia Court of Appeal had unanimously rejected any claim of Aboriginal Rights. However, the appeal to the Supreme Court of

Canada was marred, considering the importance of the case, by a legal oddity. Firstly, only seven of the nine Judges sat on the case and one of those refused to hear the case because of an error in procedure. Then, when the Supreme Court of Canada handed down its decision it was found that the Court had split: three Judges found that the Royal Proclamation of 1763 did not apply to British Columbia because the Nishgas in this case did not come under British protection until 1825 at the earliest. Moreover, if the title did exist it was extinguished by the British Columbia Colonial Ordinances and Legislation. Equally, three Judges opposed this view, holding the Royal Proclamation did apply to British Columbia because it specifically states it applies to "all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and Northwest as aforesaid". In the Judges' view this clearly contemplated British Columbia. Further, once Aboriginal Title is established it is presumed to continue until the contrary is proven and it cannot be extinguished except by specific surrender or specific legislation.

Thus, the net result of the Supreme Court's effort was to leave the legal issue in confusion - a "judicial stalemate" as one case put it. Technically, following the doctrine of stare decisis (precedent), the failure of the Supreme Court of Canada to arrive at a decision meant that the binding authority on the issue, as far as British Columbia is concerned, is the decision of the British Columbia Court of Appeal. It therefore follows that as the British Columbia Court of Appeal rejected Aboriginal Rights, the issue should be considered settled that way. But even this point is subject to debate. The British Columbia Provincial Court in R vs Dennis and Dennis, in deciding that native peoples were possessed of Aboriginal Rights expressly stated it would not be bound by the rule of stare decisis because of the degree of uncertainty surrounding the issue. On the other hand, the British Columbia Supreme Court in R vs Derriksan held that it was bound by stare decisis to follow the British Columbia Court of Appeal's decision in Calder and, therefore, Aboriginal Rights did not exist as the Royal Proclamation did not apply to British Columbia. The Court further held that even if they did exist, they were extinguished when British Columbia entered Confederation and reserves were created. It is of interest to note that as the British Columbia Supreme Court is superior to the British Columbia Provincial Court, stare decisis may operate to "overrule" the Provincial Court's decision in R vs Dennis and Dennis thereby reaffirming the notion that the British Columbia Court of Appeal's decision in Calder is the relevant and binding authority in British Columbia. Also, R vs Derriksan was appealed to the British Columbia Court of Appeal in February, 1975 where the Court affirmed that the defendants in that case do not have Aboriginal Rights. Although the Royal Proclamation was considered during that appeal it did not receive much judicial examination in the reasons.

The final decision relating to Aboriginal Rights in British Columbia is the recent British Columbia Court of Appeal decision in R vs Kruger and Manuel. This decision overturns the lower Court's decision giving the defendants Aboriginal Rights. However, as the Court of Appeal did not address itself directly to the issue of the effect of the Royal Proclamation, the case is of limited value other than confirming the opinion that Aboriginal Rights are not yet recognized in British Columbia.

It should be again noted that as the Derriksan and Kruger cases are being appealed to the Supreme Court of Canada, the above discussion may be subject to change and, hopefully, a definitive statement of the law in this area will emerge. But, at this point, it would appear that a claim of Aboriginal Rights based on the Royal Proclamation of 1763 is not acceptable in British Columbia because of the theory that British Columbia was terra incognita at the time the Proclamation came into existence. If they are eventually held to exist in British Columbia the question still arises as to whether they will exclude provincial legislation in respect to wildlife management as far as Indians are concerned. Non-Indians would still come under provincial jurisdiction. There could be discussion by the Indians that Aboriginal Rights, e.g. hunting, fall under Federal jurisdiction due to Section 91(24) of the British North America Act: "Indians and Lands reserved for Indians". However, this may not necessarily mean the absolute loss of control over game management because in R vs George (1966) 55 DLR (2d) 386, (1966) SCR 267, the Court expressly rejected any suggestion as to the Royal Proclamation of 1763 forming a limitation on the legislative competence of the Parliament of Canada. R vs Sikyea (1964) SCR 642, 50 DLR (2d) 80, held that the Federal government can restrict or extinguish Aboriginal Rights without compensation.

In addition, it could be argued that in any event Section 88 of the Indian Act would operate to make a provincial law such as the Wildlife Act applicable to Indians as a law of "general application". However, in R vs Dennis and Dennis, at page 644, the Court makes the point that the Wildlife Act would no longer be a law of general application if Aboriginal Rights were held to exist because the Act would then be specifically restricting a particular segment of society's legal rights. Such a restriction would, therefore, not be "general".

Another point arises as to who would be entitled to claim Aboriginal Rights. There is some doubt at present whether a non-status Indian could claim Aboriginal Rights. D. Sanders in "Indian Hunting and Fishing Rights" Volume 38, Saskatchewan Law Review, page 45, suggests that the rights of non-status Indians will probably depend upon future judicial interpretation of the constitutional scope of the term "Indian".

There is one further point in relation to Aboriginal Rights and that is whether they exist apart from the Royal Proclamation of 1763. Again, there is historical-legal evidence to the effect that they existed prior to the Royal Proclamation and the Proclamation merely operated to confirm pre-existing rights. However, this view has not received as much judicial attention as the argument centering on the applicability of the Royal Proclamation of 1763 and, therefore, not much comment can be made at this point. It is of interest to note that Provincial Court Judge O'Connor, in finding the defendants in R vs Dennis and Dennis had Aboriginal Rights, expressly avoided basing his decision on grounds relating to the Royal Proclamation of 1763.

Rather he chose to follow Hall J. (in Calder, SCC) in reasoning that if Aboriginal Rights did not exist there would have been no need to negotiate treaties with the native peoples. Thus, the existence of the treaties themselves operated as a recognizance of Aboriginal Rights.

In summary, Aboriginal Rights have not received definitive judicial recognition to this date. As O'Connor stated in Dennis and Dennis:

> "The issue can only be clarified by the Supreme Court of Canada...The issue involved is one of great public importance with broad social, economic and cultural consequences to the native people of B.C. The matter ought to be clarified by the Courts and it is important that either this or a case with the same issue be appealed so the uncertainty might be resolved. In the meantime, I am of the view that there has been such a difference of judicial opinion in both the Supreme Court of Canada and the British Columbia Court of Appeal that the question remains open."

The only point relevant to the issue of Aboriginal Rights which seem to be beyond doubt at this time is that Federal legislation is paramount to such rights and can operate to remove them. That, of course, may involve a political decision which the Federal government may or may not make.

C. TREATY RIGHTS

(1) Provincial Legislation and Treaty-Guaranteed Hunting Rights

Other than Treaty No. 8, there were only fourteen treaties made with British Columbia natives. All fourteen occur on Vancouver Island: one in the vicinity of Nanaimo, another near Port Hardy, and twelve in the vicinity of Victoria and the Saanich Peninsula. One of the terms of the transfer was that the native bands involved ceded their land to British authority in exchange for the retention of the right to hunt over "unoccupied" Crown lands. As will be seen from the following discussion, the right to hunt in the twelve areas around Victoria has been rendered inapplicable because these areas are now "occupied". Thus, the two areas near Nanaimo and Port Hardy are the two areas where the "treaty" rights may still apply.

The Provinces have long had the legislative authority to control game: R vs Robertson (1886) and R vs Boscowitz. R vs White and Bob 50 DLR (2d) 613 tested whether the Provinces could also control hunting by natives when the right to hunt was purportedly guaranteed by Treaty. In White and Bob, the accused killed deer out of season in violation of the British Columbia Game Act (1960). The British Columbia Court of Appeal found the accused were descendants of certain Nanaimo bands who had surrendered their lands by Treaty. A term of the Treaty reserved hunting rights for the Indians. The Court held that in the case of a conflict between a Treaty and a provincial game law, the Treaty provisions would prevail i.e. provincial game laws do not override Treaty-guaranteed rights. This was affirmed by the Supreme Court of Canada (1965) 52 DLR (2d) 481.

The legal soundness of that decision is now beyond dispute. However, there is a problem with the White and Bob decision in that the Treaty in question only guaranteed native hunting rights in respect of "unoccupied Crown lands". The British Columbia Court of Appeal did not address its mind to the interpretation of this phrase. It simply stated that the west side of Mount Benson (where the "offences" occurred) was unoccupied Crown land within the meaning of the phrase. There was no supporting reasoning from which it could be determined how the Court arrived at this interpretation.

The Fish and Wildlife Branch has accepted the Court's decision in this respect and is presently allowing the Indian groups covered by the Treaty to hunt in the Nanaimo area without restriction. However, the area where this hunting takes place appears to be an area covered by the E & N land grant. Under this grant the title in fee simple was given to the E & N Railway Company. It was later purchased by the CPR. The land later came under the ownership of several logging companies. A discussion with an official of Pacific Logging Ltd confirmed that most of the land in the Nanaimo area is owned outright by corporations such as MacMillan-Bloedel, Pacific Logging, Northern Development and others. A rough approximation, using British Columbia Lands and Forests map 92 F/1 East, of the land owned by these corporations would be in the range of 80% to 90%. It should be emphasized that this land is owned in fee simple and is not merely held under a timber lease. As such, it is submitted that this privately held

land is removed from the category of "Crown land" with the result that the Treaty hunting rights would not extend to such land. Rather, the Treaty hunting rights would appear to apply only to that 10%-20% of remaining land which is still Crown land and unoccupied. It has been suggested that the Indian groups affected by this might argue that the existence of treaty-guaranteed hunting rights still operates as a "burden" on the land regardless of who owns the underlying title, but that such a "burden" is unlikely to be found, in view of the cases on "unoccupied lands" arising on the Prairies.. As this point arose too late to canvas for this report, it is suggested that an opinion be sought from the Attorney-General's Department as to the relevancy of this point.

The interpretation of the phrase "unoccupied Crown land" is in itself an important point in so much as it serves to define the boundaries of the Treaty-conferred hunting rights. For instance, does the existence of a logging lease operate to make the lands included in the licence "occupied" or does it still leave such land "unoccupied"? As yet judicial interpretation is sparse and it is necessary to turn to jurisdictions other than British Columbia to see what definition the Courts have attached to the phrase. Most cases arise under the Natural Resources Transfer Agreement of the Prairie provinces and therefore are not strictly applicable to British Columbia. Nevertheless, they may be indicative of the approach a British Columbia Court is likely to take.

In R vs Smith (1935) 2 WWR 433 (Saskatchewan Court of Appeal) the Court decided that a game preserve constituted "occupied" Crown land. No native hunting or fishing on a game preserve was allowed as this would have destroyed the basic purpose of establishing such a restricted area. The Court further decided that the term "unocuppied" was equivalent to "idle", "not put to use", or "not appropriated". The Court noted at page 438:

> "I think that tracts set aside for mining, lumbering, settlement or other purposes (and upon which the right to hunt was withheld from the Indians) might have been said to be "occupied". So I take it that when the Crown, in the right of the province, appropriates or sets aside certain areas for special purposes.... such areas can no longer be deemed to be "unoccupied Crown lands".

Following this reasoning it might be possible to argue that timber licences operate to remove land from the category of "unoccupied Crown Land". However, this case may be limited by the fact that it is from Saskatchewan and was concerned with the Natural Resources Transfer Agreement. Thus, it is not strictly applicable to British Columbia.

R ex rel Clinton vs Strongquill (1953) 2 DLR 264 examined the question of whether a forest preserve was "unoccupied" or not. The Court held a forest preserve was within the meaning of "unoccupied Crown lands". However, this case may not be of much use in British Columbia because the decision again turned on a narrow constitutional point of law peculiar only to the Prairie provinces by reason of the Natural Resources Transfer Agreement.

A lower Court decision in Alberta has concluded that a National Park was "occupied" Crown land: R vs Rider (1968) 70 DLR (2d) 77. D. Sanders Saskatchewan Law Review Volume 38 at page 54 suggests that it would appear likely that a Provincial Park is also "occupied".

Finally, Justice Laskin (dissenting) in Cardinal vs Attorney-General of Alberta 40 DLR (3d) 533 states that Indian Reserves themselves do not fall into the category of "unoccupied Crown lands".

In conclusion, it is firmly established by the White and Bob decision that Treaty-guaranteed rights are immune from the provincial Wildlife Act. There is no specific judicial determination of what is or is not "unoccupied Crown land" other than those cases discussed above. However, it would appear, at least in the Nanaimo area, that an argument could be made for limiting the extent of Treaty-guaranteed hunting rights because of the proviso extending such rights only to occupied Crown lands. In deciding the question, the Courts may rely on the guideline laid down in R vs Smith (1969) 71 WWR 67: "Whether Crown land is occupied or unoccupied is a question of fact ... in every case". Thus, if a case with similar facts as White and Bob was brought before the Courts today, a different verdict as to the guilt of the accused may be reached.

(2) Federal Legislation and Treaty-Guaranteed Rights

A ground for the Indian's claim of the right to take fish and wildlife without restriction rests upon the provisions of treaties made by Federal authorities with various Indian bands across Canada. These are the so called "numbered" treaties, e.g. No. 8, No. 11. Under the terms of these treaties the Indian band usually agreed to give up their ownership rights in the land--usually for little compensation. However, many of the treaties expressly recognized that the native people derived their existence from living off the land and, therefore, a term was usually included in the treaty giving the native group the right to "pursue their usual vocations of hunting, trapping, and fishing over land not required for settlement, etc". It is these terms, purportedly guaranteeing native rights to take fish and wildlife, which run in direct conflict with various Federal statutes such as the Migratory Birds Convention Act and the Fisheries Act. This created an interesting legal issue, not to mention a moral one, which was fully recognized by the Court in R vs Sikyea 43 DLR (2d) at page 158:

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

In R vs Sikyea, the accused was charged with shooting a duck out of season contrary to the terms and regulations of the Migratory Birds Convention Act. The accused was also an Indian under Treaty No. 11 (NWT) and the accused claimed that by the terms of Treaty No. 11 he was entitled to hunt for food without fear of restriction. Nevertheless, the Court entered a conviction against the accused on the reasoning that the Migratory Birds Convention Act was intended to apply to Indians since the Act expressly listed species of birds which an Indian could take for food. Therefore, the mallard duck which the accused had shot, not being on the list of approved food species for Indians, must, by inference, have been intended to be protected from Indian hunting. The accused's conviction was affirmed in the Supreme Court of Canada (1964) SCR 643.

The effect of the decision was that valid Federal legislation could abrogate treaty guaranteed rights. The reasoning behind this was simply stated in the Northwest Territories Court of Appeal:

> "This 'promise and agreement' treaty, like any other, can of course, be breached, and there is no law of which I am aware that would prevent Parliament by legislation, properly within Section 91 of the British North America Act, from doing so."

Substantially, the same problem arose a few years later in the case of R vs George (1966) SCR 267. The accused shot two ducks on a reserve in Ontario. The ducks were to be used for food. The accused was charged under the Migratory Birds Convention Act with shooting ducks out of season. The lower Courts registered an acquittal but, on appeal to the Supreme Court of Canada, the accused was found guilty. The majority in that Court found that there was no valid distinction between the case before them and that of R vs Sikyea which they followed. Thus, the first point to be gained from the case is that, by upholding Sikyea, the Supreme Court of Canada firmly established that valid Federal legislation can abrogate treaty guaranteed rights. The second point the Supreme Court of Canada had to deal with was the effect of Section 87 of the Indian Act RSC 1952 c 179 (now Section 88 RSC 1970 c I-17). Section 88 of the Indian Act reads as follows:

> "88. 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."

(The wider import of this section is covered in this report under the headings of "Application of Provincial Laws on Reserves"). The narrower point the Supreme Court of Canada had to determine in R vs George was whether, as it prima facie does, Section 88 had the effect of guaranteeing by statutization the supremacy of treaties over Federal legislation.

The majority held that Section 88 was not intended to be a declaration of the paramountcy of treaties over Federal legislation. Rather, Section 88 was incorporated to make applicable to Indians provincial laws of general application so as to preclude any interference with rights under treaties resulting from the impact of provincial legislation. The result, therefore, is that Section 88 only refers to provincial laws of general application and the phrase in Section 88 "subject to the terms of any treaty..." does not prevent the application to treaty Indians of such Federal legislation as the Migratory Birds Convention Act or the Fisheries Act.

That R vs George is now seen as binding authority is illustrated by R vs Cooper (1964) 1 DLR (3d) 113. In that case, the Court found that the accused Indians, members of the Sooke band, were guaranteed fishing rights by reason of a binding treaty signed in 1850, which purported to give the Indians an unrestricted right to fish. Nevertheless the accused were convicted of charges made pursuant to the Fisheries Act: the British Columbia Supreme Court stated that it was compelled to follow the authority of R vs George and that, therefore, the existence of a treaty was no defence to a charge laid under the Federal legislation.

Thus, to repeat by way of summary, R vs Sikyea and R vs George jointly stand for two propositions. Firstly, Federal legislation can override treaty guaranteed rights. This has the effect of offsetting or, probably in some cases, of negating what appears to be a strong legal basis for the existence of such rights. Secondly, such treaty rights can be overridden notwithstanding Section 88 of the Indian Act which, on first reading, seems to contain a statutory guarantee of the sanctity of native treaty rights. It should be noted that R vs George also decides that Federal legislation can limit treaty-protected rights on a reserve.

Treaty No. 8 (1899)

Treaty No. 8 is the most geographically extensive treaty in British Columbia, covering the area east of Atlin and north of Fort St. James and Prince George. Treaty No. 8 purports to grant Native hunting and fishing rights, subject to Federal restriction:

> "and Her Majesty the Queen Hereby Agrees with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the Country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes." (emphasis added)

At present, the Fish and Wildlife Branch is enforcing the provisions of the Wildlife Act against the native people in the Treaty No. 8 area. However, in R vs White and Bob the British Columbia Court of Appeal held that the existence of a Treaty has the effect of excluding provincial game laws from applying to the Indians who made the Treaty (see the part of this report referring to Provincial legislation and treaties). There does not appear to be a distinction with regard to Treaty No. 8 which would negate the decision of White and Bob. It seems, from that decision, that the Fish and Wildlife Branch is acting outside its authority in enforcing the Wildlife Act against Treaty No. 8 Indians. (In fact, it is surprising that the Treaty does not yet appear to have been raised as a defence) However, it should be noted that the Provincial Wildlife Act would not be entirely excluded from the area. It would still be applicable to those Indians who did not belong to a band covered by the treaty and, of course, it would still be applicable to non-Indians.

Seemingly, the phrase "subject to such regulations... as may be made by the Government of the Country" suggests that any treaty-guaranteed rights could be erased simply by the Federal government passing legislation. However, some Courts have suggested another interpretation. In R vs Wesley (1932) at page 789. the Court commented that the phrase in question could not have been contemplated to mean that the Indians could be deprived of their unfettered right to hunt. This was accepted by the Northwest Territories Court of Appeal in R vs Sikyea (1964) where the Court said that the "regulations" stated in the Treaty meant only those regulations necessary to maintain game populations so as to ensure food for Indian hunters. Except in this case restrictions on hunting could not affect the treaty conferred right. This, however, is in conflict with the Supreme Court of Canada decision in R vs Sikyea and R vs George which hold that valid Federal legislation can override treaty-guaranteed rights.

Assuming that the Courts concur with the view that the provincial Wildlife Act is inapplicable to Treaty No. 8 Indians, there is one case which, while not dealing specifically with the question, suggests that the Treaty itself may be inoperative. In Re Paulette et al and Registrar of Titles (No. 2) (1973) 42 DLR (3d) 8, the Northwest Territories Court of Appeal dealt with an application by Indian groups to register a caveat of Indian Aboriginal title against large tracts of land in the Northwest Territories.

The Court held that the Registrar of Titles was under a duty to register the caveat. The Court's decision was based on, among other things, the reasoning that Treaty No. 8 and Treaty No. 11 under which the Indians purportedly "ceded, released, surrendered and yielded up" the land in exchange for assurances of continued hunting and fishing rights, may not have had the legal effect of terminating Indian title. This was because the treaties may have done no more than confirm the paramount title of the Crown. Secondly, the Court expressed some doubt as to whether the Indians negotiating the Treaties had understood that the effect of the treaties was to terminate Indian title and that the Indians had intended that to be the case. At any rate, this potential argument awaits further clarification by the Courts.

In conclusion it appears that, based on R vs White and Bob, provincial legislation, such as the Wildlife Act, is not applicable to Treaty No. 8 Indians. However, Treaty No. 8 would appear not to exclude Federal legislation: R vs George.

D. APPLICABILITY OF PROVINCIAL LAWS ON RESERVES

(1) Pre - Indian Act Position

Starting with R vs Edward Jim (1915) 22 BCR 106, there is a line of authority that has held that the province's power to enact game laws does not extend to Indians when killing game on Indian reservations. This was affirmed by R vs Rodgers (1923) 2 WWR 353 where the Court stated that because Section 91(24) British North America Act gives the Federal government exclusive legislative authority over "Indians and Lands Reserved for Indians" it was not competent for the provincial legislature to pass laws interfering with their own reserves. However, the Court pointed out that if an Indian leaves his reserve and takes up any calling or occupation outside the reserve he would come under the control of the provincial laws as an ordinary citizen. The argument that provincial game laws do not apply to Indians while they are on Indian Reserves was again upheld in R vs Hill (1951) 101 CCC. It should be remembered however, that in the Rodgers Case the accused was a Treaty Indian, and could have been protected from provincial legislation as in R vs Bob and White.

(2) The Section 88 Problem - "Laws of General Application"

To this point, the law seems fairly straight forward: prior to 1951 the province's game laws had no application to Indians on Indian reserves but the game laws would apply to an Indian who was off the reserve. In 1951, however, the new Federal Indian Act was enacted containing Section 87 (now Section 88) which purported to make all laws of general application apply to Indians within the province.

The interpretation of Section 88 has been a controversial topic. The legal scope of Section 88 has been obscured by mainly three factors:

(1) Inconsistency of application; i.e. Section 88 has not been brought up in cases where it could have conceivably been argued (see R vs Sikyea, Corporation of Surrey vs Peace Arch Enterprises Ltd (1970) 74 WWR 380).

(2) Doubt, in British Columbia, at least, as to the legal standing of the Aboriginal Rights argument (see R vs Dennis and Dennis [1975] 2 WWR 636 as opposed to R vs Kruger and Manuel unreported BCCA).

(3) The question of whether Section 88 applies to Indian lands at all -- Section 88 only refers to "Indians" not Indian "Lands". (see the note on this argument at page 12.)

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

It should be noted that Section 88 itself contains four limitations on the applicability of laws of general application:

(1) Treaty terms override "laws of general application" if there is a conflict.

(2) Federal statutes override "laws of general application" if there is a conflict.

(3) Laws of general application will not apply if there is a conflicting provision under the Indian Act.

(4) Laws of general application will not apply in the case of a conflict with an order, rule, regulation or by-law made under the Indian Act.

A law of general application is a law which applies generally to all residents in the province without distinction: for example, a law which applies to non-Indians and Indians alike. R vs George, supra, determined that Section 88 did not include Federal laws and thus "laws of general application" applied only to provincial laws.

The Courts' approach to the question of whether the British Columbia Wildlife Act is a law of general application has been varied.

The first case in which the issue came up was in R vs Discon and Baker (1968) (British Columbia County Court). The accused, non-Treaty Indians, were convicted of killing a deer out of season. The offence occurred off the reserve. The accused's claim was based on a claim of Aboriginal Rights that they had the right to hunt on ancient tribal territory. The Court rejected the claim that the Squamish band had Aboriginal Rights. In light of the fact that the band's rights were not guaranteed by Treaty the Court also decided that the Wildlife Act was applicable to the accused by virtue of Section 88. That is, the Wildlife Act was a law of general application. Some academics have criticized the decision in Discon because the Court apparently did not refer to previous legal decisions on Aboriginal Rights and it made evidentiary errors as well. Cumming and Mickenberg, at page 215 state that the effect of these oversights limits the force of the decision to the case's specific facts. In other words, the case cannot be cited as an authority for the general principle that the Wildlife Act is a law of general application and therefore applies to all Indians in the province.

Furthermore, the case was one of first instance, tried in a lower Court, and not appealed, which also limits its authority.

A decision which opposes R vs Discon and Baker is that of R vs Dennis and Dennis (1975) (British Columbia Provincial Court). In this case, non-Treaty Indians shot a moose off reserve for food. Although it was shot in Treaty No. 8 territory, the Court held that as the band had not been signatories to the treaty they could not rely on its protection. This time the Court specifically accepted the fact that the defendants did have Aboriginal Rights and these had never been extinguished by Treaty. The Court then went on to say that because of the existence of an Aboriginal Right to hunt, the British Columbia Wildlife Act infringed on their right to take game for food. The effect of this was stated to be:

> "... that legislation that extinguishes or restricts Aboriginal hunting rights is also legislation in relation to Indians because it deals with rights peculiar to them."

Thus, the Court concluded that the Wildlife Act, insofar as it extinguished or restricted native hunting rights is not competent provincial legislation under the British North America Act. Consequently, because it affects Natives specifically, Section 88 does not operate to make the Wildlife Act a law of general application. (This was not the view of the Supreme Court of Canada in R vs Cardinal.)

Some general remarks about this case are pertinent. Firstly, the case referred to here is only from the Provincial Court of British Columbia. At the time of this writing it is known that the case has already been appealed and argued to the British Columbia Supreme Court. It may be that the British Columbia Court of Appeal has overturned the Provincial Court's decision, thus substantially altering the decision in Dennis and Dennis. Secondly, the case may be limited because the decision was based on the existence of Aboriginal Rights. (Refer to the heading of "Aboriginal Rights in British Columbia" for a discussion on the legal status of the Aboriginal Rights argument).

The final case in which the effect of Section 88 on the Wildlife Act was discussed, was the February 1975 decision of the British Columbia Court of Appeal in R vs Kruger and Manuel. In that case the accused Indians had been charged with taking game out of season. The offence occurred off reserve. They were acquitted in the British Columbia County Court on the basis that they had Aboriginal Rights to hunt arising from the Royal Proclamation of 1763. Mr Justice Robertson, in the Court of Appeal, did not deal with the question of whether Aboriginal Rights did or did not exist. Rather, he concentrated on Section 88 of the Indian Act. He stated that the opening words of Section 4 "no person shall" were of such wide application that they must be interpreted as meaning that the Wildlife Act was a law of general application and was therefore applicable to the accused unless they could bring themselves within the exceptions listed in Section 88. As the Royal Proclamation of 1763 was not (a) a treaty, (b) an Act of Canada and (c) because the Wildlife Act was not inconsistent with the Indian Act, the Court held that the Wildlife Act was applicable to the accused and therefore the convictions were restored.

The question of whether the Wildlife Act was a law of general application also came before the British Columbia Court of Appeal in R vs Derriksan, but, as it was unnecessary to the decision, was not considered. It should again be pointed out that none of the above cases specifically decides whether Section 88 operates to apply provincial law to reserves. However, this distinction has not been brought up and the Courts, when holding Section 88 makes the Wildlife Act applicable to Indians in the province, attach no limitations as to the geographical extent of the Act. Moreover, it has been established since R vs Rodgers (1923) that Indians are subject to provincial laws off reserve anyway. This being so, one may then question why the Courts would be concerned with the Section 88 argument at all if Section 88 merely operates to make provincial laws applicable to off reserve Indians. This would be an unnecessary restatement of the law as it already stands. Rather, the inference would seem to be that Section 88 would now make provincial laws of general application applicable throughout the entire geographic limits of the province - including reserves. In R vs Shade 4 WWR 430 (Alberta) the Court interpreted the intention of Section 88 as follows:

> "Section 88 is a new section, not appearing in any of the prior legislation affecting Indians. It seems to be a clarification and restatement of previous case law with respect to offences against provincial statutes. Parliament has elected to legislate for the Indian in those fields particularly affecting his welfare, such as intoxicants and property rights, and to leave him subject to the laws of the province within which he resides and to the general laws of Canada in all other areas." (emphasis added)

This statement would seem to indicate that given a law is of general application, it would apply without distinction to all Indians in the province whether they were on or off reserve.

As was noted above there has been very little direct comment on the issue of the applicability of provincial laws of general application to reserve lands. R vs Williams (1958) 120 CCC 34, an Ontario Magistrate's Court decision dealing with the Highway Traffic Act, held that if a law is of "general application" then the effect of Section 88 is to make that law binding on Indians on reserve lands. In R vs Gingrich (1958) 29 WWR 471 the Alberta Supreme Court stated:

> "Section 88 expressly states that 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 ..... This supports the view that the rights of an Indian on a reserve are those of a resident of Alberta, except where curtailed by Treaty, Act of Parliament, or regulations made thereunder."

The Court here concurs with the view that once a law is of general application it will apply to reserves. On the other hand, the Saskatchewan Court of Appeal stated in R vs Johns (1962) 39 WWR 49 that Section 88 applies only to Indians and not to Reserves. As none of these cases appear to have received subsequent judicial notice with respect to Section 88 it is not possible to say that either of them represent an accurate solution to the question. In any event, neither case is binding in British Columbia (see page 21 of this report for a fuller discussion of the argument contained in R vs Johns).

It would appear at this point that the strongest authority for the applicability of provincial game laws to reserves lies in the majority's decision in Cardinal vs Attorney-General of Alberta (1973) 40 DLR (3d) 544 (Supreme Court of Canada). In this case, the accused Indian, while on a reserve, was convicted of selling game in violation of the Alberta Wildlife Act (1970). The issue before the Court was whether provincial game laws of general application could apply to Indians on reserves. The Supreme Court of Canada decided that because of the Natural Resources Transfer Agreements which specifically granted to the Prairie provinces authority to regulate game in these provinces, the accused was subject to provincial game legislation while on reserve. As this majority decision turned solely on the effect of the Natural Resources Transfer Agreements, the majority could have confined its reasoning to this point. The majority, however, went on to say that regardless of the effect of the Agreements, the fact that Section 91(24) of the British North America Act gives exclusive legislative authority to the Federal government re Indians does not make reserve lands an "enclave" in which provincial laws of general application cannot apply. Justice Martland states at page 559:

> "A provincial Legislature could not enact legislation in relation to Indians, or Indian reserves, but this is far from saying that the effect of Section 91(24) of the British North America Act was to create enclaves within a province of which provincial legislation could have no application. In my opinion, the test as to the application of provincial legislation within a reserve is the same as with respect to its application within the Province and that is that it must be within the authority of 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 (or any other subject under Section 91) it is applicable anywhere in the Province, including Indian reserves, even though Indians or Indian reserves might be affected by it. My point is that Section 91(24) enumerates classes of subjects over which the Federal Parliament has the exclusive power to legislate, but it does not purport to define areas within a Province to enact legislation, otherwise within its powers, is to be excluded."

Thus Justice Martland's statement, which the Supreme Court of Canada accepted by a majority of six to three, says that given a valid provincial law, which does not relate to Indians or lands reserved for Indians (i.e. is of general application), it will apply to all areas of the province, including reserves. It should be noted that Martland J. did not have to rely on Section 88 to reach this conclusion. Instead, he found that provincial laws would apply simply on basic constitutional principles. If this approach is accepted, it would seem then to follow that Section 88 operates merely as a reaffirmation of existing constitutional law. In any event, as R vs Robertson and R vs Boscowitz decided that game laws are validly within provincial legislative authority, and as R vs Kruger and Manuel has so far decided that the British Columbia Wildlife Act is a law of general application, the conclusion, based on Martland J's reasoning in Cardinal, would seem to be that the British Columbia Wildlife Act is applicable to reserve lands. At present, the Wildlife Act is not being enforced on Indian reserves in British Columbia.

However, it must be emphasized that the majority decision re the applicability of provincial laws to reserve lands on general constitutional principles is not technically a binding decision. Because the issue involved could have been determined exclusively on the basis of the interpretation of the Natural Resources Transfer Agreements, the majority's statements concerning the general applicability of provincial laws are, technically, obiter dicta (that is, reasoning unnecessary to the decision). Albeit that dicta can have persuasive importance, it is nevertheless not strictly binding on the Supreme Court of Canada or the lower Courts. Thus, Cardinal vs Attorney-General of Alberta is narrowly binding on only the Prairie Provinces and only to the extent that the decision rests on the interpretation of the Natural Resources Transfer Agreements. The fact that the majority decision is dicta does not necessarily nullify the force of the reasoning since dicta itself is frequently cited as persuasive authority if it is recognized by a subsequent Court as being correct. Generally, dicta is even more persuasive if it originates from the Supreme Court of Canada. However the fact that the opinion in the Cardinal case is dicta is an important limitation and although the persuasive authority of Justice Martland's judgement cannot be discounted, it should be restated that, according to strict legal theory, the issue of the applicability of provincial game laws to Indian reserve lands remains open and a future Court is relatively unfettered should it choose to decide the issue in an opposite way.

This limitation, however, may turn out to be largely academic in light of possible future events. The Cardinal case was decided in July, 1973. Since that time, the bench of the Supreme Court of Canada has been altered by two members. As was previously mentioned, the issue of the applicability of provincial laws to Indians will in all probability arise again if and when R vs Derriksan, R vs Kruger and Manuel reach the Supreme Court of Canada this fall. Given that the membership of the Supreme Court of Canada is basically the same as it was in the Cardinal case, it would be surprising, although possible, if the Court were to reverse the Cardinal decision in either of these three cases. It would be dangerous to otherwise predict the

the Supreme Court of Canada's stance and so the most advisable approach to the problem at this time should be one of "wait and see".

(3) Argument against Section 88's Application to Reserves

Parenthetically, a further limitation on the majority's decision in Cardinal may be the fact that Justice Laskin (Now Chief Justice Laskin) dissented. Laskin is generally highly regarded as both a legal scholar and a Judge. Because his dissenting judgements are usually considered to be "strong" dissents, they may even overshadow the majority decision on force of reasoning alone, although, as is the case with dicta, they have no binding authority. (In fact, the general rules regarding the acceptability of dicta apply to dissenting opinions as well). In any event, Laskin's dissenting judgement in Cardinal touched upon an argument which, if accepted by the Courts, it has been suggested, could operate to negate Section 88's applicability to reserves.

The argument is as follows: Even assuming that the Supreme Court of Canada holds the Wildlife Act to be a law of general application and applicable to reserves by virtue of Section 88 of the Indian Act, Section 88 itself may be open to attack. Section 91(24) of the British North America Act gives Parliament jurisdiction over "Indians" and "lands reserved for Indians". Section 88, however, speaks only of application to Indians and not of lands reserved for Indians. It may therefore be possible that, by its own wording, Section 88 has inadequate force to extend provincial game laws to reserves. This is because, ever since St. Catherines Milling vs The Queen (1886), Indian hunting rights have been recognized as a "usufructuary" right. that is, a right in respect of the land. Theoretically, a law relating just to Indians, is not a law relating to lands reserved for Indians. It therefore follows that, as Section 88 does not mention "lands", Section 88 should not operate to make provincial laws of general application applicable to reserves. This argument has been given more recognition by legal academics than by the Courts. The Courts have generally not made this distinction between Indians and lands reserved for Indians and have interpreted Section 88 broadly so as to encompass both Indians and Indian lands.

The first reported case which dealt with this point was R vs Johns (1962) 39 WWR 49. There, the Court flatly stated that Section 88 of the Indian Act relates to Indians and not to reserves. However, R vs Johns is just one authority opposed to many in which the distinction was not even acknowledged. This tends to reduce the case's potential usefulness. K. Lysyk in Chapter Twelve of the Hawthorne Report (1966) at page 215, expressed doubt as to whether, in the future, the question would still be considered open in light of the number of decisions in which the Courts have assumed that Section 88 refers to both Indians and lands reserved for Indians.

Justice Laskin, however, dissenting in Cardinal vs Attorney-General of Alberta (1966), distinguishes Section 88 as dealing "only with Indians, not reserves". He further adds:

> "It was contended by the respondent Attorney-General of Alberta ... that Indians like aliens were subject to provincial laws of general application. I do not pursue the analogy because it breaks down completely when regard is had to the fact that we are dealing here not only with Indians but with "lands reserved for Indians". The fact that Section 88 of the Indian Act makes provincial laws of general application "applicable to and in respect of Indians in the province", and hence could be construed as applicable to them on their reserves as well, does not add anything to the case for the application of provincial game laws to Indians on a reserve".

It obviously appears from this statement that Chief Justice Laskin would not accept an argument for the application of provincial game laws to reserves by operation of Section 88 because of the distinction between "Indians" on one hand, and "lands reserved for Indians" on the other. At present, the existence and, therefore, the importance of this distinction has been generally overlooked by the Courts. It is nevertheless worthwhile to note that the argument has been recognized, albeit in dissent, by Chief Justice Laskin of the Supreme Court of Canada. The composition of the Court's membership will change substantially in the next few years. Should an issue similar to the one in Cardinal then appear before the Supreme Court, the recognition of the distinction may then be of crucial importance in deciding on the applicability of our Wildlife Act to Indian reserves.

Summary:

It should be obvious from the above discussion of the case law that it is difficult to draw firm conclusions in respect to the status of Section 88 and that, in any event, such conclusions are subject to drastic change. Nevertheless, the following submissions appear warranted at this time.

(1) the Wildlife Act is a law of general application within the meaning of Section 88.

(2) while at present the Wildlife Act is not being applied on Indian reserves there is judicial opinion supporting the proposition that it can be enforced against Indians on reserves.

It would appear at the present time that the case law in favour of its applicability is stronger than that opposed.

(3) In addition, the appeals to the Supreme Court in R vs Derriksan, R vs Dennis and Dennis and R vs Kruger and Manuel may shortly provide clarification of the issue.

(4) A Note on Referential Incorporation

One further point arises in connection with Section 88 and that is whether it has the effect of "adopting" the Wildlife Act by referential incorporation. This is the process whereby provincial legislation, not otherwise applicable, is incorporated into Federal legislation so as to make the provincial law the same as if it were a valid Federal Act. For example,

if it were held that the province did not have the authority to restrict native hunting because this was an infringement upon a Federal field, it would be possible for the Federal government, which has authority over the field, to legislate so as to specifically make the provincial law applicable to native hunting. In this way the provincial Act would apply to Indians because it was referentially incorporated as a Federal statute.

The effect of this process is, of course, that the provincial law becomes enforceable as if it were a Federal Act in the area it was referentially incorporated.

As yet, there has not been much discussion of this issue in the case law. The Court in R vs Dennis and Dennis specifically stated that Section 88 did not operate to referentially incorporate the Wildlife Act. However, in Cardinal vs Attorney-General of Alberta, Justice Laskin (Dissenting) decided that Section 88 does referentially incorporate all provincial laws of general application. The issue is still open. There has been no discussion of the significance if any, referential incorporation would have with reference to the practical aspects of enforcing the Wildlife Act against native hunting.

(5) Provincial Game Laws as they Apply to Non-Indians on Reserves

There is judicial authority to suggest that even if the province's game laws do not extend to Indians situated on reserve lands, they may apply to non-Indians. In R vs McLeod (1930) 2 WWR 37 (BCCA) the Court held that the fact the Federal government has exclusive legislative authority over Indians and lands reserved for Indians by virtue of Section 91(24) of the British North America Act does not prevent a provincial game protection Act, which prohobits the killing of game out of season, from being applied to the killing of game on an Indian reserve when the offender is a non-Indian.

R vs Morley (1932) 4 DLR 483 (BCCA) went further than R vs McLeod in suggesting that, on constitutional grounds, the Game Act (1924) was applicable to both Indians and non-Indians alike on reserve lands. However, it appears the decision that provincial game law is applicable to Indians on reserves has not been accepted and the case is usually mentioned in the context that the provincial hunting law is applicable to non-Indians hunting on reserves.

It would appear from these cases that the somewhat anomolous situation existed (at least prior to Section 88 of the Indian Act) whereby non-Indians were subject to the Wildlife Act while on a reserve whereas Indians were not. The law concerning Section 88 of course, appears to destroy this distinction. If Section 88 was held not to make the Wildlife Act applicable to Indians on reserve lands it would appear from R vs McLeod and R vs Morley that the province could at least control non-Indian hunting on reserve. D. Sanders at page 240 of the Saskatchewan Bar Review, Volume 38, notes, however, that there is no sound legal reason why non-Indians should be subject to the Wildlife Act if, at the same time, Indians were exempt.

(6) Band By-Laws made pursuant to the Indian Act

It should be emphasized that in neither the McLeod nor Morley cases did the convicted non-Indians have permission under the Indian Act to hunt on reserve lands. In this regard, observations by D. Sanders in Volume 38 (1974) of Saskatchewan Bar Review, footnote #31 at page 49, are particularly informative:

> "Under the current Indian Act (Section 81) band councils have the power to pass by-laws for the preservation, protection, and management of fur-bearing animals, fish and other game on the reserve. Under this authority certain bands have enacted by-laws which require a non-Indian hunter to purchase a licence from the band. If a non-Indian has a permit to hunt from the band, can he be convicted under provincial law? There appear to be no cases dealing with this issue. In all cases where a non-Indian has been charged under provincial law for hunting on a reserve, the non-Indian has not had authorization or permission from the band. In the Morley case it was suggested that the provincial law only applied in the absence of a decision or permit under the Indian Act - yet Mr. Justice Martin specifically questions whether the Indian Act would authorize hunting on a reserve during a period declared a closed season by provincial law. The question is left unresolved. Apparently most band bylaws for on-reserve hunting permits for non-Indians specifically require the non-Indian to have a provincial licence. Such a provision is encouraged by the Department of Indian Affairs. It may be that the Minister would refuse to approve a hunting by-law which did not so provide. The issue, then, of the band's ability to prevent provincial hunting laws from applying to non-Indians hunting on the reserve is unlikely to come up. If provincial laws would not otherwise apply to a non-Indian on a reserve with a permit from the band, they are adopted by the band in the band's by-laws by the requirement of a provincial licence. Provincial laws are made to apply by the legislative power of the band council."

Section 81 reads:

> Section 81 "The Council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely:
>
> ... (o) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve."

Norm Prelypchan of the Attorney-General's office provided information that there is, as yet, no band by-laws existing in British Columbia for the regulation of game. However, it should be noted that if such by-laws were enacted they would have the effect of excluding the Wildlife Act even if the Wildlife Act was held to apply to reserves. This is because of the doctrine Paramountcy which holds that in the case of valid Dominion legislation (in this case a by-law made pursuant to the Indian Act which in turn is valid by virtue of Section 91(24) of the British North America Act) conflicting with valid provincial legislation (in this case the Wildlife Act made under Section 92(13) of the British North America Act) the Federal legislation will prevail. In addition Section 73 of the Indian Act allows the Federal government the power to enact its own game laws in relation to reserve lands. The principle of Paramountcy is applicable here too.

It appears, therefore,that even if the Wildlife Act is held to be applicable to reserve lands its applicability is at the mercy of band by-laws or regulations made pursuant to the Indian Act.

E. MISCELLANEOUS NOTES

(a) The Natural Resources Transfer Agreements of the Prairie Provinces

The following short discussion is included so as to clarify the state of the law as it exists in the Prairie Provinces. The situation in these provinces is quite distinct from the situation in British Columbia and caution should be taken in applying the law from Alberta, Saskatchewan or Manitoba to the question of native rights in British Columbia.

In 1929 each of the Prairie Provinces separately negotiated Natural Resource Transfer Agreements with the Federal government. These were intended to convey the ownership of natural resources from the Federal government to Alberta, Saskatchewan and Manitoba (these three provinces were the only provinces which had entered Confederation without control of their own resources). On completion the Agreements were incorporated into the British North America Act of 1930 (UK) thus becoming part of the Canadian constitution.

The Agreements contain a unique provision with respect to native hunting and fishing rights. Clause 12 (Clause 13 in Manitoba) reads as follows:

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

Court decisions involving interpretation leave no doubt that the Natural Resources Transfer Agreements create a binding guarantee of native hunting and fishing rights. Most judicial attention is now directed at relatively minor points such as the interpretation of "rights of access" and "unoccupied Crown Lands", i.e. the scope of the guarantee.

Thus at present the guarantee operates so that an Indian in the Prairie Provinces hunting on lands which are unoccupied or to which he has a right of access, is for all practical purposes exempt from provincial game legislation provided that he is hunting for food. If the Indian is hunting for sport or for commerce he is subject to provincial game laws. Furthermore, there is no prohibition against the method used in hunting for food providing it is done in a manner so as not to endanger the lives or safety of others: R vs Myron and Meeches et al, (unreported decision of the Supreme Court of Canada, July 1975).

The Agreements do not exclude Federal legislation such as the Migratory Birds Convention Act from applying to Prairie Indians. Also, the Agreements do not affect the decision reached in Cardinal vs Attorney-General of Alberta (1971) 40 DLR (3d) 554 which provided that the Prairie Provinces' game Acts were of general application (i.e. they applied to Indians and non-Indians alike) and could apply to restrict non-food hunting on reserves.

In summary, the Transfer Agreements embody a constitutional guarantee of native hunting and fishing rights from encroachment by provincial legislation. This is distinct from the situation in British Columbia where no such guarantees exist apart from treaties.

(b) Article 13 of the Terms of Union Agreement

This argument has not achieved much prominence yet. But as the R vs Jack case cited below will probably be appealed a short note here may be of future interest.

Article 13 of the Terms of Union of British Columbia and Canada agreement (1871) under which British Columbia entered Confederation reads in part:

> "The charge of the Indians, and the trustee-ship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion government, and a policy as liberal as that hitherto pursued by the British Columbia government shall be continued by the Dominion government after the Union."

There have been three cases in which the constitutional validity of Federal law has been challenged by reference to clause 13. In R vs Point (No. 2) (1957) 22 WWR 527 the British Columbia Court of Appeal held that the only parties which could rely on Article 13 were the parties signing the agreement, i.e. the British Columbia and Canadian governments. Therefore the accused Indian in this case could not use Article 13 as a defence to a charge of failing to file an income tax return under the Federal Income Tax Act.

In Geoffries vs Williams (1959) 16 DLR (2d) 157 the Court rejected an attack on a Federal law by Article 13 on the grounds that there was no evidence to suggest that British Columbia's attitudes toward Indians were more liberal prior to British Columbia joining Confederation.

Finally, there is the recent case of R vs Jack handed down in the British Columbia Provincial Court in January 1975 (as yet unreported). In that case the accused Indian was charged with illegal fishing on the Cowichan River. The accused sought to attack the validity of Section 19 and Section 32 of the Fisheries Act on the basis of Article 13. It was argued that Article 13 embodies a constitutional limitation on the legislative power of the Federal parliament to the effect that the Federal government is prohibited from enacting any law or adopting any policy affecting Indian people which is less liberal than the laws or policies of the British

Columbia government prior to the Union. The defence adduced expert evidence showing that prior to the Agreement in 1871 there existed a government policy of not interfering with Indian food fishing. The Court, in rejecting the accused's argument, held:

(1) The pre-Union policy of non-interference with Indian fishing was predicated on the assumption that the fishery resource was inexhaustible and that unlimited fishing was allowed the Indians to prevent any hostilities while the land was gradually occupied by non-Indians. Furthermore, as it was just policy, it was subject to change with changing times.

(2) Therefore, such policy did not deny the government the right to interfere with or regulate the fishing in the province. Article 13 must be interpreted in the light of the fishery situation in 1871 up to the present day and this requires regulations not envisioned in 1871.

In conclusion, the net effect of the three cases, and specifically R vs Jack, seems to be that Federal laws are immune from constitutional attack based on Article 13.

(c) Applicability of Provincial Law to "Surrendered" Indian Lands

This brief note is included because it clarifies the position of "surrendered" portions of Indian reserve lands. It is also an excellent example of the Court's view as to what type of provincial legislation oversteps the distinction between "Indians" and "lands reserved for Indians".

In Corporation of Surrey vs Peace Arch Enterprises Limited (1970) 74 WWR 380 (BCCA) the Court gave a concise summary of constitutional principles:

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

In this case the defendants sought to build, among other things, a restaurant on an Indian reserve within the municipality. The municipality sought to stop construction on the basis that it did not comply with municipal by-laws passed pursuant to the Health Act. It should be noted that the company acquired the lands by way of a leasing arrangement made under the Indian Act. By Section 37 of the Indian Act, Indians are prohibited from alienating their land except by "surrender" to the government of Canada. As was the case in Peace Arch, the band surrendered the land to the Federal government who in turn leased the land to the company for the Indian band. Thus, the narrow issue of the case was whether the provincial Health Act extended to an Indian reserve - especially when the lands in question were being used by someone other than the Indians themselves. The Court decided two relevant points:

(1) even though the land was not being used by the Indians themselves and, in fact, had been surrendered, this did not have the effect of removing the lands in question from under the phrase "lands reserved for Indians",

(2) the Health Act was a law which, in relation to Indian reserves sought to control the use of such land and, therefore, was inapplicable to Indian reserves.

It should be noted that in this case the Court did not consider whether Section 88 operated to make the Health Act applicable to the reserve. Conceivably, such an argument could have been used.

(d) Trespass

The Indian Act states:

> Section 30 "A person who trespasses on a reserve is guilty of an offence and is liable on summary conviction to a fine not exceeding fifty dollars or to imprisonment for a term not exceeding one month or to both."

The Hawthorn Report (1966) Volume 1 at page 277-278, states:

> "The segregating effects of the trespassing provisions of the Indian Act and some of the confusion and uncertainty with which they are surrounded, can be illustrated in a variety of ways:
> (2) Some Indians have recently reported to feel strongly that provincial officials visiting an Indian reserve in discharge of their duties are trespassing. This Indian interpretation is wrong. The enforcement of a law which properly applies on an Indian reserve allows administrative personnel of the enforcing agency to go on a reserve without violating the trespass provisions of the Indian Act."

R vs Gingrich (1958) 29 WWR 471 states that "the wrong of trespass to land consists in the entering upon land in possession of the plaintiff without lawful justification". Assuming that the Wildlife Act applies on reserve lands, it would obviously appear from the above statements that a provincial Conservation Officer could legally enter reserve land to enforce the Wildlife Act.

The question then arises whether, if the reserve members enact game by-laws pursuant to Section 81 of the Indian Act thus excluding the Wildlife Act, these by-laws would have the effect of subjecting a provincial Conservation Officer to an action for trespass. The Court found in R vs Gringrich

that "Section 81 gives the council power to remove and punish persons found trespassing on the reserve - it does not give the power to council to decide what constitutes trespassing and council, by establishing a system of permits, cannot create the offence of trespass by those who enter the reserve without permit". But it follows that unless the Conservation Officer has "lawful justification" (i.e. a "permit"), he would have no authority to enter reserve lands. Band by-laws with respect to game management would appear to exclude the Wildlife Act and, consequently, would appear to destroy any lawful justification the Conservation Officer might have. Of course, as always, the legal status of this point would be subject to the terms of the by-law itself.

F. CONCLUSIONS

Three conclusions emerge with respect to the Wildlife Act as it is presently being applied:

(1) The Wildlife Act is being applied to natives in the Treaty No. 8 area. Based on the principle enunciated in R vs White and Bob, it would appear that the Treaty would represent a sound defence against a charge under the Wildlife Act. Note, however, that only those Indian groups actually party to the Treaty are affected. Non-Treaty natives and non-Indians would still be subject to the Act. The enforcement of Federal legislation, such as the Fisheries Act and the Migratory Birds Convention Act, is paramount to the Treaty in British Columbia: R vs George; R vs Sikyea.

(2) The Wildlife Act is not presently being enforced on reserves. Cases concerning Section 88 of the Indian Act suggest that Section 88 may extend provincial laws of general application to reserves. This would appear to be the stronger view. The Wildlife Act is a law of general application. To re-iterate, however, the status of this view will likely be subject to Supreme Court of Canada decisions to be handed down this fall concerning the cases of R vs Derriksan and R vs Kruger and Manuel. Federal legislation is enforceable on reserve lands.

(3) The Wildlife Act is presently not being enforced against certain Indian groups in the Nanaimo area because of the R vs White and Bob decision which confirmed that the Treaty in issue protected the Indians from provincial game laws. However, that Treaty restricted that right to "unoccupied Crown lands". Land privately owned is not "unoccupied" and is not "Crown land". A substantial portion of the land in back of the Nanaimo area is privately held by various logging companies. It therefore appears that native hunting in this area can be legally restricted. This is subject to the determination of the question whether the Treaty constitutes a "burden" on the land, however.

TABLE OF CASES

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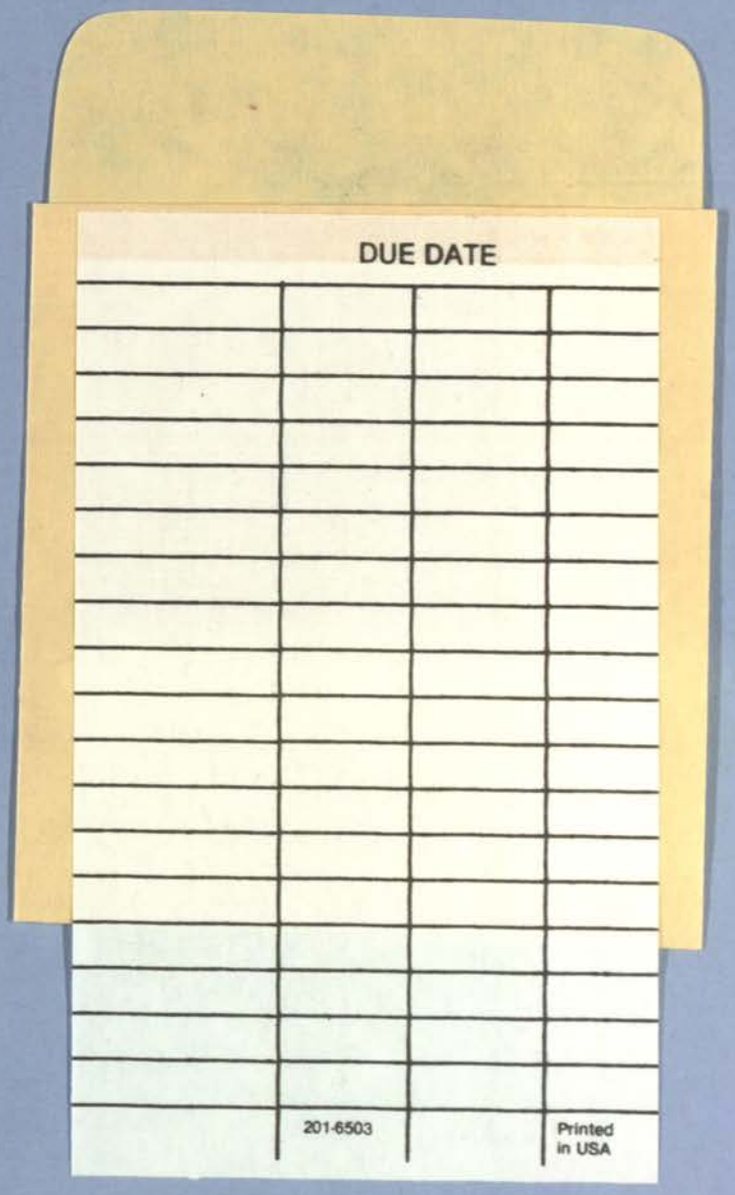
ABBREVIATIONS

WWR	-	Western Weekly Reports
DLR	-	Dominion Law Reports
CCC	-	Canadian Criminal Cases
SCR	-	Supreme Court Reports
BCR	-	British Columbia Reports
MR	-	Manitoba Reports
BCCA	-	British Columbia Court of Appeal
SCC	-	Supreme Court of Canada
NWTCA	-	Northwest Territories Court of Appeal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