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JURISDICTION FOR ABORIGINAL HEALTH IN CANADA

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EXECUTIVE SUMMARY

The purpose of this thesis is to determine which level of government has jurisdiction for Aboriginal[1] health in Canada - the federal or the provincial. Jurisdiction is an issue that is frequently raised by both levels of government and by Aboriginal organizations. At times, there appears to have been some confusion with respect to the use of the word "jurisdiction". It has often been used synonymously with responsibility. Having jurisdiction to legislate over a certain matter does not necessarily mean that Parliament has responsibility for that matter. It follows that a finding that the provinces have legislative jurisdiction for Aboriginal health does not necessarily mean that they have any greater responsibility for providing health services to Aboriginal people than to the rest of their residents. This thesis is concerned with legislative jurisdiction for Aboriginal health and leaves aside any consideration of responsibility.

As background to the consideration of jurisdiction for Aboriginal health in Canada, three things are examined: the existing legal and policy frameworks for Aboriginal health; the development of the delivery of health services to Aboriginal people; and the current health status of Aboriginal people in Canada.

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[1] In this thesis, the term "Aboriginal" is intended to have the same meaning it does in the Constitution Act, 1982, section 35. Section 35(2) states: "In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada." It is my submission that "Indian" as it is used in section 35 includes both status and non-status Indians.

The distribution of exclusive legislative powers between the federal and provincial legislatures contained in sections 91 and 92 of the Constitution Act, 1987 is examined and the "peace, order and good government" power of the federal Parliament is considered. Parliament has exclusive legislative jurisdiction over "Indians, and Lands reserved for the Indians" under subsection 91(24) of the Act, while the provinces have jurisdiction for health through various provisions of section 92. The law respecting judicial review of legislation to determine its constitutional validity is summarized, including consideration of the double aspect doctrine, the ancillary power, paramountcy, and singling out.

Legislative jurisdiction over health is considered. From the case law, it is clear that the provinces have jurisdiction over hospitals, that they have jurisdiction over public health and that they can regulate health professionals. It is also clear that health is an "amorphous topic" with both a federal and provincial aspect.[2] The federal aspect appears to be ancillary to its jurisdiction over other matters and may be limited to public health.

The extent of the federal power over "Indians, and Lands reserved for the Indians" as a result of subsection 91(24) of the Constitution Act, 1867 is explored. As a preliminary matter, what is meant by the terms "Indian" and "Lands reserved for the Indians" is examined. In answer to the question, "Who is an Indian?", the conclusion is that all Aboriginal people in Canada

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[2] Schneider v. The Queen, [1982] 2 S.C.R. 112.

are included in the definition. The response to "What are lands reserved for the Indians?" reveals that the following are included in the definition: reserve land; all of the land covered by the Royal Proclamation of 1763 that has not been formally surrendered by treaty or land claim settlement; and any land granted to Aboriginal people for use and occupancy in land claim settlements, even if the land is granted in fee simple if it can only be alienated to the Crown. The application of provincial laws to "Indians, and Lands reserved for the Indians" is also considered, including discussion of section 88 of the Indian Act. Provincial laws of general application apply to Indians of their own force and effect if they do not impair "Indianness", and by virtue of section 88 of the Indian Act if they do.[3] Section 35 of the Constitution Act, 1982 in which aboriginal and treaty rights are "recognized and affirmed" is addressed. From the case law, it is clear that federal legislative powers continue with respect to aboriginal rights and treaty rights, but the justification standard set out in Sparrow[4] must be met.

Due to the paucity of case law with respect to the subsection 91(24) powers and health, and because there are many similarities between labour relations and health jurisdictional issues, parallels are drawn between the two in an attempt to determine where legislative jurisdiction for Aboriginal health rests.

The possibility that jurisdiction for Aboriginal health may

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[3] R. v. Dick, 23 D.L.R. (4th) 33 (S.C.C.).

[4] Sparrow v. The Queen, [1990] 1 S.C.R. 1015.

flow from something other than the division of powers in the Constitution is considered. Therefore, the spending power of Parliament, the Crown-Indian treaty process and the nature of Indian treaties, and the fiduciary relationship between First Nations and the federal and provincial governments is examined.

It becomes clear during the course of the discussion of the federal spending power that it does not augment Parliament's legislative jurisdiction. The same is true of the treaties. With respect to the fiduciary duty, the conclusion reached is that there is a possibility that the existence of a fiduciary duty, if one exists for health, would be a factor weighing in favour of federal jurisdiction for Aboriginal health.

The final conclusion is that Aboriginal health is a duouble aspect matter, to which valid legislation of both levels of government can apply. Although there are spheres of exclusive provincial jurisdiction, e.g. regulation of health practitioners and hospitals, there is no exclusive federal sphere. However, the federal government does have concurrent jurisdiction with the provinces over the public health of Aboriginal people. The doctrine of paramountcy applies to give valid federal legislation pre-eminence over inconsistent provincial legislation.

In this thesis, jurisdiction for Aboriginal health is considered only as between the federal and provincial governments and leaves aside any consideration of health jurisdiction as an aspect of the inherent sovereignty that First Nations believe they have.

CHAPTER 1

INTRODUCTION

1. Purpose

The purpose of this thesis is to determine which level of government has jurisdiction for Aboriginal[1] health in Canada - the federal or the provincial. Jurisdiction is an issue that is frequently raised by both levels of government and by Aboriginal organizations.

At times, there appears to have been some confusion with respect to the use of the word "jurisdiction". It has often been

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[1] In this thesis, the term "Aboriginal" is intended to have the same meaning it does in the Constitution Act, 1982, section 35. Section 35(2) states: "In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada." It is my submission that "Indian" as it is used in section 35 includes both status and non-status Indians. Indians registered under the Indian Act, R.S.C. 1985, c. I-5, are said to have status, and are, therefore, referred to as status Indians. "Non-status Indians" refers to Aboriginal people of the same racial group and cultural affiliation as status Indians, but who, for one reason or another, are not registered under the terms of the Indian Act. The Inuit are persons descended from the indigenous people who inhabited the northernmost portions of the Northwest Territories, Quebec, and Labrador. The Métis are persons of mixed Indian and European ancestry who distinguish themselves from Indians and Inuit. The two broad definitions of Métis that are most frequently referred to by governments and Métis organizations are: persons who are descendants of the Métis community that developed on the Prairies in the 1800s, and of individuals who received land grants and/or scrip under the Manitoba Act, 1870, 33 Vic., Cap. 3 or the Dominion Lands Act, 1879, S.C. 42 Vic., Cap. 31 (this definition is prominent in Western Canada); and any person of mixed Indian/non-Indian descent who identifies himself or herself as Métis and/or who has been accepted as Métis by the Métis community. Use of the latter definition means that there are Métis all across Canada.

used synonymously with "responsibility".[2] Jurisdiction means: "The legal power or authority to act in a particular way (for example, the sense of courts, tribunals or statutory officers) or to legislate."[3] Webster's Ninth New Collegiate Dictionary defines "responsibility" as: "1: the quality or state of being responsible: as a: moral, legal or mental accountability b: reliability, trustworthiness 2: something for which one is responsible: burden."

Jurisdiction, then, is the legal **power** to act or to legislate, while responsibility is the legal or moral **obligation** to act. Having jurisdiction to legislate over a certain matter does not necessarily mean that Parliament has responsibility for that matter. It follows that a finding that the provinces have

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[2] For example, Robert Reiter, An Examination of the Evolving Concept of Band Councils, Their Authorities and Responsibilities and Their Statutory Instruments of Power, 1990, at 2.5, states, when speaking of band council powers under ss. 81 and 83 of the Indian Act:

> It should be emphasized that these powers are ancillary to the administration of reserves and have their constitutional existence based in s. 91(24) (the federal government's **responsibility** with respect to Indians and lands reserved for Indians). (Emphasis added.)

Under the heading "Responsibility for Indian Health", R.T. McKall, "Constitutional Jurisdiction Over Public Health" (1975) 6 Man. L.J. 317, at 325, states:

> The Parliament of Canada was conferred exclusive jurisdiction under section 91(24), "Indians, and Lands reserved for Indians". Included therein, it was assumed, was the responsibility for the provision of health care.

[3] Bradford Morse, "Government Obligations, Aboriginal Peoples and Section 91(24) of the Constitution Act, 1867", in David C. Hawkes, ed., Aboriginal Peoples and Government Responsibility, 1989, at 61.

jurisdiction for Aboriginal health does not necessarily mean that they have responsibility for providing health services.

Native organizations frequently argue that the federal government has **jurisdiction** for the health of all Aboriginal people when what they want is the federal government to take **responsibility** for their health care by providing them with the health services they require, or by providing funds so they can do it themselves.

Usually, when the two levels of government talk about jurisdiction, they are concerned about legislative jurisdiction. But the concern does not necessarily stem from a desire by government officials to regulate Aboriginal health. Rather, they are cognizant of the fact that frequently jurisdiction carries with it financial responsibility.

This thesis is concerned with legislative jurisdiction for Aboriginal health and leaves aside any consideration of responsibility.

2. Thesis Content

As background to the consideration of jurisdiction for Aboriginal health in Canada, Chapter 2 covers three things: the existing legal and policy frameworks for Aboriginal health; the development of the delivery of health services to Aboriginal people; and the current health status of Aboriginal people in Canada.

Chapter 3 of this thesis deals with sections 91 and 92 of the Constitution Act, 1867. The distribution of exclusive legislative powers between the federal and provincial legislatures contained in those sections is examined and the "peace, order and good government" power of the federal Parliament is considered. Parliament has exclusive legislative jurisdiction over "Indians, and Lands reserved for the Indians" under subsection 91(24) of the Act, while the provinces have jurisdiction for health through various provisions of section 92. The chapter also contains a summary of the law respecting the judicial review of legislation to determine its constitutional validity, including consideration of the double aspect doctrine, the ancillary power, paramountcy, and singling out.

Chapter 4 is a consideration of the legislative jurisdiction over health. From the case law, it is clear that the provinces have jurisdiction over hospitals, that they have jurisdiction over public health and that they can regulate health professionals. It is also clear that health is an "amorphous topic" with both a federal and provincial aspect.[4] The federal aspect appears to be ancillary to its jurisdiction over other matters and may be limited to public health.

In Chapter 5, the extent of the federal power over "Indians, and Lands reserved for the Indians" as a result of subsection 91(24) of the Constitution Act, 1867 is explored. As a preliminary matter, what is meant by the terms "Indian" and "Lands reserved

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[4] Schneider v. The Queen, [1982] 2 S.C.R. 112.

for the Indians" is examined. In answer to the question, "Who is an Indian?", the conclusion is that all Aboriginal people in Canada are included in the definition. The response to "What are lands reserved for the Indians?" reveals that the following are included in the definition: reserve land; all of the land covered by the Royal Proclamation of 1763 that has not been formally surrendered by treaty or land claim settlement; and any land granted to Aboriginal people for use and occupancy in land claim settlements, even if the land is granted in fee simple if it can only be alienated to the Crown. The application of provincial laws to "Indians, and Lands reserved for the Indians" is also considered in this chapter, including discussion of section 88 of the Indian Act. Provincial laws of general application apply to Indians of their own force and effect if they do not impair "Indianness", and by virtue of section 88 of the Indian Act if they do.[5] Section 35 of the Constitution Act, 1982 in which aboriginal and treaty rights are "recognized and affirmed" is addressed. From the case law, it is clear that federal legislative powers continue with respect to aboriginal rights and treaty rights, but the justification standard set out in Sparrow[6] must be met.

Using all of the above information, and through comparison with labour relations, Chapter 6 contains speculation as to which level of government has jurisdiction for Aboriginal health without coming to any conclusions. Labour relations is used for comparison

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[5] R. v. Dick (1985), 23 D.L.R. (4th) 33 (S.C.C.).

[6] Sparrow v. The Queen, [1990] 1 S.C.R. 1015.

purposes because of the paucity of case law with respect to the subsection 91(24) powers and health, and because there are many similarities between labour relations and health jurisdictional issues. One major difference is the existence of a clearly defined sphere of exclusive federal labour relations jurisdiction with respect to federal undertakings, services and businesses.

Chapter 7 considers the possibility that jurisdiction for Aboriginal health may flow from something other than the division of powers in the Constitution. Therefore, the spending power of Parliament, the Crown-Indian treaty process and the nature of Indian treaties, and the fiduciary relationship between First Nations and the federal and provincial governments is examined.

Through the use of its spending power, the federal government exerts control over matters that fall within provincial jurisdiction. Medicare, the terms and conditions of which are set by the federal government through the Canada Health Act,[7] is an outstanding example. It becomes clear in the course of the discussion of the federal spending power that it does not augment Parliament's legislative jurisdiction.

Through the treaties between the Indians and the Crown, it is possible that the federal government gained a much broader scope of legislative power with regard to Aboriginal people than it has with respect to the general population. Whether this includes health or not would be another question for consideration, since only Treaty 6 contains the "medicine chest clause", and that has been given its

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[7] R.S.C. 1985, c. C-6.

literal meaning by the Saskatchewan Court of Appeal in Regina v. Johnston[8]. The conclusion reached is that the treaties do not give the federal government any greater legislative jurisdiction than it would otherwise have had.

It may also be possible that the federal or provincial fiduciary responsibility toward Indians gives rise to jurisdiction over Aboriginal health. Although the Guerin case,[9] which recognized that the federal government had a fiduciary obligation

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[8] (1966), 56 D.L.R. (2d) 749. Later cases suggest a different approach to the consideration of Indian treaties. In R. v. Taylor and Williams (1981), 34 O.R. (2d) 360 (C.A.), at 367, the Court canvassed the principles to be applied to the interpretation of Indian treaties:

> In approaching the terms of a treaty...the honour of the Crown is always involved and no appearance of "sharp dealing" should be sanctioned.... Further, if there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible....
>
> Finally, if there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms. As already stated, counsel for both parties to the appeal agreed that recourse could be had to the surrounding circumstances and judicial notice could be taken of the facts of history. In my opinion, that notice extends to how, historically, the parties acted under the treaty after its execution.

In Nowegijick v. The Queen (1983), 1 S.C.R. 29 at 36, the Court stated that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.

[9] Guerin v. R., [1984] 2 S.C.R. 335.

to Indians, dealt with land, the Sparrow case[10] stated the fiduciary relationship in far broader language. It is possible, then, that the fiduciary responsibility extends to health. Once this obligation exists, jurisdiction in that area may be ancillary. The source, character, standard of care, scope of the fiduciary duty, and to whom it is owed are considered, as is the provinces' fiduciary obligation. The conclusion is reached that there is a possibility that the existence of a fiduciary duty would be a factor weighing in favour of federal jurisdiction for Aboriginal health. This means that a fiduciary duty must be found to exist in the particular circumstances. It is unclear whether one exists for health.

Chapter 8 is the conclusion. In my judgment, Aboriginal health is a dual aspect matter, to which valid legislation of both levels of government can apply. Although there are spheres of exclusive provincial jurisdiction, e.g. regulation of health practitioners and hospitals, there is no exclusive federal sphere. However, the federal government does have concurrent jurisdiction with the provinces over the public health of Aboriginal people. The doctrine of paramountcy applies to give valid federal legislation pre-eminence over inconsistent provincial legislation.

In this thesis, jurisdiction for Aboriginal health is considered only as between the federal and provincial governments. Although it is beyond the scope of this thesis, it is important to bear in mind that jurisdiction for the health of Aboriginal people

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[10] Supra, note 6.

may rest with Aboriginal people themselves. Health jurisdiction may be an aboriginal right -- one of those things that flow from aboriginal title -- or an aspect of the inherent sovereignty that First Nations believe they have. If so, then it is protected by section 35 of the Constitution Act, 1982.

CHAPTER 2

BACKGROUND

As background to the consideration of jurisdiction for Aboriginal health in Canada, this chapter is concerned with three things: the existing legal and policy frameworks for Aboriginal health; the development of the delivery of health services to Aboriginal people; and the current health status of Aboriginal people in Canada.

1. Existing Legal and Policy Frameworks For Aboriginal Health

The existing legal framework for Aboriginal health is comprised of the Constitution Act, 1867, which gives the federal government legislative competence for "Indians, and Lands reserved for the Indians",[1] the Constitution Act, 1982, which recognizes and affirms existing aboriginal and treaty rights without defining them,[2] the Indian Act,[3] the Canada Health Act,[4] provincial and territorial health insurance plans, and provincial and territorial health legislation. The latter is of importance because, although health is not explicitly mentioned, section 92 of the Constitution Act, 1867 is considered to give the provinces legislative

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1 Subsection 91(24).

2 Section 35.

3 R.S.C. 1985, c. I-5, as amended.

4 R.S.C. 1985, c. C-6.

competence in that area,[5] and because the case law indicates that provincial legislation of general application applies to Aboriginal people, including status Indians living on reserves, of its own force and effect, unless it impairs "Indianness". Even legislation that impairs "Indianness" applies to Indians by virtue of section 88 of the Indian Act, unless it is inconsistent with the Act, "or any order, rule, regulation or by-law made thereunder", "subject to the terms of any treaty or any other Act of Parliament", and "except to the extent that such laws make provision for any matter for which provision is made by or under the Act".[6]

Until January 23, 1992, the Indian Health Regulations[7], passed under the Indian Act, formed part of the existing legal framework for Aboriginal health. Since it considered some of provisions of the regulations to be unconstitutional, and the Department of Indian Affairs and Northern Development (DIAND) failed to amend them in a timely fashion, the Standing Joint Committee For the Scrutiny of Regulations recommended to Parliament that the Minister of Indian Affairs be required to repeal the offending sections.

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[5] In Schneider v. The Queen, [1982] 2 S.C.R. 112, the Court emphasized that health is an "amorphous topic" over which both the federal and provincial governments are competent to legislate, depending on the purpose and effect of the particular health measure in issue (at 142 per Estey J.). Dickson J., writing for seven of the nine judges, based provincial authority over public health on s. 92(16) of the Constitution Act, 1867.

[6] R.S.C. 1985, c. I-5, s. 88. See, for example, R. v. Hill (1907), 15 O.L.R. 406 (Ont. C.A.); Four B Manufacturing v. United Garment Workers, [1980] 1 S.C.R. 1031; and R. v. Dick (1985), 23 D.L.R. (4th) 33 (S.C.R.).

[7] C.R.C. 1978, c. 955

The Minister's response was to repeal the regulations in their entirety.[8]

Section 4 of the Indian Health Regulations required that Indians living on a reserve or following "the Indian mode of life" comply with all laws and regulations in force within a province relating to health or sanitation, except such laws or regulations as were inconsistent with Part I of the Regulations. It did not mention Band by-laws, as does section 88 of the Indian Act, which gives them paramountcy to provincial legislation of general application. This limited the legislative power of Bands since any by-laws they passed could not require Band members to do anything that was inconsistent with provincial legislation. The practical effect of this was that the DIAND routinely disallowed Band health by-laws.

Through sections 81, 83 and 85.1 of the Indian Act, the federal government has given Band councils the right to pass by-laws in several areas, including health:

> 81. (1) 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:
>
> > (a) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;

However, as indicated above, health is generally considered to be within the legislative competence of the provincial government

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[8] SOR-92-77. Although the Assembly of First Nations was informed in advance of this action being taken, it was done without consultation. There has been little response from First Nations.

rather than the federal government.

Although the matter appears never to have been the subject of a court challenge, it is not clear that the federal government has the power to allow Indians to legislate through Band by-laws in the area of health, or any other area that would ordinarily come within provincial jurisdiction. Before the federal government is competent to legislate in an area normally within the purview of the provinces, the "pith and substance" of the law must fall under one of Parliament's constitutional heads of power.[9] The relevant provisions of the Indian Act could be challenged on the basis that they are more in relation to health than to Indians or land reserved for Indians. If a challenge was successful, and health legislation in regard to Indians was found to be ultra vires the federal government, then Parliament could not presume to give Band Councils the power to make by-laws in the area of health since Parliament itself could not exercise jurisdiction.

It should be noted in passing that the provinces have rarely explicitly asserted jurisdiction in relation to Aboriginal people and health. In fact, many provinces take the position that jurisdiction for the health of status Indians rests solely with the federal government, especially for those Indians who reside on a reserve.[10] As stated earlier, since jurisdiction tends to carry

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[9] Peter Hogg, Constitutional Law in Canada, 2nd Edition, 1985, at 338.

[10] The Ontario and Quebec governments have taken the position that they have the jurisdiction, and the responsibility, to take a role in the provision of health services to all Aboriginal people in the province, regardless of where they reside.

with it financial responsibility, for the most part, the provinces have been content to let the federal government provide health care to status Indians on reserves.

It is argued by Aboriginal people that a special relationship exists between them and the federal Crown, "which gives rise to legal and political obligations of protection and trust".[11] The provinces also take this position, and it has found support in many judicial decisions.[12] Some provinces use this argument as a rationale for denying status Indians access to some provincial health programs, although they do not extend the argument to non-status Indians and the Métis.

All provinces provide benefits to their residents, through their provincial health insurance plans, that fall outside of the definition of "insured services" in the Canada Health Act[13] (CHA). These additional provincial benefits are not subject to the universality criterion of the CHA, so, in some cases, the provinces explicitly deny these benefits to status Indians. For example, Saskatchewan reimburses its residents for a large portion of the cost of prescription drug purchases, but will not do so for status Indians, arguing that they are a federal responsibility with access to the non-insured health benefits program, which covers prescrip-

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[11] Alan Pratt, "Federalism in the Era of Aboriginal Self-Government" in David Hawkes, ed. Aboriginal Peoples and Government Responsibility, 1989, at 23.

[12] E.g. Guerin v. The Queen, [1984] 2 S.C.R. 355.

[13] R.S.C. 1985, c. C-6.

tion drugs, that is provided by Health and Welfare Canada.[14]

Treaty Indians, particularly adherents of the numbered treaties, argue that the federal government has a legal responsibility to provide health services that flows from treaty. They base their claim on the "medicine chest" clause that is contained in Treaty No. 6, one in a series of numbered treaties made after Confederation between the federal government and the Indian people of the northern and western part of Canada. Through the "medicine chest clause", Her Majesty agreed that "a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of such agent".[15]

Although only Treaty 6 contains a medicine chest clause in its written terms, government documents show that similar promises were made by the treaty commissioners during the negotiation of Treaties 7, 8, 10 and 11.[16] Even Indians that are not adherents of Treaties 6, 7, 8, 10 and 11 argue that they receive health services from the federal government as a treaty right. This may be based on the

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[14] It is possible that this practice is discriminatory, and therefore, Charter offending. The fact that Health and Welfare Canada has a program that provides prescription drugs to status Indians is, it is submitted, irrelevant.

[15] Norman Zlotkin, "Post-Confederation Treaties" in Bradford Morse, ed., Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada, revised 1st ed., at 400. In R. v. Johnston (1966), 56 D.L.R. (2d) 749 (Sask. C.A.) the Judge held that the clause should be given its literal meaning. The respondent's claim that it entitled him to all medical services, including hospital care, was rejected.

[16] "Report of the Commissioner for Treaty No. 8" in Canada, Sessional Paper. no. 14, 1900, xxxv; "Report of First Commissioner for Treaty No. 10" in Canada, Sessional Papers, no. 27, xlii; Canada, Treaty No. 11, 4.

statements made by Commissioners that all the treaties were to be the same.[17]

At the present time, it is the Medical Services Branch (MSB) of Health and Welfare Canada (HWC) that delivers health services to status Indians living on reserves. The government contends that it provides these health services on the bases of policy, custom and the special relationship that exists between the federal government and the Indian people, rather than as a result of some legal requirement.

The federal government's current Indian Health Policy was promulgated in 1979 (see Appendix I). It establishes, at a general level, present federal policy with regard to the provision and payment of health services to registered Indians and Inuit. The goal of the Indian Health Policy is "to achieve an increasing level of health in Indian communities, generated and maintained by the Indian communities themselves". This goal is supported by three "pillars":

1. the socioeconomic, cultural and spiritual development of Indian communities;
2. the traditional relationship of the Indian people to the federal government; and
3. the Canadian health system, where federal, provincial and local governments, and the Indian communities themselves, all

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[17] Lieutenant Governor Morris, in his opening address during Treaty No. 6 negotiations, told the Cree that their treaty should be the same as the previous treaties so that all were equal. Barkwell, Peter, "The Medicine Chest Clause in Treaty No. 6", [1981] 4 C.N.L.R. 1, at 6.

have a role to play.

It is the third pillar which supplies the key to the means for achieving the policy's goal: the full potential of the Canadian health system will be tapped, and at each level, the parties involved will play the role for which they have the mandate and are best equipped.

As a matter of policy, the federal government has singled out status Indians and the Inuit as beneficiaries of federally funded programs. Health services are no exception. However, it is the position of the Métis and non-status Indian organizations that they, too, should benefit from federally funded health services. The provinces, for the most part, support their position. As a result of a demonstration by the Native Council of Canada, and at the behest of the provinces, on September 17, 1991, the four national Native organizations - Assembly of First Nations (AFN), Inuit Tapirisat of Canada (ITC), Métis National Council (MNC), and Native Council of Canada (NCC) - made presentations to a meeting of the federal and provincial Ministers of Health in Winnipeg, Manitoba.

The main assertion made by NCC representatives was that both the federal and provincial governments are responsible for the health of Aboriginal people living off-reserve by virtue of sub-section 91(24) of the Constitution and the Canada Health Act. They also raised the point that little is known about the health status of Aboriginal people who live off-reserve. For the MNC, the main issue was the question of jurisdiction and which level of

government is responsible for the provision of health services to the Métis people. To the Inuit, poor health, which they related directly to poor economic and social conditions, was the main issue. The AFN identified additional programs that were necessary to improve the health of status Indians on-reserve. These include a mental health program and a community-based sexual abuse program. The varied focus of the groups reflects the reality of their differing relationships with the federal government.

2. Development of Aboriginal Health Services in Canada

When the first Europeans came to Canada, the Indians and Inuit were already here and in large numbers. This necessarily means that, up to that time, they were able to deal successfully with the health problems they experienced. Whether or not they experienced good health in pre-contact days is difficult to determine since there are no written accounts. However, during the fur trade era, reference to the health of the Indians began to appear in the journals of traders and explorers. In 1767, Andrew Graham, a trader for the Hudson's Bay Company wrote that:

> the Indians in general exceed the middling stature of Europeans; are straight and well made people, large boned, but not corpulent.... Their constitution is strong and healthy; their disorders few, the chief of which are the flux, consumption, and pain in the breast.... The venereal disease is also common among them...but the symptoms are much milder than in Europe.... They seldom live to a great age, but retain all their faculties to the last.[18]

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[18] Glyndwr Williams, ed., Andrew Graham's Observations on Hudson's Bay 1767-91, 1969, at p. 143.

Writing in the same time frame, explorer Alexander Henry described the Indians as being relatively "free from disorders". He noted that they did not suffer from gout or dropsy, and that "inflammations of the lungs are among their most ordinary complaints".[19]

Young notes that the observations of Henry and Williams are substantiated by other raconteurs of the time. He states:

> The near unanimity of opinion among these early Europeans is remarkable. There may have been an element of hyperbole in their observations about the idealized "noble savage". The good health of the natives was in contrast to that of the European traders of that age, who were hardly sturdy specimens of health themselves.[20]

From these accounts, it is apparent that, long after first contact between Indians and Europeans, the Indians were healthy, especially by comparison with the Europeans. However, the medical knowledge of the Aboriginal people was no match for the decimation they faced when they came into contact with the "white man's" diseases. Never having been exposed to these diseases, the Indians and Inuit had no natural immunity. Diseases like measles, that caused only minor discomfort to a European, were severe, even fatal, to an Indian. More virulent diseases, such as tuberculosis, which frequently caused death among the white population, spread

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[19] Alexander Henry, Travels and Adventures in Canada and the Indian Territories Between the Years 1760 and 1776. Toronto: George Morang, 1901, at 114, as quoted in Kue Young, "The Health of Indians in Northwestern Ontario: A Historical Perspective" in Cobourn et al, eds. Health and Canadian Society, 2nd ed., 1987, at 111.

[20] Ibid.

quickly, and ravaged the Indian and Inuit populations.[21] The socialistic and communal nature of Indian life and culture facilitated the rapid spread of the disease.

At the time of contact, and indeed for hundreds of years following, there was little scientific medical knowledge in existence anywhere. Heroic forms of medical intervention performed by physicians, such as bleeding and leaching, did little or no good in curing disease. In fact, it was frequently the cure rather than the disease that killed the patient. It was not until the second half of the Nineteenth Century that a body of scientific knowledge, including the germ theory of disease emerged, providing "a rational basis for disease prevention and therapy".[22] In the time before the development of the germ theory of disease, it was herbology, as practised by women in Europe and by shamans and medicine men in North America, that was most successful in producing cures.[23] Using traditional herbal combinations, sweat lodge treatments and spiritual ceremonies, Indian medicine men appear to continue to have success in treating diseases, even in cases where modern medicine fails.[24]

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[21] G. Graham-Cumming, "Health of the Original Canadians, 1867-1967", in Medical Services Journal (1967) XXIII, No. 2 115, at 118.

[22] Barbara Ehrenreich, and Deidre English, Witches, Midwives and Nurses: A History of Women Healers, 1973, at 30.

[23] Graham-Cumming, supra, note 21, at 116.

[24] David Young, et al, Cry of the Eagle: Encounters With a Cree Healer, 1989. Russell Willier, a Woods Cree medicine man, treated non-Native psoriasis patients, some of whom had been under the care of a physician for years with little or no relief from

It follows, then, that at the time that treaties were being made between the Indians and the white man, health and medical services were not of great concern. Graham-Cumming writes:

> The Indians, and indeed, the Eskimos had their own system of medicine which had hitherto served them reasonably well; nor must it be forgotten that the actual practice of medicine in the earlier half of the nineteenth century even in Europe had not really progressed so very far beyond a fairly elementary form of herbalism not entirely unmixed with superstitious ritual.... The methods of the average practitioner of medicine in those days were not so very likely to be obviously superior to those of the medicine man; indeed history and tradition record many instances when the Indian medicine man succeeded where the medical knowledge of the white man failed.[25]

It is no surprise that medical services were not considered when most of the treaties were being made between the Indians and the Crown. The major concern was land.

Over time, the health of the Aboriginal people deteriorated to the point where they posed a serious health threat to the rest of the population. As mentioned earlier, this was due in part to the introduction of new diseases by the Europeans for which the Indians had neither immunity nor treatment. Dietary changes and starvation also took their toll. Under pressure from fur traders to trap increasing numbers of small fur bearing animals, Indians were sometimes left with too little time to hunt for food. They were then forced to rely on the supplies available from the Hudson's Bay Company, which did not provide as well-balanced or protein-rich a

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their condition. Several of the patients significantly improved. He has also had success in treating diabetics and persons suffering from illnesses which doctors were unable to diagnose.

[25] Supra, note 21, at 120.

diet as the traditional foods which included moose, caribou, water fowl, rabbit, beaver, fish, wild berries, lichens, cattails and wild rice.[26]

Young writes:

> From the 1820s on, the fortunes of the Indians plummeted. Large game such as caribou and moose was becoming scarce, but the fur bearers were also greatly reduced. With declining harvests, many trading posts were abandoned. The double loss of large game for food and hides and trade goods from the white men was a severe blow to the Indians' livelihood. Cases of starvation were increasingly frequent, and incidents of cannibalism were occasionally reported.[27]

At the same time, the practice of traditional medicine by shamans and medicine men began to decline. Since traditional healing was integrally linked with spiritual beliefs and practices, indeed, with all aspects of life, as more and more Indians were converted to Christianity and cultures began to disintegrate under pressure from colonialism, the use of traditional healers decreased leaving First Nations at the mercy of the colonists.[28]

Once the need to assist the Indians became apparent, settlers, missionaries, the military and commercial entities such as the Hudson's Bay Company all gave assistance. Later, the federal government got involved.

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[26] Kue Young, Health Care and Cultural Change: The Indian Experience in the Central Arctic, 1988, at 110.

[27] Ibid., at 112.

[28] G. W. J. Fiddes, "He Took Down His Shingle", (1965) 56 Canad. J. Public Health 400, as quoted in Graham-Cumming, ibid., at 121.

Graham-Cumming suggests that the evolution of the administration of services for Indians by the Canadian Government can be traced to the creation by the Imperial British Government of an office to administer Indian affairs under Sir William Johnson of the Mohawk Valley, New York in 1755.[29] Johnson and the Indians of the Six Nations later emigrated to Canada.[30]

On July 1, 1860, the responsibility for Indian affairs was officially transferred by the Imperial Government to the Crown Lands Department of the Government of what was then the Province of Canada. Graham-Cumming writes: "The selection of the Crown Lands Department is indicative of what was then considered the prime concern of the government in relation to Indians and the provision of health services decidedly was not contemplated."[31]

When the Dominion of Canada came into being, the Office of the Secretary of State, headed by Sir John A. McDonald, was given responsibility for administering Indian affairs.[32] In 1873, a new Department of the Interior was created, and the Minister of the

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[29] Ibid., at 121-122.

[30] The Mohawks argue that they were already in Ontario and Quebec.

[31] Ibid.

[32] An Act providing for the organisation of the Department of the Secretary of State of Canada and for the management of Indian and Ordnance Lands, S.C. 31st Vict., c.42, s. 5. In addition to making the Secretary of State the Superintendent General of Indian Affairs, with control and management of Indian lands and property, the Act, among other things, contained provisions relating to the surrender of Indian lands, creating an offence for selling or giving liquor to Indians, defining which persons would be deemed Indians, and who could live on Indian lands.

Interior became the Superintendent General of Indian Affairs, with responsibility for the control and management of Indian lands and property.[33] In 1880, the Department of Indian Affairs was created and continued until December 1, 1936.[34]

Since it was not originally concerned with Indian health problems, Indian Affairs did not initially employ medical personnel. Later, doctors were employed on larger reserves, and were paid on a "fee for service" basis on smaller ones. Hospitals were built where and when they were needed. Bands were given an inadequate annual grant to pay for these services. Some Bands supplemented this with money from their trust funds.[35] In some cases, Indian leaders accepted the responsibility for developing health facilities for their people. This trend was particularly evident among the Indians of the Six Nations in Southern Ontario

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[33] An Act to provide for the establishment of The Department of the Interior, S.C. 36th Vict., c. 4, s.3.

[34] The Indian Act, 1880, S.C. 43rd Vict., c. 28. In addition to creating the Department of Indian Affairs (s.4), and continuing the Minister of the Interior as the Superintendent General of Indian Affairs, the Act amended and consolidated the laws respecting Indians.

[35] Graham-Cummings, supra, note 21, at 123-124. Graham-Cumming finds this fact significant. He writes:

> One feature worth noting is that a number of Indian bands from the very beginning, voluntarily paid for the medical services given. These Indians never considered that they were entitled to free medical services nor do they today. Of recent years the annual voting of communal funds towards defraying the expense of medical services has increasingly taken the form of purchasing insurance coverage for medical care from recognized insurance agencies having nothing to do with the central government and arranged entirely by themselves.

and Quebec, and in Southern Alberta. On Kahnawake, a Mohawk reserve near Montreal, virtually all health services, including the Kateri Memorial Hospital, are run by the Band to the present day.

In 1905, the Department of Indian Affairs appointed a General Medical Superintendent, Dr. Peter H. Bryce, an indication of the growing awareness that something had to be done about the extremely high morbidity and mortality rate of Aboriginal people in Canada, mainly due to tuberculosis. Dr. Bryce was the first to collect data systematically on the health status of Indian people. He toured residential schools where tuberculosis was epidemic. He examined the reasons underlying the prevalence of disease among Indians. Apparently he did his job too well, thus proving an embarrassment to the government. Although ostensibly he remained the chief medical officer until his retirement in 1921, Bryce was effectively dismissed in 1913 since his advice and direction were no longer sought. It was not until 1927, 14 years after his services ceased to be utilized, that he was replaced.[36]

Until 1922, most of the health services in the field were provided by physicians. At that time, nurses began visiting reserves and residential schools to provide public health services and education. This idea was conceived by Dr. Bryce but was not implemented until after his retirement. However, the service was very disorganized and the Indian people were apparently receiving little benefit:

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[36] Ibid., at 124.

> A study of the reports and correspondence impresses one with the disorganization of the services. The natives received medical treatment but there was little effort to overcome the worst epidemics. The appointment of a Medical Superintendent might have been postponed indefinitely but for the increasing friction between field doctors and the departmental accountant who taxed their fees.[37]

In 1927, with the appointment of Colonel E. L. Stone as Medical Superintendent, organized health services for Indians and Inuit came into effect. He drew up public health regulations[38] "defining the responsibility and powers of Indian Agents and departmental physicians in handling communicable disease, vigorously attacked the tuberculosis problem, and greatly expanded both personnel and facilities and set in action numerous surveys and special studies".[39] The first stationary nursing service was established in 1930, in Manitoba.[40]

In 1931-32, over $1,000,000 was spent on Indian health programs. In 1933-34, that amount was reduced to $793,000, or $7.20 per capita as compared with the $30 per capita that was spent on the residents of Ontario during the same period.

On December 1, 1936, the Department of Mines and Resources assumed responsibility for Indian Affairs, including health

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[37] C.R. Maundrell, quoted in Graham-Cummings, ibid., at 125.

[38] These regulations appear never to have been enacted. The Indian Health Regulations, supra, note 7, were made in 1953.

[39] Graham-Cummings, supra, note 21, at 126.

[40] Young, supra, note 26, at 86-88.

services.[41] Following this change, health services for the Inuit received more attention. The Northwest Territories Branch of the Department of Mines and Resources began to provide medical services to the Inuit. This responsibility soon merged with the Indian Health Services Division.

The Department of National Health and Welfare was constituted in 1944.[42] By Order in Council, P.C. 6495, the Indian Health Services Division (including the Inuit) was transferred to that Department effective November 1, 1945. It is there, in the Medical Services Branch, that the responsibility for registered Indian and Inuit health services still rests.

At its inception, most of the resources of the Indian Health Service were used for the treatment of tuberculosis and other communicable diseases. By 1943, there were 14 Indian hospitals, and half of the total bed capacity was used for tuberculosis patients.

By 1960, over $23 million per annum was being spent to provide health services to registered Indians and Inuit. There were 22 Indian hospitals, 37 nursing stations and 83 health centres.[43]

At the present time, the range of health services provided by MSB on-reserve, and the type of facility from which they are provided, depends upon the location and population of the

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[41] The Department of Mines and Resources Act, S.C. 1 Ed. VIII, c. 33.

[42] Department of Health and Welfare Act, S.C. 8 Geo. VI. c. 22.

[43] Young, supra, note 26, at 88.

community. There are 122 health centres staffed by fulltime nursing and auxiliary staff providing public health and preventative medicine programs in larger communities. They are usually affiliated with a hospital or clinic where physician services are available.

Nursing stations, staffed by one or more nurses and support staff, provide the same services as health centres but are also equipped to provide emergency out-patient services and short-term in-patient care. They are usually located in isolated communities of three hundred or more persons where no other medical facilities are available. At present, there are 67 nursing stations run by MSB. Treatment services are provided by nurses with special training, and by visiting physicians. There are 197 health stations, small field units located in isolated communities, that are normally staffed by Community Health Representatives - local people who are given training in community health, who are usually employed by the Band.

The Branch also runs six Indian hospitals - in Moose Factory, Ontario; in Sioux Lookout, Ontario; on the Blood Reserve, Alberta; in Fort Qu'Appelle, Saskatchewan; on the Peguis Reserve in Manitoba; and in Norway House, Manitoba. This number is much lower than in years past when the tuberculosis epidemic was at its worst and federal sanatoria were needed to treat Indians and Inuit suffering from the disease.

Non-insured health benefits (those things that are not covered by provincial and territorial health insurance plans), including

prescription drugs, eye glasses, medical transportation, dental care, and much more,[44] are provided to all registered Indians and Inuit without a means test, regardless of their place of residence.

It is the federal government's position that it is only responsible for the delivery of health services to status Indians living on reserves, and the Inuit, so they are the target groups for most of the government's Aboriginal health programs.[45] An exception is the National Native Drug and Alcohol Abuse Program (NNADAP). Because of the high incidence of alcoholism among Aboriginal people, and the failure of mainstream alcohol abuse programs to meet that need, NNADAP is open to all Aboriginal people through community-based programs. NNADAP funds culturally relevant treatment centres, prevention services, education, and research. Projects are funded both on and off-reserve.

In 1991-92, almost $700 million dollars was appropriated by Parliament for health services for status Indians and Inuit in Canada. MSB allocates about 1,500 person-years to provide health services and to administer the program.[46]

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[44] See Appendix II for a complete list of the benefits that are provided under this program.

[45] This is consistent with most other federal government programs for Aboriginal people, for example, the post-secondary education program that is run by Indian Affairs Canada. However, in practice, anyone seeking emergency medical treatment at a Medical Services Branch health facility will receive it.

[46] Part III 1992-93 Estimates of the Government of Canada, Health and Welfare Canada.

3. Health Status of Aboriginal People In Canada

Despite the massive expenditure of dollars and person-years, the health status of Canada's original inhabitants is still far below that enjoyed by other residents. Although there have been considerable gains in recent years, the life expectancy of status Indian men, in 1985, was only 65 years as compared with 72 for the non-Indian population, while it was 74 years for status Indian women compared to 81 for non-Indians.[47]

In most respects, health status as measured by mortality rates, has improved substantially over the past ten years. Despite the improvements, Indian health remains noticeably worse than that of the Canadian population as a whole. The disparities are particularly marked among infants and preschool children and young adults 20-35 years. The infant mortality rate (birth to one month) for registered Indians is almost twice the national average (19 per thousand live births for Indians as opposed to 10 per thousand for the Canadian population). The disparity in post-neonatal rates (from one month after birth to the end of the first year) is even greater (8.5 to 3 per 1000 live births).

The five leading causes of death in the registered Indian population by rank are: diseases of the circulatory system (heart attack, strokes); injuries, poisoning and violence, which includes

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[47] The data on the health of status Indians is taken from records maintained by Health and Welfare Canada and are provided with the caveat that not all status Indian people are included in the data, and that coverage varies somewhat from province to province.

suicides; cancers; diseases of the respiratory system (pneumonia, bronchitis); and diseases of the digestive system. In the period from 1982 to 1987, the registered Indian mortality rate from diseases of the digestive system was 105 percent of the Canadian rate while for injuries and poisonings, it was 397 percent.

Indian rates of death from accidents and violence are far higher than the national average, even allowing for the fact that the Indian population is younger overall. Similarly, at equivalent ages, Indians are more likely than the general population to die from diseases of the respiratory and digestive systems. They are, however, slightly less likely to die of cancer.[48]

Information on morbidity is much less precise. There are, however, unusually high rates of diabetes, tuberculosis and infectious diseases in the Indian population. This may be related to lifestyle and to poor environmental conditions. It also seems that respiratory complaints, ear or throat infections, and skin problems are more prevalent in the Indian population. For example, in eight Quebec communities in late 1988, the main reasons for seeking health care were respiratory complaints such as colds and bronchitis; ear, nose and throat problems such as otitis media and tonsillitis; and dermatological conditions such as scabies or dermatitis.[49]

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[48] Health and Welfare Canada, Health Indicators Derived From Vital Statistics for Status Indian and Canadian Populations 1978-1986, September, 1988.

[49] Ibid.

Although the health of Indian people has improved considerably over the years that Health and Welfare Canada has provided Indian health services, the health status of Indian people remains unacceptably poor when compared with other Canadians. Because the major health problems experienced by Indians are related to social, economic and environmental conditions, improvement in health status cannot be achieved by medical technology alone.

As indicated earlier, the provinces have generally accepted responsibility for the delivery of health services to the Metis and non-status Indians and separate records are not kept for them. Indeed, some provincial officials believe that it would be a violation of their human rights if patients were asked to report their racial origins. As a result, there is very little reliable data available on the health status of these groups of Aboriginal people. However, the information that is available indicates that the health status of the Métis and non-status Indians is the same, or worse, than that of the registered Indian population. The same appears to be true of the health status of the Inuit.

It has long been believed, both by the federal government and by the Native people, that giving Aboriginal people control over the planning and delivery of relevant health programs would assist greatly in improving their health. Indian people have also been advocating greater control over health services as part of their wish for more autonomy in all areas. These events have given impetus to the current transfer initiative which is well under way in the Medical Services Branch.

The transfer of health services to the control of Indian communities is centred on the concept of self-determination in health, and has been developed to respond to the individual circumstances of each community. The decision to enter into transfer discussion is optional and rests with each community.

If Aboriginal people are to be autonomous and self-governing, and to control their own health services and manage them effectively, it will be necessary for them to have enforceable jurisdiction in the area of health that allows them to legislate, either through Band by-laws under the Indian Act, or through subordinate legislation passed under delegations in self-government or land claims legislation. Anything less means that they do not have real control, but are only administering the delivery of health services for the federal government on the terms and conditions set by it. Aboriginal groups that, either now or in the future, have legislative power over health delegated to them by the federal government must be able to rely on the constitutionality of the delegations. Thus, determining where jurisdiction currently lies is more than an academic exercise.

CHAPTER 3

DISTRIBUTION OF LEGISLATIVE POWERS AND JUDICIAL REVIEW

1. Introduction

The purpose of this chapter is to examine the distribution of exclusive legislative powers between the federal Parliament and the provincial Legislatures that is contained in the Constitution of Canada,[1] and to summarize the law respecting the judicial review of legislation to determine its constitutional validity. The distribution of legislative powers contained in the Constitution was originally intended to be exclusive and exhaustive but time and technological advances have proven it to be neither. The courts have often been called upon to decide which level of government has jurisdiction over a contentious "matter".

There is uncertainty surrounding jurisdiction for Aboriginal health. It has never been the subject of a court decision. Because of this, the bases of judicial review, and the rules that have been developed by the courts to assist them in making determinations are summarized here. Later chapters will consider how these rules might be applied by a court to determine the question of legislative jurisdiction for Aboriginal health.

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[1] This term is defined in subsection 52(2) of the Constitution Act, 1982.

2. The Constitution of Canada

By its own terms, the Constitution of Canada is the supreme law of the land, and any law that is inconsistent with its provisions is of no force and effect.[2] The main purpose of the constitution, its "essence", is the distribution of legislative powers between the federal Parliament and the provincial Legislatures.[3] It is binding on the federal and provincial governments and can only be amended through the procedures contained within its terms. The powers of the two levels of government are contained in the Constitution Acts, 1867 to 1982. The important distribution of powers for the purposes of this thesis is contained in the Constitution Act, 1867[4].

3. The Constitution Act, 1867

The Constitution Act, 1867, formerly the British North America Act, 1867 (B.N.A. Act), purports to distribute exhaustively the exclusive authority to make laws over all "matters" between the federal Parliament and the provincial legislatures. Section 91 contains the federal powers and section 92, the provincial.[5]

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[2] Ibid., subsection 52(1).

[3] Peter Hogg, Constitutional Law of Canada, Second Edition, 1985, at 93.

[4] R.S.C. 1985, Appendix II, No. 5.

[5] Other sections of the Constitution Act, 1867 also assign legislative powers to one level of government or the other. For example, section 93 gives the provincial legislatures exclusive power to make laws in relation to education while section 94A

Section 91 reads, in part:

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,-
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> ...
>
> 24. Indians, and Lands reserved for the Indians.
>
> ...
>
> 29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislature of the Provinces.
>
> And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Section 92 states, in part:

> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,-
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> ...
>
> 7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
>
> ...
>
> 10. Local Works and Undertakings other than such as are of the following Classes:-
> (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the

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empowers the Parliament of Canada to make laws in relation to old age pensions and supplementary benefits. The full text of sections 91 and 92 can be found in Appendix III.

> Limits of the Province;
> (b) Lines of Steam Ships between the Province and any British or Foreign Country;
> (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
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> ...
>
> 16. Generally all Matters of a merely local or private Nature in the Province.

The framers of the Constitution Act 1867, intended to create a strong central government. Accordingly, they gave the residuary powers to the federal Parliament.[6] The provinces were also made subordinate to the central authority in some ways. For example, under section 90, the federal government was given the power to disallow provincial statutes and, by section 58, the power to appoint the Lieutenant Governor of each province.[7]

Some commentators[8] contend that the residuary power is the only one that the federal Parliament has under the Constitution. They argue that the "peace, order and good government" or "p.o.g.g." power of section 91, contains the entire federal legislative authority and, that the enumerated heads are merely illustrative of the kinds of things that are included therein.

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[6] This is the reverse of the constitution of the United States which gives the residual powers to the states.

[7] Hogg, supra, note 3, at 88, contends that the subsequent development of case law, convention and practice has virtually eliminated the elements of provincial subordination from the Constitution.

[8] E.g., Rene Richard, "Peace, Order and Good Government" (1940) 18 Can. Bar Rev. 243, and W.P.M. Kennedy, "The Interpretation of the British North America Act" (1943) 8 Camb. L.J. 146.

Thus, if a matter does not fall within the classes of subjects assigned exclusively to the provincial legislatures, then, through the residuary power, the federal Parliament has exclusive jurisdiction. Additionally, it is argued that the purpose of the enumerations of section 91 is to create classes of subjects that, "even in their local aspects" are deemed to be generally "laws for the peace, order and good government of Canada" and amenable to federal legislation.[9]

Hogg[10] disagrees. He argues that the theory that the p.o.g.g. power is the only federal legislative power "is not a particularly useful way of reading the Constitution Act, 1867". He writes:

> In the first place, despite the apparent import of the reference in s. 91 to "for greater certainty, etc.", it is reasonably clear that many of the enumerated heads of federal power are not merely examples of the opening words. Topics such as "trade and commerce" (s. 91(2)), "banking" (s. 91(15)), "bills of exchange and promissory notes" (s. 91(18)),...and "marriage and divorce" (s. 91(26)) would probably have been held to come within the provincial head of "property and civil rights in the province" (s.92(13)) if they had not been specifically enumerated in the federal list. If not specifically enumerated they would therefore have been excluded from the p.o.g.g. language, since it does not include provincial heads of power.[11]

Another reason that Hogg rejects what he describes as the "general" theory of the p.o.g.g. power is "that it does not accord with the practice of the courts in applying the power-distributing

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[9] Richard, ibid., at 250-251.

[10] Hogg, supra, note 3.

[11] Ibid., at 371.

provisions of the Constitution".[12] From a trilogy of Privy Council decisions,[13] it is clear that the Court's interpretation of the distribution of powers sections of the Constitution Act, 1867 is that the federal Parliament has exclusive legislative power over the enumerated classes of subjects in section 91, and the residuary power to legislate for the peace, order and good government of Canada. It is also clear, as Hogg states above, that the p.o.g.g. power is residuary in its relationship to the provincial heads of power in section 92. To the courts fell the role of determining the constitutional validity of legislation through judicial review.

4. Judicial Review

Over time, it became apparent that the classes of subjects in sections 91 and 92 are not as mutually exclusive as the framers of the Constitution intended. Also, since the provisions that distribute legislative powers to the two levels of government are necessarily stated in general terms, confusion as to their exact meaning resulted.

The concept of judicial review of legislation in Canada does not flow from the common law, but rather from Imperialism and Imperial statutes.[14] In England, Parliament reigned supreme, and

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[12] Ibid., at 372.

[13] Citizens Insurance Co. v. Parsons (1881), 7 A.C. 96; Tennant v. Union Bank, [1894] A.C. 31; and A.-G. Ontario v. A.-G. Canada, [1896] A.C. 348.

[14] B.L. Strayer, Judicial Review of Legislation in Canada, 1968, at 1-10.

despite occasional pronouncements to the contrary,[15] its enactments were not reviewable by the Courts. But English courts had no qualms about reviewing enactments of colonial legislative bodies. In Watson's case,[16] the Court of King's Bench heard a challenge to legislation of Upper Canada. Colonial courts, too, felt free to review Imperial statutes.[17]

Judicial review was sometimes necessary because the colonial legislatures were prohibited from enacting laws that conflicted with the laws of England, although the extent of the restriction was in doubt. Statutes containing such prohibitions were in force as early as 1696 when an Imperial statute entitled An act for preventing frauds, and regulating abuses in plantation trade[18] was passed. Later, the Colonial Laws Validity Act, 1865[19] was passed. This Act continued the restriction, but made it clear that colonial laws were void only for repugnancy to "any Act of Parliament extending to the Colony to which such law may relate, or...to any

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[15] See, for example, Dr. Bonham's case (1610) 77 E.R. 646, at 652 (K.B.). in which Lord Coke stated:

> And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void....

[16] (1839) 112 E.R. 1389 (K.B.).

[17] Strayer, ibid., note 14.

[18] 7 & 8 Will. III, c.22, s.9. See Appendix IV for the text of the Act.

[19] 28-29 Vict., c. 63.

Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force or Effect of such Act....[20]

Despite the practice of the courts, the Constitution Act, 1867 does not address the issue of judicial review. Strayer states:

> It is surprising that the question of judicial review and the position of the courts in relation to the new Parliament and legislatures of Canada was not given more express consideration at the time of Confederation. The records of the Quebec Conference of 1864 do not suggest that this matter was discussed directly.... In the Confederation Debates in the Parliament of the province of Canada in 1865 little mention is made of it and the comments which do appear are not very helpful.[21]

However, the lack of any specific power of review did not hinder the Canadian courts. In 1868, the Supreme Court of New Brunswick held a statute of that province to be invalid because it related to bankruptcy, a federal matter.[22] Other courts quickly followed suit.[23] In 1878, Severn v. the Queen[24] became the first reported decision in which the Supreme Court of Canada considered the constitutional validity of legislation, "without showing any hesitation about its right to do so".[25] Strayer writes:

> And so the Canadian courts were launched on a course from which they have never swerved. The ease with which they

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[20] Ibid., s.2.

[21] Ibid., at 15.

[22] The Queen v. Chandler (1868), 12 N.B.R. 556.

[23] L'Union St. Jacques de Montreal v. Belisle (1870), 15 L.C.J. 212 (Que. Circ. Ct.); Re Goodhue (1873), 19 Grant 366 (Ont. C.A.); Keefe v. McLennan (1876), 2 Russell & Chesley 5 (N.S. Sup. Ct.).

[24] (1878), 2 S.C.R. 70.

[25] Strayer, supra, note 14, at 20.

> could take up judicial review of legislation after Confederation must have been the result of the situation existing prior to 1867. There was a continuity of judicial practice because the Imperial structure had not changed basically. Colonial laws, and the Dominion of Canada was really only a colony, still were subject to overriding Imperial laws.... Colonial legislatures, whether Dominion or provincial, were limited legislatures and the courts could enforce the limitations.[26]

The Constitution Act, 1982 still does not expressly provide a dispute resolution mechanism within its terms. However, added to the other bases of juridical review is subsection 52(1) of the Constitution Act, 1982 which states: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

If a statute does not come within the constitutional jurisdiction of the enacting body, then it is ultra vires the legislature that enacted it, and therefore, invalid. Any delegation of legislative authority in the statute is also invalid. This is an important consideration for First Nations that want to control effectively their own health services and to use Band by-laws to assist them, or to enact laws under the terms of federal self-government or land claims legislation. If the federal Parliament does not have jurisdiction to legislate for Indian health, then the Indian Act delegation to Indian Bands of the power to make health by-laws is invalid, thus placing Band councils in an untenable position.

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[26] Ibid., at 21.

The issue of constitutionality, whether on the basis of the distribution of powers, or some other ground,[27] can be raised during the course of any action before a decision-making body. When this occurs, the tribunal has the ability, and indeed, the responsibility, to address the issue during its deliberations.[28]

Sections 91 and 92 of the Constitution Act, 1867 grant exclusive legislative jurisdiction over "Matters coming within the Classes of Subjects" listed therein. Therefore, in determining whether a statute is valid, it is necessary for the court to identify the "matter", or "pith and substance", of the law in question, and then to allocate it to one of the classes of subjects in sections 91 and 92.[29]

Identifying the "matter" of a statute is not always easy. Hogg writes:

> The difficulty in identifying the "matter" of a statute is that many statutes have one feature (or aspect) which comes within a provincial head of power and another which comes within a federal head of power. Clearly, the selection of one or the other feature as the "matter" of the statute will dispose of the case; equally clearly, the court in making its selection will be conscious of the ultimate result which is thereby dictated.... What the courts do in cases of this kind is to make a judgment as to which is the most important feature of the law and to characterize the law by that feature: that dominant

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[27] For example, it may be alleged that a particular law abrogates rights guaranteed by the Charter of Rights and Freedoms.

[28] Hogg, supra, note 3 at 310.

[29] Hogg, supra, note 3, at 311, sees this as a two-step process. For Albert Able, "The Neglected Logic of 91 and 92" (1969) U. Tor. L.J. 487, it is a three-step process involving identification of the "matter" of the statute, definition of the scope of each relevant "class of subjects", and assignment of the matter to the most appropriate "class of subjects".

> feature is the "pith and substance" or "matter" of the law; the other feature is merely incidental, irrelevant for constitutional purposes.[30]

To assist them in dealing with situations where the "matter" does not fall neatly into either federal jurisdiction or provincial jurisdiction, the courts have developed several rules. Of importance in the current context are the "double aspect" doctrine, the ancillary power, paramountcy, and "singling out". Each of these doctrines has been used by the courts in judicial review of legislation in the context of Indians and lands reserved for them.

4.1 Double Aspect Doctrine

In Hodge v. The Queen[31], Lord Fitzgerald said: "subjects which in one aspect and for one purpose fall within section 92, may in another aspect and for another purpose fall within section 91."[32] If one aspect is more important than the other, then the issue can be resolved by assigning the matter to that class of subjects thereby giving one level of government exclusive legislative jurisdiction.[33] The double aspect doctrine applies to

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30 Hogg, supra, note 3, at 314.

31 (1883) 9 A.C. 117.

32 Ibid., at 130.

33 W.R. Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963) 9 McGill L.J. 185, at 188.

situations where it is not possible to priorize them because "the relative importance of the two features is not so sharp".[34]

The courts have given little guidance as to when it is appropriate to apply the double aspect doctrine, and when one aspect is to be preferred over another. Hogg concludes: "When the court finds that the federal and provincial characteristics of a law are roughly equal in importance, then the conclusion is that laws of that kind may be enacted by either the Parliament or the Legislature."[35] The Supreme Court of Canada has found this equality of importance in relation to highway traffic laws, upholding provincial highway offences while at the same time upholding similar federal offences contained in the Criminal Code.[36]

In Multiple Access v. McCutcheon[37], at issue were the provisions of federal and provincial statutes, both of which created a civil remedy for insider trading, and their applicability to a federally-incorporated company. The Court held that both statutes were intra vires, and that the doctrine of paramountcy did not apply since the two statutes were not inconsistent, but were rather duplicates.

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[34] W. R. Lederman, "Classification of Laws and the British North America Act" in W.R. Lederman, ed., The Courts and the Canadian Constitution, 1964, at 193.

[35] Hogg, supra, note 3, at 317.

[36] O'Grady v. Sparling, [1960] S.C.R. 804; Stephens v. The Queen, [1960] S.C.R. 823; and Mann v. The Queen, [1966] S.C.R. 238.

[37] [1982] 2 S.C.R. 161.

In addition to highways and securities regulation, Hogg identifies insolvency, temperance, interest rates, the maintenance of spouses and children, and custody of children as double aspect fields of law.[38]

4.2 Ancillary Power

The Constitution of Canada, unlike those of the United States and Australia, does not include an ancillary power. MacDonald describes this doctrine as follows:

> Provisions of a Dominion Statute which directly intrude upon provincial classes of jurisdiction and which, standing alone, would be incompetent to the Dominion, may nevertheless be valid as being necessarily incidental to full-rounded legislation upon a Dominion subject-matter or to the effective exercise of an enumerated Dominion power, or to prevent the scheme of an otherwise valid Act from being defeated.[39]

In other words, in certain circumstances, Parliament can "trench upon" provincial jurisdiction.[40]

In Hogg's opinion, there is no theoretical need to find an ancillary power where one does not exist. He writes:

> There have been suggestions from time to time that an ancillary power should be implied. The better view, however, is that no such power is needed. The pith and substance doctrine enables a law that is classified as "in relation to" a matter within the competence of the enacting body to have incidental or ancillary effects on matters outside the competence of the enacting body. With respect to those incidental or ancillary effects, legislative power is, of course, concurrent rather than

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[38] Hogg, supra, note 3, at 318.

[39] Vincent MacDonald, "Judicial Interpretation of the Canadian Constitution" (1935) 1 Uni. Tor. L.J. 260, at 273-274.

[40] Lederman, supra, note 34.

> exclusive, but it does not seem to be necessary or helpful to introduce the concept of an ancillary power to explain results that can just as easily be regarded as flowing from well-established rules of classification.[41]

Lederman agrees, dismissing the ancillary power as "just another way of describing a dual-aspect situation", rather than giving it the status of a separate interpretive approach.[42]

The ancillary power has a checkered history in the courts.[43] In 1962, the Supreme Court of Canada rejected the existence of an ancillary power as redundant. In A.-G. Can. v. Nykorak,[44] that Court upheld legislation that came "squarely under head 7 of s.91" despite the fact that it incidentally affected property and civil rights within the province, adding that it was "meaningless" to rely on a "necessarily incidental (or ancillary) doctrine to support the effect on property and civil rights".[45]

In the 1970 case, Papp v. Papp,[46] Laskin J. said the same thing, preferring instead a "rational, functional connection" between what is admittedly within legislative competency and what is challenged. Hogg calls this the "rational connection test. He argues that this test:

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[41] Supra, note 3, at 334.

[42] Lederman, supra, note 27.

[43] The following analysis of the case law, and the conclusions regarding it, is taken from Hogg, supra, note 3, at 334-337.

[44] [1962] S.C.R. 331.

[45] Ibid., at 335.

[46] [1970] 1 O.R. 331 (Ont. C.A.)

> allows each enumerated head of power to embrace laws that have some impact on matters entrusted to the other level of government, and it provides a flexible standard which gives the enacting body considerable leeway to choose the legislative techniques it deems appropriate, while providing a judicial check on an unjustified usurpation of powers.[47]

The rational connection test was applied by the Supreme Court of Canada in R. v. Zelensky[48] in 1978, and in Multiple Access v. McCutcheon[49] in 1982. However, in 1979, in R. v. Thomas Fuller Construction[50], the majority referred to "the ancillary power doctrine" and said that it was "limited to what is truly necessary for the effective exercise of Parliament's legislative authority".[51] This dictum was cited with approval in the 1982 Regional Municipality of Peel v. MacKenzie[52] case.

With respect to these cases, Hogg states:

> These two parallel lines of authority, one consisting of Papp v. Papp, Zelensky and Multiple Access, and the other consisting of Fuller Construction and Peel, do not seem to be explained by unresolved differences of opinion between judges on the Court. When the voting patterns are examined, it emerges that most of the judges have espoused both inconsistent approaches. Nor do the different approaches represent a general shift of opinion of a particular time: the inconsistent opinions in Multiple Access and Peel were both rendered in 1982 within three weeks of each other. For some reason, the

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47 Hogg, supra, note 3, at 335.

48 [1978] 2 S.C.R. 940.

49 [1982] 2 S.C.R. 161.

50 [1980] 1 S.C.R. 695.

51 Ibid., at 18.

52 [1982] 2 S.C.R. 9.

> Court has been unable to be consistent on this fundamental point of doctrine.[53]

Hogg prefers the rational connection test, arguing that it is more liberal, allowing greater legislative leeway, and is the course of judicial restraint.

4.3 Paramountcy

The paramountcy doctrine was developed to address situations where the court had applied the double aspect doctrine so that both the federal and provincial laws are valid, and yet they are inconsistent. Both statutes cannot be allowed to stand if they require the same group of people to do things in inconsistent ways. Thus, in situations where a federal statute and a provincial statute are both validly enacted and yet they are inconsistent, the doctrine of paramountcy applies, and the federal statute prevails.[54]

The question of what constitutes inconsistency then arises. Hogg identifies three kinds of potential inconsistency:

1. express contradiction - one law expressly contradicts the other so that it is impossible for a person to obey both laws;
2. negative implication ("covering the field") - the federal law covers the field, giving the negative implication that there should be no provincial law on the same subject;[55] and

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[53] Hogg, supra, note 3, at 337.

[54] Lederman, ibid., note 32.

[55] This test is employed by the courts of the United States and Australia. See Hogg, supra, note 3, at 359.

3. overlap and duplication - the federal and provincial laws are the same in some or in all respects.

The negative implication test found support from the Privy Council in the Local Prohibition[56] in 1896. Despite this fact, it never found favour with Canadian courts.[57] With respect to inconsistency due to overlap and duplication, duplicate legislation was held to be inconsistent in two Supreme Court of Canada decisions.[58]

Since the 1982 decision of the Supreme Court of Canada in Multiple Access v. McCutcheon[59], the only type of inconsistency that triggers the application of the paramountcy doctrine is "express contradiction".[60] In that case, Dickson J. stated:

> I would say that duplication is,...'the ultimate in harmony'. The resulting 'untidiness' or duplication is the price we pay for a federal system in which economy 'often has to be subordinated to[...]provincial autonomy'. Mere duplication without actual conflict or contradiction is not sufficient to invoke the doctrine of paramountcy and render otherwise valid provincial legislation inoperative.[61]

Hogg argues that this case "is a considered and unequivocal ruling

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[56] A.-G. Ont. v. A.-G. Can., [1896] A.C. 348.

[57] It can be found in the dissenting opinion of Cartwright J. in O'Grady v. Sparling, [1960] S.C.R. 804. A thorough canvass of the issue can be found in Hogg, supra, note 3, at 558-563.

[58] Home Insurance Co. v. Lindal and Beattie, [1934] S.C.R. 33 and N.S. Bd. of Censors v. McNeil, [1978] 2 S.C.R. 662. Hogg, supra, footnote 3, at 354 suggests that these two cases should be treated as overruled by Multiple Access.

[59] [1982] 2 S.C.R. 161.

[60] Hogg, supra, note 3, at 358.

[61] Supra, note 25, at 190, citations omitted.

that duplication is not a test of paramountcy". He asserts that by defining inconsistency so narrowly, "Canadian courts have followed the course of restraint".[62]

4.4 Singling Out

This doctrine allows provincial laws of general application to apply to federal heads of power, but prohibits provincial statutes from "singling out" federal "matters". Thus, provincial laws of general application can apply to Indians and lands reserved for Indians, but they are not valid if they attempt to single them out for special treatment.

There are several cases, however, in which provincial laws were held to apply within federal jurisdiction although they were not laws of general application.[63] For example, in Bank of Toronto

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[62] Hogg, supra, note 3, at 355. This is consistent with Hogg's theory of the proper limits of judicial review. He states, at 99:

> There can be no doubt that judicial review permits, indeed requires, non-elected judges to make decisions of great political significance.... It seems to me that...the lack of democratic accountability, coupled with the limitations inherent in the adversarial judicial process, dictates that the appropriate posture for the courts in constitutional cases is one of restraint: the legislative decision should always receive the benefit of a reasonable doubt, and should be overridden only where its invalidity is clear. There should be, in other words, a presumption of constitutionality. In this way, proper respect is paid to the legislators, and the danger of covert (albeit unconscious) imposition of judicial policy preferences is minimized.

[63] See Hogg, supra, note 3, at 315-316.

v. Lambe,[64] the Privy Council upheld a statute that taxed corporations, including banks, and imposed a different rate of taxation on the latter. The Court characterized the pith and substance of the statute as being in relation to taxation rather than banking, and therefore, the statute was intra vires the provincial Legislature.

There have also been cases where a provincial law of general application has been invalid with respect to an undertaking within federal jurisdiction because it impaired the status of the federal undertaking. Hogg writes:

> Normally,...a provincial law of general application which is in relation to a provincial matter may validly affect federal matters as well. But the courts have carved out an important exception to this general rule. If the effect of the provincial law would be to impair the status or essential powers of a federally-incorporated company, or to "sterilize" a federally-regulated enterprise, then the provincial law, although valid in the generality of its applications, will not apply to the federally-incorporated company or federally-regulated enterprise.[65]

5. Conclusion

It is clear from the above summary that the framers of the Constitution Act, 1867 failed in their attempt to provide the federal Parliament and the provincial legislatures with mutually exclusive spheres of legislative jurisdiction. Complicated rules exist to assist the courts in determining whether a particular statute is intra vires the legislative body that enacted it. It is

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[64] (1887) 12 App.Cas. 575.

[65] Hogg, supra, note 3, at 316.

also evident that both levels of government can have concurrent jurisdiction over a "matter". As will be seen in later chapters of this thesis, these rules have been applied to the matters of health and "Indians, and Lands reserved for the Indians" in ways that have resulted in confusion, thus making it extremely difficult to determine with any accuracy where jurisdiction of Aboriginal health lies.

CHAPTER 4

LEGISLATIVE JURISDICTION OVER HEALTH

1. Introduction

Health has many aspects, including hospital services; physicians services; treatment services; public health; regulation of health practitioners; and health insurance. Health is not specifically mentioned in the Constitution Act, 1867. However, there appears to be no doubt that hospitals, regulation of the medical professions, and health insurance come exclusively within the legislative competence of the provinces.[1] The jurisdiction over hospitals is derived from subsection 92(7) of the Constitution Act, 1867, which explicitly gives the provinces authority over "the establishment, maintenance, and management of hospitals". Provincial authority over the medical profession is derived from jurisdiction over "property and civil rights in the province" in subsection 92(13).[2] The provincial authority over all local and private matters in the province (subsection 92(16)) is probably another source of jurisdiction over health. Provincial authority over a contributory insurance scheme, such as the medicare plans that exist in all of the provinces and the territories, was affirmed by the Court in Attorney General of Canada v. Attorney

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[1] Peter Hogg, Constitutional Law of Canada, 2nd edition, 1985, at 124.

[2] Ibid.

General of Ontario,[3] also known as the Unemployment Insurance case.[4]

Where there is some doubt is with respect to jurisdiction for public health. In 1938, the Royal Commission on Dominion - Provincial Relations (the Rowell-Sirois Commission) commented on public health:

> In 1867 the administration of public health was still in a very primitive stage, the assumption being that health was a private matter and state assistance to protect or improve the health of the citizen was highly exceptional and tolerable only in emergencies such as epidemics, or for purposes of ensuring elementary sanitation in urban communities. Such public health activities as the state did undertake were almost wholly a function of local and municipal governments. It is not strange, therefore, that the British North America Act does not expressly allocate jurisdiction in public health, except that marine hospitals and quarantine (presumably ship quarantine) were assigned to the dominion, while the province was given jurisdiction over "generally all matters of a merely local or private nature in the Province", and it is probable that this power was deemed to cover health matters, while the power over "municipal institutions" provided a convenient means of dealing with such matters.[5]

The Commission recommended that:

> provincial responsibilities in health matters should be considered basic and residual. Dominion activities on the other hand, should be considered exceptions to the general rule of provincial responsibility, and should be justified in each case on the merit of their performance by the Dominion rather than by the Province.... Dominion

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[3] [1937] A.C. 355.

[4] Despite provincial authority in this area, it was the federal government that created the medicare scheme, that partially funds it through cash and tax points grants, and that set the criteria for payment of grants using the Canada Health Act, R.S.C. 1985, c. C-6.

[5] Report of the Royal Commission on Dominion-Provincial Relations, Book 11, at 32-33.

> jurisdiction over health matters is largely, if not wholly, ancillary to express jurisdiction over other subjects....[6]

From the case law, it is evident that the courts have divided the authority over public health between Parliament and the provincial Legislatures, thereby creating what one commentator calls a "non-system".[7]

2. Provincial Jurisdiction

The lack of an express reference to health in the Constitution Act, 1867 did not prove a serious obstacle to the Quebec Court of Appeal in Rinfret v. Pope.[8] In that case, at issue was chapter 38 of the Consolidated Statues of Canada, an act respecting the preservation of public health, and the provision of a federal statute[9] that allegedly repealed chapter 38. The Court held that all matters concerning public health, with the exception of quarantine stations and marine hospitals, were within the exclusive purview of provincial legislation and that the federal statute was ultra vires the Dominion Parliament, in so far as it purported to repeal chapter 38 of the Consolidated Statutes of Canada, thereby affecting public health. Of this decision, McKall writes: "The

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[6] Ibid., at 34.

[7] R. T. McKall, "Constitutional Jurisdiction over Public Health" (1975) 6 Man. L.J. 317.

[8] (1886) 12 Q.L.R. 303 (C.A.).

[9] An Act relating to Quarantine and Public Health, S.C. 31 Vict., ch. 63, section 15 (1868).

public health power which resided in the province of Canada before Confederation is deemed by the court to reside in separate provinces after confederation."[10]

In Re Bowack,[11] at issue was a Vancouver by-law that provided for the confinement of persons who had been exposed to smallpox. George Bowack was detained under the by-law, and challenged its constitutional validity. The Court held that the by-law, and the provincial statute that authorized it, were constitutional, "as the subject of public health falls within the class of subject of legislative matters assigned to the Province by section 92 of the British North America Act.[12]

In a more recent case, Fawcett v. A.G. Canada,[13] the authority of the province to detain persons in mental institutions was upheld by the Supreme Court of Canada. Fawcett, as an accused person, was remanded by a magistrate to a mental hospital for examination pursuant to subsection 524(1a) of the Criminal Code. Following the examination, he was confined continuously as a certificated patient pursuant to The Mental Hospitals Act.[14] The appellant argued that the provisions of the Act were ultra vires the Legislature of the province.

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[10] McKall, supra, note 7, at 321.

[11] (1892), 2 B.C.L.R. 216 (B.C.C.A.).

[12] Ibid., at 224.

[13] [1964] S.C.R. 625.

[14] R.S.O. 1960, c. 236.

In rendering the judgment of the court, Mr. Justice Cartwright stated:

> On the constitutional question also I am in agreement with the view of Schroeder J.A. that the Act is legislation in relation to the subject-matter described in head 7 of s.92 of the British North America Act and not in relation to criminal procedure, that the relevant provisions of the Criminal Code and those of the Act are complementary to, and not in conflict with, each other. It follows that the sections of the Act impugned by the appellant are intra vires of the Legislature.[15]

In Re Levkoe and the Queen,[16] sections of the Ontario Health Disciplines Act[17] were impugned. It was argued that they were inoperative as conflicting with the federal Food and Drugs Act.[18] Levkoe was accused of operating a pharmacy without a certificate of accreditation as required by the Health Disciplines Act. He applied for judicial review on the above grounds. The court held that the purpose of the Act was to regulate the practice of pharmacy, something that is within provincial competence under section 92 of the Constitution Act, 1867, and that it did not purport to be legislation in relation to the criminal law.

In Schneider v. The Queen,[19] the appellant challenged the constitutional validity of the British Columbia Heroin Treatment Act,[20] and sought a declaration that it was ultra vires the

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15 Supra, note 13, at 630.

16 (1977), 18 O.R. (2d) 265 (Div. Ct.).

17 S.O. 1974, c. 47.

18 R.S.C. 1970, c. F-27.

19 [1982] 2 S.C.R. 112.

20 S.B.C. 1978, c. 24.

provincial Legislature, especially the compulsory treatment and detention aspects. Justice Dickson, on behalf of the majority, held that the Heroin Treatment Act was, in pith and substance, in relation to the medical treatment of heroin addicts and was within the general provincial competence over health matters under subsection 92(16) of the Constitution Act, 1867. The compulsory aspects were incidental to the effectiveness of the treatment and were not intended to be punitive.

It is clear then, that the provinces have jurisdiction over hospitals; that they have jurisdiction over public health; that they can detain people in mental institutions; that they can regulate health professionals; and that they can detain people and forcibly treat them for drug addiction. It is also evident from the decisions in Fawcett and Re Levkoe that there is room for provincial health legislation to co-exist with compatible federal legislation.[21]

3. Federal Jurisdiction[22]

The enumerated heads of federal power contain only one express reference to a health matter; that is subsection 91(11) "Quarantine and the Establishment and Maintenance of Marine Hospitals". This has not, however, limited the federal government's activities in the health area. McKall writes:

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[21] See Schneider v. The Queen, supra, note 19, at 134.

[22] This section draws heavily on McKall, supra, note 7.

> Many other activities, directly and indirectly related to public health have been carried on unchallenged by the federal government with jurisdiction being implied from several of the enumerated heads of s.91. Subsection 91(6), "The Census and Statistics", one assumes, provides support for the federal government's undertaking of the Canadian Sickness Survey and the recently completed Nutrition Canada Survey. Five other enumerated heads give Parliament exclusive jurisdiction over classes of persons[23] including therewith the responsibility for their health care.[24]

In Rex v. Ferries,[25] the defendant was charged with selling medicine without being registered under the Saskatchewan Medical Professions Act.[26] The defendant successfully argued that the federal licence he possessed, issued under the Dominion Proprietary and Patent Medicine Act,[27] protected him from prosecution because the federal jurisdiction in matters of trade and commerce took precedence over the province's exercise of its civil rights power.

In Re Shelly,[28] the argument that a city by-law requiring merchants to wrap their bread was in relation to trade and commerce

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[23] Ss. 91(7) "Militia, Military and Naval Service, and Defence"; 91(10) "Navigation and Shipping"; 91(24) "Indians, and Lands reserved for the Indians"; 91(25) "Naturalization and Aliens"; and 91(28) "The Establishment, Maintenance and Management of Penitentiaries.

[24] McKall, supra, note 7, at 318. Unfortunately, McKall appears to confuse jurisdiction with responsibility. However, to one degree or another, the federal government has assumed responsibility for all of the groups of people mentioned.

[25] (1910), 15 W.L.R. 331 (Sask. Dist. Ct.).

[26] S.Sask., 1906, ch. 28.

[27] 7 & 8 Edw. VII, ch. 56.

[28] (1913), 4 W.W.R. 741 (Alta. S.C.).

was rejected by the Court in favour of its characterization as a health by-law.

In Standard Sausage Co. Ltd. v. Lee,[29] at issue was the validity of the federal Food and Drug Act.[30] The Court took the view that food adulteration is a criminal matter and upheld the legislation based on the federal Parliament's criminal law jurisdiction taking precedence over property and civil rights jurisdiction.

It appears that the power of the federal government to regulate trade and commerce (subs. 91(2)) may carry with it a right to legislate over health matters.[31] More certain is that Parliament's criminal law jurisdiction under subsection 91(27) gives rise to a federal power to punish conduct that is dangerous to health. Hogg suggests that the peace, order and good government power "probably also authorizes legislation regarding health, where a problem has attained a national dimension, or where an emergency exists".[32] In Schneider, Mr. Justice Estey noted that jurisdiction over health concerns may also be raised by subsection 91(7) "Militia, Military and Naval Service and Defence".

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[29] [1934] 1 W.W.R. 81 (B.C.C.A.).

[30] R.S.C. 1927, c. 76.

[31] Some caution is necessary here because this conclusion is based on only two early 20th Century lower court decisions.

[32] Hogg, supra, note 2, at 405.

4. Conclusion

From this discussion, it is clear that there is both federal and provincial jurisdiction for health, but the scope of the federal power is uncertain. In Schneider, all three judges emphasized this concurrent jurisdiction. Laskin J. said that his conclusion that the Heroin Treatment Act was intra vires the provincial Legislature "must not be taken as excluding the Parliament of Canada from legislating in relation to public health, viewed as directed to protection of the national welfare".[33]

Estey J. described health as "an amorphous topic which can be addressed by valid federal or provincial legislation, depending upon the circumstances of each case on the nature or scope of the health problem in question".[34]

Writing for the majority, Mr. Justice Dickson said:

> This view that the general jurisdiction over health matters is provincial (allowing for a limited federal jurisdiction either ancillary to the express heads of power in s. 91 or the emergency power under peace, order and good government) has prevailed and is now not seriously questioned.[35]

There remains, however, a question as to whether the federal government has, as McKall contends, an ancillary power over health for all of the classes of persons over which it has exclusive jurisdiction under section 91, including Indians, and if it does, whether or not it is confined to public health.

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[33] Ibid., at 114.

[34] Ibid., at 142.

[35] Ibid., at 137.

CHAPTER 5

LEGISLATIVE JURISDICTION OVER INDIANS AND LANDS RESERVED FOR THE INDIANS

1. Introduction

Subsection 91(24) of the Constitution Act, 1867 gives to Parliament the exclusive power to legislate for "Indians" and for "Lands reserved for the Indians". Hogg argues that the first power allows Parliament to legislate for Indians wherever they reside, and the second can be exercised in respect of both Indians and non-Indians as long as the law is connected to land reserved for Indians.[1]

As Hogg correctly points out, the power of Parliament to legislate for Indians raises two questions, both of which are especially relevant in the context of this thesis. The first is: "Who is an Indian?" and the second is: "What kinds of laws may be made in relation to Indians?".[2]

In determining which level of government has jurisdiction for Aboriginal health, it is necessary to determine who is an Indian under subsection 91(24) of the Constitution Act, 1867. Therefore, this chapter begins by attempting to answer Hogg's first question. It then moves on to consider the question "What are 'Lands reserved for the Indians'?". Next there is an examination of the kinds of

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[1] Peter Hogg, Constitutional Law in Canada, 2nd Edition, 1985, at 551.

[2] Ibid., at 552.

laws the federal Parliament may make in relation to Indians and lands reserved for Indians. The chapter concludes with a consideration of which provincial laws apply to Indians and reserved lands.

1.1 Who is an Indian?

Before attempting to answer this question, it is necessary to consider the alternative methods of constitutional interpretation. Should the question be answered using an 1867 definition or today's understanding?

The Constitution has been characterized as "a living tree"; that is, as a thing that grows and changes as it adapts to an evolving Canadian society. This is known as the doctrine of progressive interpretation. Hogg writes:

> What this doctrine stipulates is that the general language used to describe the classes of subjects (or heads of power) is not to be frozen in the sense in which it would have been understood in 1867. For example, the phrase "undertakings connecting the provinces with any other or others of the provinces" (s.92(10)(a)) includes an interprovincial telephone system, although the telephone was unknown in 1867;[3] the phrase "criminal law" (s.91(27)) "is not confined to what was criminal by the law of England or of any province in 1867";[4] the phrase "banking" (s.91(25)) is not confined to "the extent and kind of business actually carried on by banksin Canada in 1867".[5] On the contrary, the words of the Act are to be given a progressive interpretation, so

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[3] Toronto v. Bell Telephone Co., [1905] A.C. 52.

[4] P.A.T.A. v. A.-G. Can., [1931] A.C. 310, at 324.

[5] A.-G. Alta v. A.-G. Can. (Alberta Bill of Rights) [1947] A.C. 503, at 553.

> that they are continuously adapted to new conditions and ideas.[6]

Underlying this doctrine are some practical considerations. One is the fact that the Constitution "is a 'constituent' or 'organic' statute which has to provide the basis for the entire government of a nation over a long period of time".[7] It must be flexible so that either Parliament or the Legislatures have the power to pass laws over all "matters" as society and technology advance. Another consideration is that amending the Constitution is a long and arduous process that makes it difficult to react quickly to change.

In the alternative, it is possible to argue that the best approach to interpreting some of the provisions of the Constitution, including subsection 91(24), is to determine what the terms meant in 1867.[8] Subsection 91(24) is sui generis among the heads of power enumerated in section 91. It pertains to people and land, not bodies of law like subsection 91(27), or new inventions as in Toronto v. Bell Telephone Co..[9] Lending weight to this argument is the fact that, if there has been a change in the meaning of "Indian" over time, it has come as a result of unilateral action on the part of the federal government, mainly

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[6] Hogg, supra, note 1, at 340-341.

[7] Ibid., at 341.

[8] This was the approach that was taken by the Supreme Court of Canada in Re Eskimo, [1939] S.C.R. 104.

[9] Supra, note 3.

through Indian legislation, and not as a result of a shift in the thinking of society as a whole.[10]

Aboriginal groups have long argued that the Indian Act definition and the subsection 91(24) meaning are not congruent and, that the latter is much broader and encompasses all Aboriginal people, including the Métis and non-status Indians. It seems to me, then, that the meaning ascribed to the term should be the one that was in use and generally accepted in 1867. A logical place to start looking for evidence of this meaning is in the legislation that was in existence in the Province of Canada[11] at the time of Confederation. The first important piece of legislation passed by the Assembly of Canada was An Act for the better protection of the Lands and Property of the Indians in Lower Canada.[12] It defined "Indian" as:

> Firstly - All persons of Indian blood, reputed to belong to the particular Body or Tribe of Indians interested in such lands and their descendants.
>
> Secondly - All persons intermarried with any such Indians and residing amongst them, and the descendants of all such persons.
>
> Thirdly - All persons residing among such Indians, whose parents on either side were or are Indians of such Body or Tribe or entitled to be considered as such. And

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[10] The Indian Act, R.S.C. 1985, c. I-5, defines "Indian" for the purposes of that Act and creates a sub-group known as status or registered Indians. The Act expressly excludes the Inuit from its operation.

[11] The Province of Canada, an amalgamation of Upper and Lower Canada, was created by An Act to Re-Unite the Provinces of Upper and Lower Canada and for the Government of Canada, (1840) 3 & 4 Vic., cap. 35.

[12] C.P., Statutes of Canada, (1850) 13 and 14 Vic., cap. 42.

> Fourthly - All persons adopted in infancy by any such Indians, and residing in the village or upon the lands of such Tribe or Body of Indians or their descendants.

It would appear, then, that at this point in time, the accepted definition of "Indian" included anyone of Indian ancestry; anyone married to an Indian; their offspring; and even European children adopted into First Nations.

In the same year, An Act for the better protection of Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury[13] was passed by the Province of Canada. The Act does not define the term "Indian", but contains provisions protecting "Indians and persons intermarried with Indians".[14]

The definition of "Indian" was contracted somewhat by legislation enacted in 1851. In A Bill to amend Indian Lands Protection Act of Lower Canada: An Act to repeal in part and amend an Act entitled An Act for the better protection of the Lands and property of the Indians in Lower Canada,[15] an Indian was:

> Firstly. All persons of Indian blood, reputed to belong to the particular Tribe or Body of Indians interested in such land or immovable property, and their descendants:
>
> Secondly. All persons residing among such Indians whose parents were or are, or either of them was or is, descended on either side from Indians, or an Indian reputed to belong to the particular Tribe or Body of Indians interested in such lands or immovable property, and the descendants of all such persons: And

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[13] C.P., Statutes of Canada, (1850) 13 and 14 Vic., cap. 74.

[14] Ibid., s. 1.

[15] C.P., J.C.A.C., (1851) 15 Vic., cap. 30.

> Thirdly. All women, now or hereafter lawfully married to any of the persons included in the several classes hereinbefore designated, the children issued of such marriage, and their descendants.

It appears then, that the result of this amendment was to exclude non-Indian males married to Indian women from the definition of "Indian".[16]

In 1857, the Province of Canada passed An Act to Encourage the Gradual Civilization of the Indian Tribes in this Province, and to Amend the Laws respecting Indians.[17] Section 1 of the Act limited its application to

> ...Indians or persons of Indian blood or intermarried with Indians, who shall be acknowledged as members of Indian Tribes or Bands...; and such persons and such persons only shall be deemed Indians within the meaning of any provisions of the said Act or of any other Act or Law in force in any part of this Province by which any legal distinction is made between the rights and liabilities of Indians and those of Her Majesty's other Canadian subjects.

This application does not exclude non-Indian men married to Indian women as did the definition in the 1851 Act.[18] It is probable, then, that the framers of the Constitution Act, 1867 intended the term "Indian" in subsection 91(24) to apply to all Aboriginal people, persons to whom they were married, and their off-spring.

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[16] R. Moore, The Historical Development of the Indian Act, (1978), at 26.

[17] C.P., Statutes of Canada, (1857) 20 Vic., cap. 26.

[18] A Bill to amend Indian Lands Protection Act of Lower Canada: An Act to repeal in part and amend an Act entitled An Act for the better protection of the Lands and property of the Indians in Lower Canada, C.P., J.C.A.C., (1851) 15 Vic., cap. 30.

In 1939, the Supreme Court of Canada in Reference as to whether "Indian" in section 91(24) of the BNA Act, 1867 includes Eskimo Inhabitants of Quebec (Re Eskimo),[19] established that the Inuit are included in the term "Indian" as it is used in subsection 91(24). In coming to that conclusion, the Court relied, in part, on the Report of the Select committee on the Hudson's Bay Company, reports from officials in Canada to the Imperial Parliament on their dealings with the Indians, and on Imperial Parliamentary debates.[20]

Chartier, in his analysis of the term "Indian" as it is used in subsection 91(24),[21] adopts the procedure used by the Court in that case. He suggests that it is important to set the Hudson's Bay Company Report in the context of the prevailing attitude of England and Canada to the Indian population. As I have shown, the prevailing attitude was very inclusive, and covered all Indian people, people with Indian blood, and persons married to Indians, if they were acknowledged members of Indian Tribes and Bands. After citing several passages from the Select Committee Report, Chartier states:

> In view of the oral testimony contained in the Report, the writer suggests that the weight of the evidence would

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[19] Supra, note 8.

[20] Ordered by the House of Commons to be printed 31 July and 11 August, 1857.

[21] Clem Chartier, "'Indian': An Analysis of the Term as Used In Section 91(24) of the British North America Act, 1867" (1978) 43 Sask. L.R. 37. In his article, Chartier is concerned with whether or not half-breeds (Métis) were included in the term "Indians" as it is used in the Constitution Act, 1867.

> favour the conclusion that, according to the Hudson's Bay company officials, half-breeds were Indians under the generic term "Indian"....[22]

After an exhaustive application of the Supreme Court's process in Re Eskimo to half-breeds, Chartier concludes:

> The precedent set by the Supreme Court of Canada in **Re Eskimos** has provided a well-structured process which may be utilized to determine whether or not half-breeds are included under the generic meaning of the word "Indian". It does not however determine which source of information should be given most weight in arriving at the answer to the issue. The writer would suggest the information found in the Select Committee Reports and in Imperial Parliament debates should be given the greatest emphasis. Next in priority should be the sources of information dealing with the provincial and Colonial governments and their dealings with the Indians and the Imperial Parliament. The Hudson's Bay Company and their administrative dealings with the Indians should then be considered.
>
> The writer further suggests that the sources of information from the three above-named entities would favour an interpretation that the half-breeds [Métis] were, in fact, considered to be "Indians" for the purposes of the British North America Act, 1987.[23]

I accept his conclusion.

It is apparent, then, that the term "Indian" in subsection 91(24) of the Constitution Act, 1867 includes the Inuit and the Métis. Through the Indian Act, the federal government has created two groups of Indians -- status and non-status.[24] Since this

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[22] Ibid., at 49.

[23] Ibid., footnote 21, at 68.

[24] It was not until the 1951 version of the Indian Act, S.C. 1951, c. 29, that the concept of registration, which created status and non-status Indians, was introduced. Band lists in existence in the Department of Indian Affairs on the 4th day of September, 1951 constituted the Indian Register. The Act also contained a provision stating who was not entitled to be an Indian under its terms. Persons who had received or had been allotted half-breed

occurred post-1867, and because it was done unilaterally by the federal government as it exercised its right not to legislate to the full extent of its jurisdiction, I would argue that both status and non-status Indians are included in the subsection 91(24).

All of this leads to the conclusion that the federal Parliament has the jurisdiction to legislate for all Aboriginal people -- status and non-status Indians, Métis, and Inuit. This is consistent with subsection 35(2) of the Constitution Act, 1982 which defines "aboriginal peoples of Canada" as including "the Indian, Inuit and Métis peoples of Canada".[25]

To date, the major means by which Parliament has exercised its legislative power over Indians and lands reserved for Indians is through the Indian Act.[26] The Act defines "Indian" as a person who

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lands or money scrip were excluded as were persons who had enfranchised. The concept of enfranchisement was introduced in An Act to Encourage the Gradual Civilization of the Indian Tribes in this Province, and to Amend the Laws respecting Indians (1867) 20 Vic., Cap. 26. and was intended to gradually remove all legal distinctions between Indians and other Canadians. Upon enfranchisement, a person ceased to be an Indian for all legal purposes. His name was removed from the Band membership list, and he was no longer subject to whatever restrictions faced Indians at the time, (i.e. no right to vote) but also lost the right to live on a reserve, and the benefit of any programs that the government provided to status Indians.

[25] In Re Eskimo, supra, note 8, at 118, Justice Cannon stated that the word Indians "included all the present and future aborigines native subjects of the proposed Confederation of British North America, which at the time, was intended to include Newfoundland".

[26] The Act was first passed in 1876, and was a compilation of existing legislation. It perpetuated the government policy that had been behind all of the legislation to that point in time - civilizing the Indian population and achieving assimilation and integration as soon as possible. It was not until the Indian Act was amended in 1985 that this changed significantly.

is registered as an Indian, or entitled to be registered, under the provisions of the Act, and expressly exempts the Inuit from its operation.[27] Section 6 includes in the operation of the Act all persons who were "registered or entitled to be registered immediately prior to April 17, 1985", and provides for the registration of descendants of that group, and those eligible to be registered under the amendments to the Indian Act that were made by Bill C-31.[28]

Since the Indian Act does not apply to the Inuit, non-status Indians and the Métis and, as I have shown, these groups are covered by subsection 91(24), it is evident that the federal government has chosen not to legislate to the full extent of its subsection 91(24) jurisdiction over "Indians". The exclusive right to legislate contained in subsection 91(24) is permissive rather

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[27] Ibid., subs. 4(1).

[28] Prior to the Bill C-31 amendments, the Indian Act, R.S.C. 1970 c. I-6, created a charter group of people entitled to be registered under the Act. It was based on previous statutory provisions. Entitlement to be registered as an Indian was confined to members of the charter group, descendants in the male line, and wives or widows of these persons. Persons not entitled to be registered included persons who had received or had been allotted half-breed lands or money script, and their descendants. The latter refers to the grants that were made to the Métis in lieu of any right to live on reserves. Paragraph 12(1)(b) provided that a woman who married a person who was not an Indian was not entitled to be registered. If the addition of the name of the illegitimate child of an Indian woman to a Band List was protested within twelve months, and it was decided that the father of the child was not an Indian, the child was not entitled to be registered under the Act (subs. 12(2)). Also, upon attaining the age of 21 years, any one born of a marriage entered into after September 4, 1951, whose mother and paternal grandmother became registered under the Act as the result of a marriage to a registered Indian man, was not entitled to be registered (clause 12(1)(a)(iv)). It was also possible to lose status through enfranchisement (ss. 109-113).

than prescriptive. It is clear from the case law that nothing requires Parliament to legislate to the full extent of its jurisdiction over "Indians".[29]

The Courts have never been called upon to fully define "Indians" in subsection 91(24). However, in A.G. Canada v. Canard[30] Mr. Justice Beetz said:

> The British North America Act, 1867,...by using the word "Indians" in s. 91(24) creates a racial classification and refers to a racial group for whom it contemplates the possibility of a special treatment. It does not define the expression "Indian". This Parliament can do within constitutional limits by using criteria suited to this purpose....[31]

With respect, I disagree. Although the federal government has the right to choose to legislate for less than the full class of subjects over which it has constitutional jurisdiction, it cannot supply definitions for terms in the empowering legislation. Surely that is the exclusive right of the courts.[32]

If I am correct, and the term "Indian" in subsection 91(24) of the Constitution Act, 1867 covers all of the Aboriginal people of

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[29] In re Wilson (1954), 12 W.W.R. 676 (Alta. Dist. Ct.); Re the Indian Act, re the Samson Band (1957), 21 W.W.R. 455 (Alta. Dist. Ct.); and Re the Indian Act, re Joseph Poitras (1954), 20 W.W.R. 545 (Sask. Dist. Ct.). The situation is similar for all constitutional heads of power. Although this would appear to settle the question, Lyon, infra, note 37, states that there is no "precedenc on the question of whether Parliament can exclude persons who come in the definition from the application of all laws relating to Indians when their preference is to be governed by those laws".

[30] [1976] 1 S.C.R. 170.

[31] Ibid., at 207.

[32] B.C. Power Corp. Ltd. v. B.C. Electric Co. (1962), 34 D.L.R. (2d) 196 (S.C.C.).

Canada, since the federal government has chosen to legislate for only a portion of those over whom it has power, it is possible that there is a vacuum with regard to the rest. This assertion is based on the fact that, although the competent legislative body has failed to exercise its jurisdiction over a class of subjects "to the full limit of its powers", the other level of government is not permitted to fill the gap.[33]

To date, this has not created a serious legal problem[34] for a number of reasons. Firstly, the federal government has never asserted jurisdiction, and has accepted only limited responsibility for those Aboriginal people that fall outside of the Indian Act.[35] The provinces have assumed jurisdiction and responsibility for

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[33] Union Colliery Co. v. Bryden, [1899] A.C. 580, at 588.

[34] There have been social and political problems as a result of the failure of the federal government to acknowledge jurisdiction for all Aboriginal people, and to provide the same programs for all of them. Since the federal government accepts jurisdiction only for status Indians and Inuit, the relationship between the federal government and the various Aboriginal groups is very different. This means that the aspirations of the groups vis à vis the federal government are diverse resulting in factionalism, and a concomitant loss of political clout. The differing focus of the four groups in their presentations to the Ministers' of Health outlined in Chapter 2 are a graphic illustration of this situation.

Because the federal government provides the bulk of its programs only to status Indians on reserve, and to the Inuit, the Métis and non-status Indians do no benefit even though they often live in the same geographical areas and suffer from the same economic deprivation as status Indians, or worse. Some groups of non-status Indians are among the poorest people in Canada. The Innu of Labrador are an example. For an overview of the problem see James Frideres, Native People in Canada Contemporary Conflicts, 3rd ed., 1988, Scarborough: Prentice Hall.

[35] Over the years, there has been an increase in federal programming for the Inuit.

these people. However, the Native groups themselves argue they are subject to federal jurisdiction but, to date, the question has not been considered by the courts.

Secondly, with one exception, the provinces have not attempted to make laws that apply explicitly to Indians, Métis and Inuit, except as part of a comprehensive land claim.[36] In 1939, Alberta passed The Metis Population Betterment Act[37] to provide assistance to the Métis who were suffering severely from the Depression.

Thirdly, when courts have considered 91(24), they have tended to do so in the limited context of the Indian Act. Rather than viewing the federal enactments as representative of Parliament's choice to select from within its legislative range, it appears that the courts in some cases have taken the view that the Act reflected the full scope of federal legislative power both with respect to the people who should be included in the term "Indians" and, to the kinds of laws Parliament can make in relation to them.[38] The effect of acceptance of the Indian Act definition as describing federal jurisdiction under subsection 91(24) is that all Aboriginal people, except the Inuit, who do not have status under the Act fall outside of federal jurisdiction and, therefore, within provincial

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[36] For example, An Act respecting hunting and fishing rights in the James Bay and New Quebec Territories, S.Q. 1978, c.92.

[37] S.A. 1938, c.6. Later The Metis Betterment Act, R.S.A. 1980, Chap. M-14, it was repealed in 1990 and replaced with The Metis Settlement Act, S.A. M-14.3, and the Metis Settlements Accord Implementation Act, S.A. M-14.5.

[38] Noel Lyon, "Constitutional Issues in Native Law" in Bradford Morse, ed., Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada. Revised First Ed. 1989, at 430.

jurisdiction. However, since s. 35 of the Constitution Act, 1982 now gives some guidance as to the proper constitutional meaning of "Indian", a more inclusive definition will probably be the order of the day when next the matter is considered by the courts. This could result in a jurisdictional vacuum in the future.[39]

Lyon writes:

> This new constitutional definition of Aboriginal Peoples [s.35] should be given greater weight than statutory definitions, at least for purposes of determining what persons are within the exclusive federal legislative competence conferred by s.91(24) of the Constitution Act. Until now the juridical tendency has been to treat statutory definitions as conclusive on this question. For example, in R. v. Laprise, [1977] 3 W.W.R. 379 a non-treaty Indian was denied the special exemption enacted for Indians in the Saskatchewan Game Act because the Indian Act distinguishes between "Indians" and "non-treaty Indians". Yet the issue in Laprise was what persons enjoy the privilege conferred by s.12 of the Saskatchewan Natural Resources Act, 1930, which was given constitutional status by the Constitution Act, 1930. Since it was s.91(24) of the Constitution Act, 1867 that gave the federal government authority to negotiate the agreement that was the substance of the Act, the relevant inquiry was the scope of the exemption enacted by the province of Saskatchewan in its game legislation.[40]

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[39] As will be seen below, given the direction the courts have gone with respect to which laws apply to Indians, it is possible that this may never become a problem.

[40] Lyon, ibid., note 38. In the Laprise case, Mr. Justice Bence of the Saskatchewan Court of Queen's Bench, in determining the proper meaning of the term "Indian" as it was used in the Natural Resources Agreement of 1930 looked to the definitions contained in the Indian Act, R.S.C. 1927, c. 98, s. 2(d), and the Indian Act, R.S.C. 1970, c. I-6, ss. 11 and 12 which was the current version of the Act when the case was being decided. As A.J. Jordon states in "Who is an Indian? R. V. Laprise" [1977] Canadian Native Law Bulletin 22, at 23: "The fallacy of this approach is that it applies a statutory definition to a constitutional document without enquiring whether the word is necessarily used in the same way in both documents."

1.2 What are lands reserved for the Indians?

In my opinion, health is more related to Indians than land reserved for them, but the decision in Peace Arch,[41] where regulations containing specifications for buildings, water services and sewage disposal made under the provincial Health Act[42] were characterized as being in relation to the use of the land, and therefore, not applicable to the operation by non-Indians of a restaurant and amusement park on conditionally surrendered reserve land within the city limits, underscores the importance of this exercise.

It almost goes without saying that reserve lands are "lands reserved for the Indians". From the Peace Arch case, it is clear that conditionally surrendered reserve land remains reserve land, and thus continues to fall into that category.[43]

In the St. Catherine's Milling case,[44] their Lordships did not accept the assertion by the Province of Ontario that reserve lands were the only lands that came within the term "Lands reserved for the Indians" in subsection 91(24) of the Constitution Act, 1867. The Privy Council stated:

> The argument might have deserved consideration if the expression [Indian reserves] had been adopted by the British Parliament in 1867, but it does not occur in

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[41] Corporation of Surrey et al. v. Peace Arch Enterprises Ltd. (1970), 74 W.W.R. 380 (B.C.C.A.).

[42] R.S.B.C., 1960, ch. 170.

[43] Supra, note 41.

[44] St. Catherine's Milling and Lumber Co. v. the Queen (1888), 14 App. Cas. 46.

> sect. 91(24), and the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation. It appears to be the plain policy of the Act that, in order to ensure uniformity of "administration" all such lands, and Indian affairs generally, shall be under the legislative competence of one central authority.[45]

Thus, where the Royal Proclamation applies and the land has not been formally surrendered by treaty or land claim settlement, it can be asserted that it is land reserved for Indians and the proper subject of federal jurisdiction.[46]

Pugh writes:

> In the St. Catherine's case, Strong J. clearly and plainly stated that lands subject to Indian title at common law should be considered lands reserved for Indians. In that case, the Privy Council accepted the contention of the minority in the Supreme Court when it decided that the subject lands there fell within the meaning of subsection 91(24) although their Lordships did ascribe the origins of the title to the Royal Proclamation and not the common law. If it were to be held that lands subject to aboriginal title at common law were not lands reserved for Indians then it would appear that the plain policy of the B.N.A. Act to ensure uniformity of Indian affairs generally through one central legislative authority would be defeated.[47]

Pugh applies this reasoning to the Baker Lake lands and comes to the conclusion that they are lands reserved for Indians.[48]

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[45] Ibid., at 59.

[46] Lysyk, infra, note 52, at 516.

[47] Robert Pugh, "Are Northern Lands Reserved for the Indians?" (1982) 60 Can. Bar Rev. 36, at 53.

[48] In Hamlet of Baker Lake et al. v. Minister of Indian Affairs and Northern Development et al. (1980) 107 D.L.R. (3d) 513 (F.C.T.D.), the plaintiff Inuit alleged that mining activity that had been authorized by government defendants were an invasion of an aboriginal right to hunt caribou, and sought a declaration that the lands were subject to the "aboriginal right and title of the Inuit

Pugh writes:

> Modern settlements of land claims whereby aboriginal rights in land are extinguished or surrendered for cash, land and political consideration are fundamentally similar to the traditional treaties whereby similar rights were extinguished but in return for less valuable consideration. Since the Calder case, the concept that native title arises at common law has been accepted by the courts.... Where aboriginal title at common law is surrendered or extinguished in exchange for lands to be held by aboriginal groups but alienable only to the Crown, whether in right of the Dominion or the province, those lands that have been so set apart should also be treated as lands reserved for Indians.[49]

If Pugh is correct, then it would appear that lands granted to Aboriginal people for use and occupancy in land claim settlements are "Lands reserved for the Indians" as they are lands encumbered by aboriginal title. Even where the lands are granted in fee simple, if they can be alienated only to the Crown, then they are reserved lands and are, therefore, subject to federal jurisdiction.[50]

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residing in or near that area to hunt and fish thereon" (at 516). After concluding that he was bound by the decision in R. v. Sigeareak (1966), 57 D.L.R. (2d) 536, in which it was held that the Royal Proclamation did not apply to Rupert's Land where the Baker Lake lands are situated, Mahoney J. stated: "However, the Proclamation is not the only source of aboriginal title in Canada" (at 541). As authority for this statement he cited Calder et al. v. A.-G. (1973), 34 D.L.R. (3d) 145.

[49] Pugh, ibid., note 47, at 78.

[50] The James Bay and Northern Quebec Agreement declares that "Category I lands shall be under provincial jurisdiction" (Article 7.1.5). (Category 1A and 1A-N lands remain under federal jurisdiction.) Category II and III lands were presumed to be under provincial jurisdiction. However, the agreement recognizes that a court might categorize them as lands reserved for Indians. Section 2.10 of the agreement states, in part:

> In the event that a final judgment of a competent court of last resort declares that the whole or any part of

In sum, the answer to the question "Who is an Indian?" is: status and non-status Indians, the Métis and the Inuit. The answer to the second question "What are lands reserved for the Indians?" is: lands encumbered by aboriginal title, including reserve land; conditionally surrendered reserve land; lands covered by the Royal Proclamation of 1763 where aboriginal title has not been extinguished or surrendered; northern lands where aboriginal title has not been extinguished or surrendered; and lands set apart under land claims agreements and self-government arrangements, even if it is held in fee simple, when it is alienable only to the Crown.

2. FEDERAL JURISDICTION WITH RESPECT TO INDIANS AND LANDS RESERVED FOR INDIANS

The power of the federal government to legislate for Indians is of a different nature than the other heads of power in section 91 of the Constitution Act, 1867. Although other classification of people are mentioned in section 91, i.e. the military in 91(7) and

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> Category II or III lands fall under the legislative jurisdiction of Canada, because of rights granted to the Native people with respect to all or any such lands or because such lands are held to be lands reserved for Indians, then any rights given to the Native people with respect to such lands shall cease tc exist for all legal purposes.

Of these provisions, Pugh, supra, note 47, at 62 writes:

> ...at first glance, it does appear that enactments of the [Quebec] National Assembly which especially incorporate corporations for Indian and Inuit community purposes and which define those who qualify as beneficiaries of land claims settlements, and so forth, are of questionable constitutional validity.

aliens in 91(25), 91(24) is the only head of power that singles out a group of people using a racial distinction. Aboriginal people are mobile. They live on reserves and off them, moving freely back and forth. They are involved in the same kinds of activities as other people - they go to school; they drive cars; they marry; they divorce; they own property - things that have nothing to do with being "Indian".

The federal government has not attempted to pass a whole body of law governing Indians in all situations. For one thing, it would be almost impossible to administer. For another, it is unlikely that Parliament has the power to pass a comprehensive set of laws affecting Indians "since their application to Indians would not by itself give them the character of 'Indian' laws".[51]

As noted above, the Indian Act is the primary exercise of the federal government's legislative power over Indians. For the most part, the Act is concerned with property and band governance. It contains provisions relating, among other things, to an Indian register (ss. 5-6), Band membership lists (ss. 8-14.3), reserves and the possession of reserve lands (ss. 18-28), succession (ss. 42-50), taxation (s. 87), and education (ss. 114-122).

It gives the Governor in Council the right to make regulations with respect to specified things, inter alia, the control of traffic on reserves (s. 73(1)(c)); "to prevent, mitigate and control the spread of diseases on reserves" (s. 73(1)(f)); for the provision of medical and health services for Indians (s. 73(1)(g));

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[51] Noel Lyon, supra, note 38, at 431.

to provide for the inspection of premises on reserves and the destruction, alteration or renovation thereof (s. 73(1)(i)); and to provide for sanitary conditions in private and public places on reserves (s. 73(1))k)).

The Act also gives Band councils the right to make Band by-laws over enumerated subjects, inter alia, to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases (s. 81(1)(a)).

It is evident that several of the provisions of the Indian Act, and the powers delegated therein, relate to matters that would ordinarily fall within provincial legislative jurisdiction. The federal government has apparently taken the position that it has the power to legislate for Indians in areas where it could not do so for non-Indians.

Whether or not these provisions are valid depends upon whether they are in "pith and substance" in relation to Indians or in relation to such things as property, education, health, or succession, matters that are within provincial legislative jurisdiction.[52] However, Hogg states:

> If s. 91(24) merely authorizes Parliament to make laws for the Indians which it could make for non-Indians, then the provision would be unnecessary. It seems likely therefore that the courts would uphold laws which could be rationally related to intelligible Indians policies,

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[52] Ken Lysyk, "The Unique Constitutional Position of the Canadian Indian" (1967) 45 Can. Bar Rev. 513, at 533-534, expresses doubt as to the federal government's ability to legislate with respect to property. He notes that inquiries into the character of the law "will not be concluded by the fact that the enactment is limited in its application to a class of persons mentioned in the B.N.A. Act".

> even if the laws would ordinarily be outside federal competence. This is not to deny Lysyk's caveat about the danger of assuming that a law which applies only to Indians is a law "in relation to" Indians. For example, a law which stipulated a special speed limit for Indians driving automobiles on public highways would be hard to sustain as an "Indian" law, because it does not seem to bear any relationship to any intelligible legislative policy in regard to Indians. But laws in regard to Indian property and Indian education have traditionally been part of federal Indian policy, and could no doubt be justified as aiming at peculiarly Indian concerns.[53]

Although few examples exist, when subsection 91(24) powers are at issue, courts have not always conducted the "pith and substance" identification with their usual vigour. For example, in A.G. v. Canard,[54] the Supreme Court of Canada upheld the constitutional validity of the provisions of the Indian Act relating to testamentary matters of Indians ordinarily resident on reserves without extended discussion. In some cases, it appears that the Indian Act is used as the starting point. If the Indian Act contains provisions on a particular subject, then it is deemed to be an appropriate exercise of federal jurisdiction. This seems to be what is happening in some of the labour relations cases that are discussed in Chapter 6 of this thesis. Qu'Appelle Indian Residential School Council v. Canada[55] is a good example.

The right to legislate for Indians and lands reserved for Indians in areas normally within provincial jurisdiction might also be viewed as ancillary to the federal power under subsection

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[53] Supra, note 1, at 554.

[54] Supra, note 30.

[55] [1988] 2 F.C. 226.

91(24). Despite the uncertainty that surrounds the ancillary doctrine,[56] the courts have, on occasion, indicated its existence. In the health area, Schneider[57] is an example. In Four B Mfg Ltd. v. United Garment Wkrs,[58] Mr. Justice Beetz seemed to indicate that an ancillary power existed. He said:

> I come to the conclusion that the power to regulate the labour relations in issue does not form an integral part of primary federal jurisdiction over Indians and lands reserved for the Indians. Whether Parliament could regulate them in exercise of its ancillary powers is a question we do not have to resolve any more than it is desirable to determine in the abstract the ultimate reach of potential federal paramountcy.[59]

To date, the courts have not clearly defined the parameters of Parliament's legislative jurisdiction over "Indians". The extent to which the federal government can legislate for Indians in areas in which it cannot for non-Indians has rarely been considered by the courts, and there are no examples of federal Indian legislation being declared ultra vires.[60] In The Queen v. Drybones,[61] the Court said that the federal legislative authority "is obviously intended to be exercised over matters that are, as regards persons

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[56] See the discussion in Chapter 3.

[57] Schneider v. The Queen, [1982] 2 S.C.R. 112.

[58] (1979), 102 D.L.R. (3d) 385 (S.C.C.).

[59] Ibid., at 397.

[60] Ken Lysyk, supra, note 52, at 552, contends that little assistance can be derived from the authorities dealing with other classes of "persons" uniquely within federal legislative competence. However, the courts have done this in several areas, e.g. labour relations.

[61] [1970] S.C.R. 282.

other than Indians, within the exclusive legislative authority of the Provinces".[62] Pratt, relying on the judgments of Chief Justice Dickson in Guerin[63] and Simon[64], asserts that subsection 91(24) "is a grant of legislative power sui generis".[65] That could explain the attitude of the courts with respect to Parliament's pervasive exercise of its jurisdiction over Indians and lands reserved for them.

In Lyon's opinion, the lack of judicial definition may flow from the uniqueness of subsection 91(24). He writes.

> The difficulty is that, unique among the heads of legislative authority, s. 91(24) must have its scope determined largely by a legislative judgment as to how much distinctive Indian law is necessary or appropriate at any given time. If Parliament were to repeal the Indian Act and all other special laws for Indians, this would signal a judgment that distinctive laws are no longer needed, and as long as this judgment could be reasonably justified by the circumstances and did not represent abdication of responsibility, no court would be likely to question it.
>
> So it turns out that the scope of s. 91(24) is largely a matter for Parliament rather than the courts, which explains why the Indian Act as it exists from time to time is taken by courts as a fair reflection of that scope.[66]

The courts have treated federal jurisdiction over lands reserved for Indians, particularly reserve land, as even more

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[62] Ibid., at 303.

[63] Guerin et al. v. The Queen, [1984] 2 S.C.R. 335.

[64] Simon v. The Queen [1985] 2 S.C.R. 387.

[65] Alan Pratt, "Federalism In the Era of Aboriginal Self-Government" in David Hawkes, ed., Aboriginal Peoples and Government Responsibility, 1989, at 42.

[66] Lyon, supra, note 38, at 431.

comprehensive than its power over Indians. Characterization by the court of a provincial law as being, in pith and substance, in relation to land use is the "kiss of death". In Peace Arch,[67] municipal and provincial health standards legislation was characterized as being in relation to land use, and therefore, inapplicable on reserve land, even conditionally surrendered reserve land. In Derrickson v. Derrickson,[68] the Supreme Court of Canada held that provisions of the provincial family law act relating to possession of the matrimonial home and other realty did not apply on-reserve because the possession and use of reserve lands comes within the exclusive jurisdiction of Parliament. In Re Whitebear Band Council[69] provincial labour laws were held not to apply to carpenters who were building houses for Band members on the reserve under contract with the Band.

Despite this apparent reluctance to circumscribe federal legislative power under subsection 91(24), the theory that Indian reserves are "enclaves" from which provincial laws should be excluded, has never found favour with Canadian courts. Chief Justice Laskin, when a professor of law, advanced this theory.[70]

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[67] Supra, note 41.

[68] [1986], 1 S.C.R. 285.

[69] (1982), 135 D.L.R.(3d) 128 (Sask.C.A.).

[70] Bora Laskin, Canadian Constitutional Law, 2nd ed. rev., 1960, at 541.

In Cardinal v. A.-G. Alta,[71] Laskin J., as he then was, in dissent, stated:

> I propose to deal first with the effect of s.91(24) upon the reach of provincial game laws. Apart entirely from the exclusive power vested in the Parliament of Canada to legislate in relation to Indians, its exclusive power in relation also to Indian Reserves puts such tracts of land, albeit they are physically in a Province, beyond provincial competence to regulate their use or to control resources thereon. This is not because of any title vested in the Parliament of Canada, but because regardless of ultimate title, it is only Parliament that may legislate in relation to Reserves once they have been recognized or set aside as such....
>
> Where land in a Province is, as in the present case, an admitted Indian Reserve, its administration and the law applicable thereto, so far at least as Indians thereon are concerned, depend on federal legislation. Indian Reserves are enclaves which, as long as they exist as Reserves, are withdrawn from provincial regulatory power. If provincial legislation is applicable at all, it is only by referential incorporation through adoption by the Parliament of Canada.[72]

In Natural Parents v. the Superintendent of Child Welfare,[73] Laskin J. agreed in the result, but argued, with respect to the applicability of provincial legislation on reserve, that the fact that a provincial law is general in its application does not mean that it can touch matters within exclusive federal competence. He found that the Adoption Act[74] in question applied only through the operation of section 88 of the Indian Act.

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71 [1974] S.C.R. 695.

72 Ibid., at 715.

73 (1975) 60 D.L.R. (3d) 148.

74 R.S.B.C. 1960, c. 4.

In Four B. Manufacturing v. United Garment Workers,[75] again in dissent, Laskin C.J. stated:

> It appears to me that the foregoing statutory provisions [ss. 18 and 28 of the Indian Act], whose constitutionality is beyond question,...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.[76]

He concluded that the enterprise in question was a "federal work, undertaking or business" within the meaning of the Canada Labour Code,[77] and that the Code, rather than provincial labour laws, applied to the employees of the corporation. Speaking for the majority, Beetz J. said: "The enclave theory has been rejected by this Court in Cardinal v. A.-G. Alta...and I see no reason to revive it even in a limited form."[78]

Thus, the Four B case explicitly rejects the enclave theory, and any suggestion that federal laws are all powerful within the boundaries of Indian reserves. However, even in that case, there is language that hints at a federal jurisdictional bias. After stating that the exclusive jurisdiction of Parliament to legislate for a certain class of persons does not mean that the "totality of these persons' rights and duties come under primary federal competence to the exclusion of provincial laws of general application", Beetz J. reasons that provincial laws apply to

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75 Supra, note 58.

76 Ibid., at 389-390.

77 R.S.C. 1970, c.L-1.

78 Supra, note 58, at 398.

Indians "as long as they do not single out Indians nor purport to regulate them **qua** Indians and, as long, also, as they are not superseded by valid federal law." That said, he then notes that the Indian Act does not provide for the regulation of the labour relations of Indians.[79] One cannot help but wonder if the reasoning would have been the same in this case if it did.

3. APPLICATION OF PROVINCIAL LAWS TO INDIANS AND LANDS RESERVED FOR INDIANS

Over the years, there has been considerable controversy concerning whether or not provincial laws applied to Indians and lands reserved for Indians, and if so, by what means. It appears now to be settled law that valid provincial laws apply to Indians in the same way that they apply to, among other things, banks and federally incorporated companies. In 1907, in R. v. Hill,[80] the Ontario Court of Appeal held that a provincial law confining the practice of medicine to qualified physicians applied to Indians. The Supreme Court of Canada held that provincial adoption legislation applies to Indians in Natural Parents v. Superintendent of Child Welfare et al.,[81] but it cannot affect Indian status. In Four B Manufacturing v. United Garment Workers[82] the Supreme Court

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79 Ibid., at 398.

80 15 O.L.R. 406 (Ont. C.A.).

81 Supra, note 73.

82 [1980] 1 S.C.R. 1031.

of Canada decided that provincial labour relations laws apply on-reserve in some circumstances.[83]

Provincial laws can apply to lands reserved for Indians[84] as long as it is not in relation to the use of land by Indians.[85] In City of Vancouver v. Chow Chee,[86] the court decided that the province could tax non-Indian occupiers of reserve land on the basis of the assessed value of the land and improvements. This case has been followed in Provincial Municipal Assessor v. Harrison[87] and in Sammartino v. Attorney General of British Columbia.[88]

Little Bear suggests that provincial laws apply to Indians and lands reserved for Indians as a result of the application of the "double aspect" doctrine discussed in Chapter 3. He also attributes it to "cooperative federalism" which he describes as "the related demands of the interdependence of government policies, equalization of regional disparities, and constitutional

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[83] The law in this area is more thoroughly canvassed in the next chapter.

[84] The case law deals with situations in which the land under consideration was reserve land, a sub-category of land reserved for Indians. That notwithstanding, it is submitted that the situation should be the same with respect to other lands reserved for the Indians.

[85] For example, Corp. of Surrey et al. v. Peace Arch Enterprises and Derrickson v. Derrickson.

[86] [1941] 1 W.W.R. 72 (B.C.C.A.).

[87] [1971] 3 W.W.R. 735.

[88] [1972] 1 W.W.R. 24.

adaptation".[89] Also, pragmatically, it would be impractical, probably impossible, and possibly unconstitutional, for Parliament to attempt to govern all aspects of the life of Indians.

Provincial laws must be of general application before they apply to Indians and lands reserved for Indians. Laws that single them out would be ultra vires the provincial legislatures as impinging on the federal power to legislate for Indians. The indicia for determining whether a law is one of general application were set out in Kruger and Manuel[90] by Dickson J., as he then was:

> There are two indicia by which to discern whether or not a provincial enactment is a law of general application. It is necessary to look first to the territorial reach of the Act. If the Act does not extend uniformly throughout the territory, the inquiry is at an end and the question is answered in the negative. If the law does extend uniformly throughout the jurisdiction the intention and effects of the enactment need to be considered. The law must not be "in relation to" one class of citizens in object and purpose. But the fact that a law may have graver consequence to one person than to another does not, on that account alone, make the law other than one of general application. There are few laws which have a uniform impact. The line is crossed however, when an enactment, though in relation to another matter, by its effect, impairs the status or capacity of a particular group. The analogy may be made to a law which in its effect paralyses the status and capacities of a federal company....[91]

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[89] Leroy Little Bear, "Section 88 of the Indian Act and the Application of Provincial Laws to Indians" in Anthony Long and Menno Boldt, eds., Governments in Conflict? Provinces and Indian Nations in Canada, 1988, at 175.

[90] Kruger and Manuel v. The Queen, [1978] 1 S.C.R. 104.

[91] Ibid., at 110.

3.1 Section 88 of the Indian Act

At the centre of the controversy over the application of provincial laws to status Indians is section 88 of the Indian Act. That section reads:

> 88. 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 the Act.[92]

The issue surrounding the section was whether it was declaratory of the existing state of the law, or whether it referentially incorporated provincial laws, thereby making them federal laws. If the latter view was correct, then the phrase "from time to time in force in any province" was problematic because it could be characterized as a delegation of legislative power from Parliament to the provincial legislatures. Direct delegation between the two levels of government is prohibited by the decision of the Supreme Court of Canada in A.-G. Nova Scotia v. A.-G. Canada.[93]

The case that best illustrates the section 88 issue is Natural Parents. Laskin C.J. (Judson, Spence and Dickson JJ. concurring) held that section 88 referentially incorporated provincial legislation making it federal legislation. Martland J. (Pigeon and de Grandpre JJ. concurring) said that section 88 of the Indian Act

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[92] It is important to note that the section does not refer to "Lands reserved for the Indians".

[93] [1951] S.C.R. 31.

was not intended to incorporate all provincial laws of general application. Ritchie J. held that section 88 should be construed as meaning that the provincial laws of general application therein referred to apply of their own force to the Indians. Beetz J. did not address the issue. There was no majority decision, and so the issue was not resolved by this case.[94]

If provincial laws are referentially incorporated, and would not apply to Indians without section 88, then they are subject to the exceptions contained in the section. That is to say, that they would only apply to the extent that they do not make provision for any matter for which provision is made by or under the Indian Act and, to the extent that they are not inconsistent with the Indian Act, "or any order, rule, regulation or by-law made thereunder". They would be subject to the terms of any treaty and any other Act of Parliament.[95]

If provincial laws apply to Indians ex proprio vigore, then they are not subject to the exceptions in section 88 with respect to the Indian Act, and any regulations or by-laws made thereunder, or any other Acts of Parliament, but the doctrine of paramountcy applies. Bands could be constrained by the provincial laws when

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[94] (1975), 60 D.L.R. (3d) 148.

[95] In Francis v. R., [1956] S.C.R. 618, it was decided that the reference to "treaty" in the section referred only to treaties made with Indians which are mentioned elsewhere in the Indian Act, and did not extend to international treaties such as the Jay Treaty.

exercising their by-law making power.[96] However, the fact that valid provincial laws of general application apply to Indians of their own force and effect unless they impair "Indianness" does not mean that they will not be subject to exceptions. There are limits on the application of provincial laws that operate independent of section 88. One is section 35 of the Constitution Act, 1982. Because of the protection given to treaties under that section, it seems unlikely that provincial laws could affect treaty rights. Another is the doctrine of paramountcy.

In 1985, the Supreme Court of Canada decided the Dick[97] case. Speaking for a unified court, Beetz resolved the controversy surrounding section 88. He stated:

> I believe that a distinction should be drawn between two categories of provincial laws. There are, on the one hand, provincial laws which can be applied to Indians without touching their Indianness, like traffic legislation; there are on the other hand, provincial laws which cannot apply to Indians without regulating them qua Indians.
>
> Laws of the first category, in my opinion, continue to apply to Indians ex proprio vigore as they always did before the enactment of s. 88 in 1951, then numbered s. 87...and quite apart from s. 88....

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[96] This raises the interesting question of whether a provincial legislature could delegate by-law making power to an Indian Band and council. It can clearly delegate this power to municipal governments within the province, but a Band is a federal creation, with an uncertain nature. It is not a legal "person" (R. v. Peter Ballantyne Band (1987), 47 M.V.R. 299 (Sask.Q.B.)). It does not have municipal or government powers in relation to the reserve (Sabattis v. Oromocto Band (1987), 32 D.L.R. (4th) 680 (N.B.C.A.)). It is clear that a provincial government can delegate administrative responsibility to an Indian Band. See, for example, Sappier v. Tobique Indian Band Council (1988), 87 N.R. 1 (F.C.A.), and the Sechelt Act, S.B.C. 1987, c. 16.

[97] 23 D.L.R. (4th) 33.

> I have come to the view that it is to the laws of the second category that s. 88 refers.[98]

Beetz adopted the following argument from Lysyk:[99]

> Provincial laws of general application will extend to Indians whether on or off reserves. It has been suggested that the constitution permits this result without the assistance of section 87 of the Indian Act, and that the only significant result of that section is, by expressly embracing all laws of general application (subject to the exceptions stated in the section), to contemplate extension of particular laws which otherwise might have been held to be so intimately bound up with the essential capacities and rights inherent in Indian status as to have otherwise required a conclusion that the provincial legislation amounted to an inadmissible encroachment upon section 91(24) of the British North America Act.[100]

Beetz J. continued:

> [I]t would not be open to Parliament, in my view, to make the Indian Act paramount over provincial laws simply because the Indian Act occupied the field. Operational conflict would be required to this end. But Parliament could validly provide for any type of paramountcy of the Indian Act over other provisions which it alone could enact, referentially or otherwise. It is true that the paramountcy doctrine may not have been as precise in 1951 as it has become at a later date, but it is desirable to adopt a construction of s. 88 which accords with established constitutional principles.[101]

Beetz rejected the submission that prospective incorporation into the Indian Act of future provincial laws involved inter-delegation of powers of a type held to be unconstitutional in the Nova Scotia[102] case. In his opinion, A.-G. Ont. v. Scott[103] and

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98 Ibid., at 59-60.

99 Lysyk, supra, note 52, at 552.

100 Ibid., note 97, at 59-60.

101 Ibid., at 60-61.

102 Supra, note 93, at 61.

Coughlin v. Ontario Highway Transport Board et al.[104] "provide a complete answer to this objection".[105]

In R. v. Francis,[106] the accused was charged with an offence under the New Brunswick Motor Vehicle Act.[107] He argued that he could only be charged and convicted under section 6 of the Indian Reserve Traffic Regulations[108] enacted under the Indian Act.

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[103] [1956] S.C.R. 137.

[104] [1968] S.C.R. 569.

[105] Leroy Little Bear, supra, note 88, disagrees. He argues that these two cases on which Beetz J. relied are easily distinguishable from the case at bar. He writes:

> The Scott case dealt with the adoption by Ontario of a foreign (English) statute into the law of Ontario. It did not involve 'anticipatory incorporation' into the law of Ontario. In the Coughlin case the delegation was to an administrative body. In the case of section 88, the anticipatory incorporation involves provincial legislatures. While I reluctantly agree with administrative delegation, I believe that the line of constitutionality is crossed when future enactments of a province as anticipated by section 88 are incorporated. The proper view, in my opinion, is expressed by Gerard LaForest.... According to LaForest, "The courts have long upheld statutes incorporating existing legislation to another legislature, but a different problem is raised where a legislature purports to adopt the law of another legislature as it exists or is amended from time to time: then the legislature whose legislation is adopted is the one exercising discretion in respect of change, not the adopting legislature. The situation is clearly quite similar to delegation. (LaForest, Gerard, "Delegation of Legislative Power in Canada" (1975) 21 McGill L.J. 138.)

[106] [1988] 1 S.C.R. 1025.

[107] R.S.N.B. 1973, c. M-17.

[108] C.R.C. 1978, c. 959.

Section 6 of the regulations states:

> The driver of any vehicle shall comply with all laws and regulations relating to motor vehicles, which are in force from time to time in the province in which the Indian reserve is situated, except such laws or regulations as are inconsistent with these Regulations.

In the course of his judgment, Mr. Justice LaForest stated:

> In considering the interpretations of s. 6, counsel made reference, as had the courts below, to s. 88 of the Indian Act, which bears some resemblance to s. 6 of the regulations in issue here. Section 88 provides that all provincial laws of general application are applicable to Indians. Counsel on all sides rightly conceded that this provision has no direct bearing on this case. In Dick v. The Queen,...this Court held that s.88 served to incorporate only those provincial laws that did not extend to Indians ex proprio vigore. In particular, Beetz J. expressly referred to traffic regulations as laws that applied to Indian reserves ex proprio vigore and as such not falling into the types of laws extended to Indians by s. 88.[109]

It is now clear that section 88 of the Indian Act does not referentially incorporate all provincial laws of general application, but only those that would not otherwise apply because they impair "Indianness" in some way. All other laws apply to Indians of their own force and effect just as they always have.

That said, it is submitted that there is still considerable leeway for the federal jurisdiction to oust provincial laws. Although Hughes[110] wrote before the decisions in Dick and Francis, there is still some merit to what she says. She argues that, through judicial characterization of provincial laws in a way

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[109] Supra, note 106, at 1030-1031.

[110] Patricia Hughes, "Indians and Lands Reserved For the Indians: Off Limits to the Provinces?" (1983) 21 Osgoode Hall L.J. 82.

consistent with the principles set out below, provincial jurisdiction over Indians, especially on-reserve, could effectively be eliminated. The principles are:

> 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 find it ultra vires as encroaching directly on section 91(24);[111]

This proposition is based on a common principle of constitutional interpretation. If the subject of the legislation is within the jurisdiction of the body enacting it, "it is intra vires even if it would have an incidental effect on something within the other body's jurisdiction".[112] In formulating this principle, Hughes relies, inter alia, on Natural Parents and Whitebear Band Council.[113] The decisions in Dick and Francis have not changed this statement of the law.

> 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;[114]

Hughes bases this principle on the decision of Mr. Justice Dickson, as he then was, in Kruger and Manuel. She points out that even "a provincial law which is intended to benefit Indians (or, more neutrally, does not have either the purpose or effect of

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111 Ibid., at 85.

112 Ibid., at 86.

113 [1982] 3 W.W.R. 554 (Sask. C. A.).

114 Hughes, supra, note 110, at 85.

impairing status) will be declared invalid if it purports to affect Indians specifically", citing Natural Parents as an example.[115]

This is probably no longer correct since the decisions in Dick and Francis. Impairment of Indian status by provincial laws of general application is acceptable. But one would ask if **all** impairment is acceptable, or if there is a limit beyond which it will not be tolerated. Presumably, if the impairment is too egregious, it will not survive the operation of the first principle. It will also depend on how one defines "impair".

> 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 will be declared void to the extent it is subject to the limitations (or to the extent the questions in parentheses are answered in the affirmative);[116]

This proposition is still true following the decision in Dick, but it is now clear that it applies only to laws that impair "Indianness" and not to **all** provincial laws of general application. Thus, if a piece of valid provincial legislation that applies by virtue of section 88 is inconsistent with the Indian Act, or any order, rule, regulation or by-law made thereunder, it will not apply to Indians. Such provincial laws are also subject to the terms of any treaty and any other Act of Parliament. Provincial legislation that applies ex proprio vigore is not subject to the restrictions in section 88. However, that does not mean that there

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[115] Hughes, supra, note 110, at 85.

[116] Ibid.

are no limitations on the latter. The doctrine of paramountcy may oust its application, and treaty rights cannot be affected by provincial legislation.[117]

This proposition is still true following the decision in Dick, but it is now clear that it applies only to laws that impair Indianness, and not to **all** provincial laws of general application because it is only the former that are subject to section 88.

> 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;[118]

Hughes states:

> 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.[119]

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[117] In R. v. White and Bob, 50 D.L.R. (2d) 613 (B.C.C.A.), the court held that the provincial hunting legislation did not apply to status Indians who had a treaty right to hunt on unoccupied land. Issacs J. stated, at 618:

> Legislation that abrogates or abridges the hunting rights reserved to Indians under the treaties and agreements by which they sold their ancient territories to the crown and to the Hudson's Bay Company for white settlement is, in my respectful opinion, legislation in relation to Indians because it deals with rights peculiar to them.

[118] Hughes, supra, note 110, at 85.

[119] Ibid., at 93.

This principle appears still to be true but, as stated above, it is relevant only to provincial legislation that impairs Indianness and therefore applies to Indians by virtue of section 88. Beetz J. said that "Parliament could validly provide for any type of paramountcy of the Indian Act over other provisions which it alone could enact, referentially or otherwise".[120]

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;[121]

This principle refers to the fact that section 88 of the Indian Act refers only to Indians while subsection 91(24) gives Parliament jurisdiction over Indians **and** lands reserved for them. The author argues that it will not invigorate provincial legislation that can be characterized as impairing lands reserved to Indians, a power remaining within the exclusive jurisdiction of the federal government. Using the decision in Peace Arch as substantiation, she asserts that this principle "probably has the greatest potential for restricting the effect of provincial legislation".[122] In a more recent case, Derrickson v. Derrickson,[123] the Supreme Court of Canada held inapplicable family law legislation relating to ownership and possession of the matrimonial home and other realty situated on an Indian reserve.

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120 Dick v. The Queen, supra, note 97, at 60.

121 Hughes, supra, note 110, at 85.

122 Hughes, supra, note 110, at 97.

123 Supra, note 68.

The result was the same in Paul v. Paul[124] with respect to an application for interim sole occupancy.

> 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....[125]

We know now that section 88 does indeed referentially incorporate some provincial legislation. This principle is still applicable to that legislation, that is, to those provincial laws of general application that touch "Indianness". It will not affect provincial laws that apply of their own force and effect.

4. SECTION 35 OF THE CONSTITUTION ACT, 1982

Section 35 of the Constitution Act, 1982 represents a limit on the legislative power of both the federal and provincial governments. It states, as amended in 1984:

> 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.
>
> (3) For greater certainty, in subsection (1) "treaty rights" include rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

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[124] [1986] 1 S.C.R. 306.

[125] Hughes, supra, note 110, at 85.

The Constitution, by its own terms, is the supreme law of the land. Subsection 52(1) of the Constitution Act, 1982 states: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Therefore, since existing treaty and aboriginal rights are constitutionally protected, any federal or provincial law that is inconsistent with them will be of no force or effect to the extent of the inconsistency.[126]

At least with respect to federal legislation, however, the constitutional protection of aboriginal rights, and by analogy, treaty rights, does not appear to be absolute. In Sparrow,[127] the Supreme Court said of subsection 35(1):

> There is no explicit language in the provision that authorizes this Court or any Court to assess the legitimacy of any legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the Constitution Act, 1867. These powers must, however, now be read together with s.35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in Nowegijick, supra, and the

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[126] In R. v. Sparrow, [1990] 1 S.C.R. 1015, it was decided that "existing" meant those aboriginal rights that existed on April 17, 1982, the day that the Constitution Act, 1982 came into force. It did not revive extinguished rights.

[127] Ibid.

> concept of holding the Crown to a high standard of honourable dealings with respect to the aboriginal peoples of Canada as suggested by Guerin v. The Queen, supra.[128]

The court went on to say that, once a prima facie infringement has been proved, the inquiry moves to the justification stage. There must be a valid legislative objective,[129] and there must be "as little infringement as possible in order to effect the desired result".[130] The justification will also include questions as to "whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted".[131]

The court in Sparrow indicated that federal legislative powers continue with respect to aboriginal rights. Since treaty rights are also recognized and affirmed, it appears that they, too, are amenable to federal legislation as long as the impingement meets the justification standard set by the Supreme Court in that case.[132]

It seems unlikely that provincial legislation can abrogate aboriginal and treaty rights in the same way that federal legislation can. It is submitted that aboriginal and treaty rights

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[128] Ibid., at 1109.

[129] Ibid., at 1113.

[130] Ibid., at 1119.

[131] Ibid.

[132] Before treaty rights received constitutional protection, it was clear that the federal government could abrogate treaty rights at will. See R. v. George, [1966] S.C.R. 267, and Sikyea v. The Queen, [1964] S.C.R. 642.

are the essence of "Indianness". Therefore, valid provincial legislation that encroached on these rights would touch "Indianness" and be inapplicable to Aboriginal people. Provincial statutes may be saved by section 88 of the Indian Act with respect to status Indians despite the impairment.[133]

It is also possible that provincial legislation that abrogated aboriginal and treaty rights would not be valid, but would be ultra vires as trenching on the federal government's subsection 91(24) jurisdiction over "Indians, and Lands reserved for the Indians". In R. v. White and Bob,[134] Issac J.A. stated:

> Legislation that abrogates or abridges the hunting rights reserved to Indians under the treaties and agreements by which they sold their ancient territories to the crown and to the Hudson's Bay Company for white settlement is, in my respectful opinion, legislation in relation to Indians because it deals with rights peculiar to them.[135]

5. SUMMARY

From the foregoing discussion of constitutional jurisdiction it is possible to draw the following principles:

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[133] R. v. Dick, supra, note 97. It is not clear from the case whether all impairment is acceptable, or if there is a limit beyond which the legislation cannot go.

[134] 50 D.L.R. (2d) 613 (B.C.C.A.).

[135] Ibid., at 618. The Supreme Court later adopted this decision in (1965), 52 D.L.R. (2d) 481n.

1. Parliament can enact laws for Indians that it could not for non-Indians.[136]

It is submitted that "Indianness" is the test that should be applied to federal legislation when it impinges on provincial jurisdiction. In an area that is clearly within the class of subjects exclusively assigned to the provincial legislatures, there would have to be a significant "Indianness" factor before the federal government had power to enact the law. For example, the jurisdiction to legislate for education is clearly a provincial power, yet the Indian Act contains provisions relating to the education of Indians. In order for these provisions to be valid, the courts should look for the existence of a sufficient "Indianness" aspect to the education of Indians. Further, it is submitted that the fact that the activity involves Indians is not sufficient. In my view, a sufficient "Indianness" factor would only result where something uniquely "Indian" is involved, for example, Indian status or the "necessary incidents of status", such as registration under the Indian Act, Band membership, the right to live on a reserve; aboriginal and treaty rights; aboriginal culture; etcetera.[137]

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[136] The Queen v. Drybones, [1970] S.C.R. 282, and A.-G. Canada v. Canard, [1976] 1 S.C.R. 178.

[137] Four B Manu. v. United Garment Workers et al., supra, note 58, at 397.

2. A provincial statute that is characterized as, in pith and substance, in relation to Indians and lands reserved for the Indians is ultra vires as encroaching directly on subsection 91(24).

Most of the decisions on the constitutional division of powers with respect to Indians involve consideration of the application of provincial laws to Indians. If the provincial law is, in pith and substance, in relation to Indians, then it is ultra vires.

3. Valid provincial laws apply to Indians[138] and lands reserved for Indians[139] of their own force and effect.

If it is in relation to a provincial head of power, and it is of general application, then it applies of its own force and effect unless it impairs "Indianness", relates to the use of reserve lands, or gets ousted by the Indian Act, or other valid federal legislation through the doctrine of paramountcy.

4. A provincial law that singles out Indians or Indian reserves for special treatment would probably be characterized as, in pith and substance, in relation to Indians, and therefore, invalid.

How diligent the courts will be in this regard is illustrated by the judgment in Natural Parents.[140] At issue was the British Columbia Adoption Act.[141] The Act had been amended[142] to provide

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138 R. v. Dick, supra, note 97.

139 City of Vancouver v. Chow Chee, supra, note 86.

140 Supra, note 73.

141 R.S.B.C. 1960, c.4.

that the sections that made an adopted child the child of the adoptive parents for all purposes, did not affect "status, rights, privileges, disabilities and limitations" acquired under the Indian Act. Beetz J. concluded that the amendment was ultra vires the provincial government. Ritchie J. decided that the amendment did not change the law, but if it had, he would have felt "constrained to hold that s-s (4A) constitutes an attempt by the Province to invade the field of legislative authority...assigned to Parliament by s. 91(24)".[143] Chief Justice Laskin, speaking for four members of the court, held that the Adoption Act would not apply to the adoption of Indians, a matter within the exclusive jurisdiction of Parliament under subsection 91(24) of the Constitution Act, 1867 except by virtue of section 88 of the Indian Act.

It is, however, possible that this principle would not apply to provincial legislation that singled out Indians or Indian reserves for positive treatment if it could do so without invading federal jurisdiction, for example, the Ontario Child and Family Services Act.[144] Paragraph 10(4)(d) gives the Minister the power to approve agencies to provide services under the Act. Subsection 13(3) provides that "an approved agency that provides services to Indian or native children and families shall have the prescribed number of band or native community members on its board of directors".

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[142] 1973 B.C. 2nd sess., c. 95, s. 10(4a).

[143] Ibid., at 167.

[144] R.S.O. 1990, Chap. C.11.

5. Provincial laws that impair "Indianness" are referentially incorporated by section 88 of the Indian Act and apply as federal law, subject to the terms of any Indian treaty and other Acts of Parliament, providing that they are laws of general application and are not inconsistent with the Indian Act and any regulations and by-laws made thereunder, and do not cover matters for which provision is made under the Indian Act.

As discussed above, determining the degree of impairment that will be tolerated is problematic.

6. The doctrine of federal paramountcy will cause valid provincial laws that are inconsistent with the Indian Act or any other valid federal legislation to be overridden by the federal law.

7. If the provincial legislation can be characterized as relating to land use, it will be inapplicable to Indian reserves and will not be saved by section 88 of the Indian Act.

8. Both federal and provincial legislation that abrogates aboriginal and treaty rights protected by section 35 of the Constitution Act, 1982 are "of no force and effect" unless, at least in the case of federal legislation, it meets the Sparrow test.

9. "Indian" as it is used in subsection 91(24) includes status and non-status Indians, the Métis and the Inuit.

10. Health is an "amorphous topic" with both the federal and provincial legislatures having jurisdiction.

11. Federal jurisdiction over health is ancillary to the express heads of power in section 91, and also arises under the emergency power.

Armed with these principles, some of which, particularly the first, are unsatisfactorily defined and delimited in the case law, and by analogy to labour law, I now turn to a consideration of Aboriginal health.

CHAPTER 6

SPECULATION ABOUT CONSTITUTIONAL JURISDICTION FOR ABORIGINAL HEALTH

It appears that there are only two cases on the applicability of provincial health legislation to the section 91(24) powers. The first is R. v. Hill.[1] In that case, an Indian was convicted of the offence of unauthorized practice of medicine contrary to a provincial law that confined the practice of medicine to qualified physicians.

The second is Corp. of Surrey v. Peace Arch Enterprises.[2] In that case, the appellants were constructing a restaurant and amusement park on conditionally surrendered land within the Surrey city limits. The Court held that the municipal by-laws, and regulations made under the provincial health legislation,[3] were not applicable to the appellant's activities. Maclean J. said:

> In my view the zoning regulations passed by the municipality, and the regulations passed under the Health

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[1] (1907), 15 D.L.R. 406 (Ont.C.A.). When legal scholars and judges are considering the applicability of provincial legislation to Indians, this case is usually mentioned. However, it is an old case. It was decided in the days when the major thrust of government Indian policy was assimilation, and therefore all aspects of aboriginal culture were under attack. Today is a different era and, fortunately, things have changed. Traditional healers are being used in some hospitals. In some cases, the federal government will pay transportation costs to allow status Indians to be treated by traditional healers. That being the situation, one wonders if the outcome of this case would be the same today.

[2] (1970), 74 W.W.R. 380 (B.C.C.A.).

[3] Health Act, R.S.B.C., 1960, ch. 170.

> Act, are directed to the use of the land. It follows, I think, that if these lands are "lands reserved for the Indians" within the meaning of that expression as found in sec. 91(24) of the B.N.A. Act, 1867,[4] that provincial or municipal legislation purporting to regulate the use of these "lands reserved for the Indians" is an unwarranted invasion of the exclusive legislative jurisdiction of Parliament to legislate with respect to "lands reserved for Indians".[5]

The provincial regulations in question related to building specifications, water services and sewage disposal. By characterizing them as in relation to land use instead of health, they were inapplicable to reserve land as trenching on Parliament's subsection 91(24) power over "Indians, and Lands reserved for the Indians".[6]

Given the paucity of case law in this area, I will examine labour relations for assistance in attempting to determine which level of government has jurisdiction for Aboriginal health.

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[4] The judge found that they were.

[5] Supra, note 2, at 383.

[6] It is submitted that the characterization of the regulations made under the Health Act as in relation to land use was incorrect. As Patricia Hughes, "Indians and Lands Reserved For the Indians: Off Limits to the Provinces?" (1983) 21 Osgoode Hall L.J. 82, at 99, points out: "Health legislation is 'in pith and substance' in relation to the protection of 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. However, this case was commented upon with favour by the Supreme Court of Canada in Cardinal v. Attorney General of Alberta, [1974] S.C.R. 695, at 704-705.

1. Labour Relations Legislation

Labour relations is selected for comparison purposes because, in some ways, it is similar to health. For one thing, although it is not mentioned in the Constitution Act, 1867, it is clearly established as being within the legislative jurisdiction of the provinces under section 92(13), "Property and Civil Rights in the Province".[7] However, Parliament also has a sphere of exclusive jurisdiction with respect to labour relations:[8]

> This jurisdiction of Parliament to so legislate includes those situations in which labour and labour relations are (a) an integral part of or necessarily incidental to the headings enumerated under s. 91; (b) in respect to Dominion government employees; (c) in respect to works and undertakings under ss. 91(29) and 92(10); (d) in respect of works, undertakings or business in Canada but outside of any Province.[9]

It applies more in respect of Indians than lands reserved for Indians, as does health. The Indian Act contains no provisions relating to it. It relates to activities, as does health. Unlike health, there are no regulatory and by-law powers contained in the Act with respect to labour relations on reserves, with the exception of a limited power with respect to Band employees.[10]

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[7] Toronto Electric Commission v. Snider, [1925] A.C. 396.

[8] Reference re Validity of Industrial Relations and Disputes Investigation Act, [1955] 3 D.L.R. 721 (S.C.C.).

[9] Ibid., at 755-756.

[10] Paragraph 83(1)(c) of the Indian Act, R.S.C. 1985, c. I-6, allows the council of a band to make by-laws for "the appointment of officials to conduct the business of the council, prescribing their duties and providing for their remuneration out of any moneys raised".

Also, the federal jurisdiction over the labour relations of federal undertakings, services or businesses is well defined while there are still unanswered questions with respect to health.

The courts have developed a "functional test" to assist them in determining if a particular enterprise falls within federal or provincial jurisdiction. In Montcalm Construction Inc. v. Minimum Wage Commission[11] Mr. Justice Beetz summarized the law this way:

> The question whether an undertaking, service or business is a federal one depends on the nature of its operation.... But, in order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern"...without regard for exceptional or casual factors: otherwise, the Constitution could not be applied with any degree of continuity and regularity....[12]

Morse notes:

> Even this standard has required further refinement as the "undertaking, service or business" to be examined is the precise employment situation rather than the business as a whole. For example, a railway company clearly operates within the federal jurisdiction, however, hotels owned by such a company would not as they must be analyzed independently and would not be found to be inextricably linked to the federal power over railways.[13] This does not mean that the employer must be exclusively engaged in activities falling under Parliament's domain[14] but only that the work of the particular bargaining unit must be assessed rather than that of the employer as a whole.[15]

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[11] (1979), 93 D.L.R. (3d) 641 (S.C.C.).

[12] Ibid., at 667, citations omitted.

[13] Canadian Pacific Railway Co. v. Attorney General of B.C. et al., [1950] A.C. 122.

[14] Letter Carriers' Union of Canada v. Canadian Union of Postal Workers et al. (1973), 40 D.L.R. (3d) 105 (S.C.C.).

[15] Bradford Morse, "Aboriginal People and Labour Relations" (1986) 17 R.G.D. 663, at 667.

The leading case on the applicability of provincial labour law to Indians is Four B Manufacturing Ltd. v. United Garment Workers of America et al.[16] Four band members incorporated a company under the laws of Ontario, to manufacture running shoes at premises on an Indian reserve which they occupied pursuant to a permit from the Minister of Indian Affairs. They had also received a grant from the Department of Indian Affairs and Northern Development. They employed 68 persons, only 10 of whom were non-Indians. The employer challenged the applicability of provincial labour legislation. Applying the functional test, the majority could find nothing about the business or operation of Four B that would allow it to be considered a federal business. The industrial activity involved was ordinary - the sewing of shoes - something that falls within provincial legislative authority, and none of the other circumstances of the case changed that fact.

In response to the submission that the matter to be regulated in the case at bar was the civil rights of Indians on a reserve, Mr. Justice Beetz said:

> I think it is an oversimplification to say that the matter which falls to be regulated in the case at bar is the civil right of Indians. The matter is broader and more complex: it involves the rights of Indians and non-Indians to associate with one another for labour relations purposes, purposes which are not related to "Indianness"; it involves their relationship with the United Garment Workers of America or some other trade union about which there is nothing inherently Indian; it finally involves their collective bargaining with an employer who happens to be an Ontario corporation, privately owned by Indians, but about which there is nothing specifically Indian either....

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[16] (1979), 102 D.L.R. (3d) 385.

> But even if the situation is considered from the sole point of view of Indian employees and as if the employer were an Indian, neither Indian status is at stake nor rights so closely connected with Indian status that they should be regarded as necessary incidents of status such for instance as registrability, membership in a band, the right to participate in the election of chiefs and band councils, reserve privileges, etc. For this reason, I have reached the conclusion that the power to regulate the labour relations in issue does not form an integral part of primary federal jurisdiction over Indians or lands reserved for the Indians.[17]

Thus, it appears there exists "a presumption that private sector employers and employees will be treated in a universal fashion disregarding the presence of Aboriginal people as owners, managers or workers".[18] One wonders if the result would be the same if "Indianness" was at issue. For example, if the facts were the same as those in Four B, but instead of manufacturing, the corporation was a trapping operation, would there be a sufficient "Indianness" factor to bring that operation into federal jurisdiction? An affirmative answer would be consistent with the jurisprudence in cases where the band council is the employer,

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[17] Ibid., at 397. It appears that to Mr. Justice Beetz, "Indianness" is synonymous with the "necessary incidents" of status, i.e. registrability, membership in a band, the right to participate in the election of chiefs and band councils, etc. It is submitted that the better view is that "Indianness" includes not only those things but existing aboriginal and treaty rights that are protected by section 35 of the Constitution Act, 1982, and incidents of aboriginal culture, i.e. language, traditions, customs, etcetera.

[18] Morse, supra, note 15, at 674. Morse goes on to discuss "possible limitations on this general rule", i.e. where the band council "is fulfilling a governmental role in providing services to its community or exercising its authority as a government other than in unique circumstances".

although as will be seen below, the result in some of them is questionable.

In Whitebear Band Council v. Carpenters Provincial of Saskatchewan et al.,[19] the Saskatchewan Court of Appeal considered whether provincial law applied to carpenters who were employed by the Band Council to build houses on the reserve. The construction was funded through contribution agreements with the federal government. In delivering the judgment of the Court, Mr. Justice Cameron commented that the functional test "is not so easily applied where legislative competence is conferred in relation to persons or groups of persons".[20] He considered it necessary to determine the nature of the Band Council and concluded that it was dependant on Parliament for its existence. He described its primary function as a "local government function" in performance of which the Council exercised powers given to Parliament by subsection 91(24) of the Constitution Act, 1867, and delegated to it by the Indian Act. He was satisfied, therefore:

> that the power generally to regulate the labour relations of a band council and its employees, engaged in those activities contemplated by the Indian Act, forms an integral part of primary federal jurisdiction in relation to "Indians, and Lands reserved for the Indians" pursuant to s. 91(24) of the B.N.A. Act.[21]

Thus, the building of houses on the reserve was part of the primary function of the Band Council, and since that function was

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19 [1982] 3 W.W.R. 554.

20 Ibid., at 562.

21 Ibid., at 564.

delegated to it by Parliament as part of its subsection 91(24) powers, the Court concluded that provincial legislation did not apply to the labour relations at issue. Instead, they were governed by the Canada Labour Code as it applies to a "federal work, undertaking or business".[22] In St. Regis Indian Band Council v. Canada Labour Relations Board et al.[23] the result was similar. The work of employees of the St.Regis Indian Band who were bus drivers, garbage collectors, teachers, carpenters, stenographers, housing clerks, janitors and road crews was characterized as being almost entirely concerned with the administration of the St. Regis

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[22] Canada Labour Code, R.S.C. 1985, c. L-2, s.2. With respect to the application of the Code to a "federal work, undertaking or business", Morse, supra, note 15, at 668-669 states:

> Failure to fall within the parameters of the foregoing will generally not lead to the application of provincial legislation in situations that have been determined to be within Parliament's exclusive jurisdiction. Instead, the consequences would be somewhat of a vacuum in that labour standards and collective bargaining are statutorily based. The absence of alternative federal legislation would cause the employer-employee relationship to be governed by the limited principles of the common law. [See, e.g. Commission du salaire minimum v. Bell Telephone Co. of Canada, [1966] S.C.R. 767.] The courts have given a broad, liberal interpretation to the definition of "federal work, undertaking or business" in part so as to avoid the repercussions of such a legislative vacuum. [See, supra, note 11, and Canada Labour Relations Board v. City of Yellowknife (1977), 14 N.R. 72 (S.C.C.).]

Since the courts, like nature, abhor a vacuum, they may expand provincial legislative jurisdiction over Indians in situations where there is no federal legislation. The decision in Dick v. The Queen (1985), 23 D.L.R. (4th) 33 could be an example of this phenomenon.

[23] [1981] 1 F.C. 225 (F.C.A.).

Band of Indians, that its entire function was governmental in nature and came under the jurisdiction of the Indian Act.[24]

In Sappier v. Tobique Indian Band Council,[25] the employee in question was a professional with the Child Welfare Agency on the Tobique Indian Band. The Court concluded that the social services delivered by the Agency related to the welfare of Indians of the Tobique Band, that they dealt with Indians qua Indians, were related to "Indianness"[26] and therefore, formed "an integrated part of the primary federal jurisdiction over Indians".[27] It is interesting to note that Mr. Justice Desjardins compared the social services at issue to medical services and education and concluded that they all related to "Indianness".[28]

The finding of "Indianness" in this case is problematic. The agency in question was created by two tripartite agreements among Canada, New Brunswick and the Agency. Therefore, the Agency was not dependant on Parliament for its existence, a circumstance that was viewed as significant in Whitebear. The agreement required that the delivery of services contemplated by the agreement, not be inconsistent with the Child and Family Services and Family

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[24] Ibid., at 237. This case was reversed on other grounds. See [1982] 2 S.C.R. 72.

[25] (1988), 87 N.R. 1 (F.C.A.).

[26] This analysis - the identification of an "Indianness" factor - is consistent with my submission regarding the threshold inquiry for federal incursions into the jurisdictional space of the provinces.

[27] Supra, note 25, at 5.

[28] Ibid.

Relations Act.[29] It is submitted that the fact that the clients are Indians is not, in itself, sufficient to indicate an "Indianness" factor.

In Qu'Appelle Indian Residential School Council v. Canada,[30] the Court was concerned with characterization of the employees at the Qu'Appelle Indian Residential School. The school was on a reserve, was governed by a council incorporated under the provisions of The Societies Act,[31] was funded by the Department of Indian Affairs, taught Indian children and, in addition to the regular curriculum that was identical to the programme set up by the Saskatchewan Department of Education, gave courses in the Cree language and in Indian culture. Most of the employees were Indians.

After reviewing the law, Pinard J. concluded that, on all of the facts, the Council's employees:

> are so directly involved in activities relating to Indian status, rights and privileges that their labour relations with the Council should be characterized as forming an integral part of the primary federal jurisdiction over Indians and Indian lands, under subsection 91(24) of the Constitution Act, 1867.[32]

I cannot agree with the judge's conclusions. He seemed to be influenced by the fact that the Indian Act contained education provisions, and by the references to the federal government in the

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29 S.N.B. 1980, c. C-2.1.

30 [1988] 2 F.C. 226.

31 R.S.S. 1965, c. 142.

32 Supra, note 30, at 242.

by-laws of the Council. Also of prime importance was the fact that the school gave classes in the Cree language and Indian culture; that the provincially run schools also gave such courses was dismissed as irrelevant. It is submitted that the nature and function of the employees and their employer was education and that the only other relevant factor should have been the teaching of culturally relevant courses. This assertion is based on the following:

1) as we saw in Chapter 3, the federal government cannot be allowed to define its own jurisdiction under subs. 91(24) simply by choosing to pass or not to pass laws in respect of certain things;

2) the Council involved was provincially incorporated, and was carrying on the usual business of such councils (as we saw in the cases above, the fact that the Band Council was federally created was very important to the outcome);

3) Indian reserves are not enclaves that are immune to the application of provincial law (Natural Parents v. Superintendent of Child Welfare;

4) the fact that the teachers and students were Indians does not automatically mean that the labour relations at issue are under federal jurisdiction (Four B Manu.); and

5) federal funding does not automatically indicate federal jurisdiction (Four B. Manu.).

It is further submitted that the teaching of culturally relevant courses was not a sufficient "Indianness" factor in this case to bring the labour relations here at issue into the ambit of

subsection 91(24). If it was, then arguably provincially run schools that give culturally relevant classes would also come under federal jurisdiction.

In R. v. Paul Band,[33] the Band was charged under the Alberta Labour Act, 1973[34] with failing to pay the salary of two police constables it had hired. They were appointed by the province under the Police Act[35] at the request of the Chief of Police of the Paul Indian Band. The Court found that the provincial labour legislation applied. On appeal,[36] the Court focused on the Band Council, rather than the particular activity performed by the employees. Since the Band Council was created by the Indian Act and derived all of its authority and power from the Act, the Court concluded that "Band councils are thus within the exclusive legislative jurisdiction and control of the Parliament of Canada over 'Indians, and Lands reserved for Indians'...and such councils are thus immune to provincial legislation".[37] Since policing was a normal activity of the Paul Band Council, it constituted a federal undertaking and therefore, provincial legislation was inapplicable. Morse writes:

> Therefore, it appears that provincial labour legislation will have no application whenever an Indian band is fulfilling a governmental role in providing services to

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[33] [1982] 4 C.N.L.R. 120 (Alta. Prov. Ct.).

[34] S.A. 1973, c. 33.

[35] S.A. 1973, c. 44.

[36] [1984] 1 C.N.L.R. 87 (Alta. C.A.).

[37] Ibid., at 94.

> its community or exercising its authority as a government other than in unique situations such as...where the James Bay Agreement's terms were implemented through the creation of the Cree School Board under provincial law as a successor to a previously certified school board. The assumption then has generally been made that general legislation on labour relations should apply for such band employees. There is however, an intervening legal question of interest which is usually overlooked: namely, are these band labour relations which are subject to federal constitutional authority immune from provincial legislation irrespective of whether Parliament has occupied the field by legislating in respect of these labour relations? This doctrine of interjurisdictional immunity was originally developed in federally incorporated company cases, but it has been extended to labour-management relations regarding federal works, undertakings and businesses. Its application to Indian bands was raised, but not answered in the Whitebear and St. Regis cases. So long as the Canada Labour Code does apply in the circumstances of a given situation, this question is not required to be addressed. The Saskatchewan Court of Appeal suggested, however, that the doctrine might not apply to Indians on grounds that were dubious at best.[38]

The answer to Morse's question could be very important in the area of health where no federal legislation exists, with the exception of delegations made under the Indian Act, and in statutes implementing self-government and land claims agreements.

Morse cautions that not all band employees will necessarily be governed by federal legislation. If the activity in which they are involved is not one that can be characterized as coming within the normal operations or activities of a Band Council, then arguably they will be subject to provincial labour laws.[39]

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[38] Morse, supra, note 15, at 678-679, footnotes omitted.

[39] Morse, ibid., at 677. Morse gives as examples band economic development activities such as "a motel, restaurant, cattle ranch, farm, etcetera".

From the preceding, it becomes evident that one of the problems with attempting to draw parallels between health and the labour relations cases is the "functional test" that has developed in labour relations law. There is nothing similar in the health area. However, some general assistance can be garnered and, it is possible that the courts might use similar reasoning in considering health legislation.

2. Health

Challenge to federal legislative incursions into the health area could come from a province, or an individual unhappy with a Band health by-law or regulation made under the Indian Act. This would call into question the federal government's right to delegate the power to make health by-laws. The issue of constitutional jurisdiction might also arise as a result of attempts by non-status Indians and Métis to compel the federal government to acknowledge jurisdiction for them and, by extension, to provide to them the health programs currently available only to Inuit and status Indians.[40]

It is possible that a court would find that the delegations of health jurisdiction in the Indian Act, the Sechelt Indian Band Self-Government Act,[41] and the Cree-Naskapi (of Quebec) Act,[42] are

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[40] The Métis and non-status Indians actively lobby the federal government for services, and are currently involved in an Aboriginal/federal/provincial/territorial process to examine, inter alia, jurisdictional issues.

[41] S.C. 1986, c. 27.

"in pith and substance" in relation to health, a provincial matter, and that would end the inquiry. But this is unlikely since, as indicated earlier, when subsection 91(24) powers are at issue, the courts have not always examined the distribution of powers question in the same way they do for other classes of subjects, particularly when there are relevant provisions in the Indian Act. This is especially true given the view of the Supreme Court of Canada that health has both a federal and provincial aspect.[43] If Hogg[44] is correct, and legislation that embodies rational Indian policies will be tolerated by the courts, regardless of its subject matter, then the fact that the federal government provides health services to status Indians on reserve will be significant, and will lend weight to an argument that the Indian Act delegation is intra vires the federal government.

If, for whatever reason, the delegation of legislative power under the Indian Act is sustained, it will then be necessary to determine the limits of Parliament's power to invade provincial jurisdictional space in this area. The uncertainty with respect to the scope of federal jurisdiction in the health area will be problematic. Also, the fact that, in some aspects, for example hospital and physicians' services, the provinces appear to have exclusive jurisdiction for health, may present some difficulty. It

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[42] S.C. 1984, c. 18.

[43] Schneider v. The Queen, [1982] 2 S.C.R. 112.

[44] Peter Hogg, Constitutional Law of Canada, 2nd edition, 1985, at 554.

is clear that valid provincial health legislation of general application applies to Indians, wherever they reside, of its own force and effect unless it singles out Indians, impairs "Indianness" in some way, or can be characterized as being in relation to land use. That does not mean, however, that the federal government cannot legislate for the health of Aboriginal people if it is found to come within the powers of Parliament under subsection 91(24).

Aboriginal health may have a "double aspect", amenable to legislation by both levels of government, with the doctrine of paramountcy applying in the event of an inconsistency. Although it is not one of the heads of power specifically mentioned by the Court in Schneider,[45] subsection 91(24) may be one of those that carries with it an ancillary power over health. If health is a dual aspect matter, then Morse's question concerning whether federal constitutional authority is immune to provincial legislation if Parliament has not occupied the field is moot.

If reasoning similar to that in the labour relations cases is used, then the court would look at the nature of the activity involved. In the situation where a Band is controlling its own health services on the reserve, it is possible that a court would look at the nature of the band as was done in the Whitebear and St. Regis cases. It might notice that Bands and Band Councils are creatures of the federal government, involved in the exercise of subsection 91(24) powers that have been delegated by Parliament.

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[45] Supra, note 43.

Health and Welfare Canada transfers resources related to health services to participating bands through a contribution agreement, a fact that might become significant if a court was weighing factors. If all these things taken together are sufficiently persuasive, then the court might find that the delivery of health services on reserves formed an integral part of Parliament's jurisdiction over "Indians, and Lands reserved for the Indians", and was, therefore, within federal jurisdiction.

If the test for "Indianness" I have advocated was applied to health activities on-reserve, it is hard to imagine how they would pass. It seems to me that, with the exception of traditional medicine, there is nothing uniquely Indian about health services. I would argue that this is true even of modern health services that are provided in a culturally sensitive way. However, there is still the federal jurisdiction over public health, that was explicitly recognized in Schneider.

Weighing in favour of federal jurisdiction is the apparent reluctance of the courts to delimit the jurisdiction of the federal government under subsection 91(24) of the Constitution Act, 1867, the fact that health has been characterized as an amorphous topic, with both a federal and provincial aspect, and the ancillary power doctrine.

On the other hand, it is firmly established that provincial laws of general application apply to Indians, and that the greater jurisdiction for health rests with the provinces. Indeed, in some health spheres, that jurisdiction is apparently exclusive, at least

it has been thus far. Whether it would survive a different kind of subsection 91(24) challenge than the one in R. v. Hill[46] is another matter.

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[46] Supra, note 1.

CHAPTER 7

SPENDING, TREATY-MAKING AND FIDUCIARY DUTIES

This part of the thesis deals with extra-constitutional sources of jurisdiction; that is, those things that may give one level of government or the other competence over a particular subject, notwithstanding the distribution of legislative power in the Constitution. Although these things may not alter the apportionment of exclusive legislative power under the Constitution Act, 1867, they may lead a court to conclude that the matter is one where it is appropriate to apply the double aspect doctrine. Also, the existence of one of these things may be sufficient to persuade a court that, in pith and substance, any challenged legislation is in relation to Indians and, therefore, within federal legislative jurisdiction.[1]

Three concepts are relevant here: the federal spending power, the federal treaty-making power, and the fiduciary obligation that is owed by the Crown to Aboriginal People.[2] Of these, for reasons that will become evident, it is the fiduciary relationship between

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[1] The spending power may create de facto competence with respect to a subject within the exclusive legislative purview of the other level of government. A good example of this is the control that the federal government has over provincial health insurance schemes. The Canada Health Act, R.S.C. 1985, c. C-6 contains criteria that must be met by a provincial health insurance plan with respect to payments made to the plan under the Federal-Provincial Fiscal Arrangements and Established Programs Financing Act, R.S.C. 1985, C. F-8.

[2] The Supreme Court of Canada identified such an obligation in Guerin v. the Queen, [1984] 2 S.C.R. 335 and in Sparrow v. the Queen et al., [1990] 2 S.C.R. 1075.

the federal government and Aboriginal people that is most germane, and has the greatest impact in this area. Accordingly, following a brief discussion of the spending and treaty-making powers, I will deal with the fiduciary obligation at length.

1. Federal Spending Power[3]

In the introduction to a working paper on the spending power of Parliament that was submitted by the Government of Canada to the Constitutional Conference in 1969, the meaning of the term "spending power" was stated as "the power of Parliament to make payments to people or institutions or governments for purposes on which it (Parliament) does not necessarily have the power to legislate".[4]

In a recent case, Madame Justice L'Heureux-Dube noted that the "scope and extent of this [spending] power has been the subject of some speculation".[5] She might have said the same of its source.

Although a spending power is not expressly mentioned in the Constitution, the Government of Canada[6] and Hogg[7] have suggested

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[3] The provinces also have spending power (see E. Driedger, "The Spending Power" (1981-82) 7 Queen's L.J. 124). However, since health is generally considered to be within provincial jurisdiction, and due to the fact that the federal government provides public health and some treatment services on-reserve, it is only the federal spending power that is considered here.

[4] Federal-Provincial Grants and the Spending Power of Parliament, at 1.

[5] Brown v. YMHA, [1989] 4 W.W.R. 673 (S.C.C.), at 686.

[6] Ibid., note 4.

that it flows from the power over the public debt and property (subsection 91(1A)), and taxation (subsection 91(3)). Driedger[8] finds the source of the federal spending power in Parliament's appropriation powers contained in sections 102 and 106 of the Constitution Act, 1867. The Royal prerogative is identified as the basis of the federal spending power by some legal scholars.[9] On the other hand, Petter[10] argues "that the federal spending power cannot be supported on the basis of doctrine or constitutional values".[11]

With respect to the "scope and extent" of the spending power, Hogg writes:

> Some constitutional lawyers, including Pierre Elliott Trudeau (before he assumed high federal office), have argued that the federal spending power is confined to objects within federal competence. The argument is that the general pattern of the distribution of powers in the Constitution Act, 1867 implicitly confines the taxing power of the federal Parliament in s.91(3) to raising taxes for the legislative objects of the federal Parliament, and for no other objects; that provincial taxing power in s.92(2) is also so limited; and that the spending powers of federal and provincial governments are also implicitly limited to their legislative objects.[12]

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[7] Hogg, supra, note 43, at 124.

[8] Driedger, supra, note 3.

[9] Driedger, ibid.; Ken Hanssen, "Constitutional Grant Legislation" (1967) 2 Man. L. J. 191.

[10] Andrew Petter, "Federalism and the Myth of the Federal Spending Power" (1989), 68 Can. Bar Rev. 448.

[11] Ibid., at 474.

[12] Hogg, supra, note 7, at 124-125.

He continues:

> It seems to me that the better view of the law is that the federal Parliament may spend or lend its funds to any government, or institution or individual it chooses, for any purpose it chooses; and it may attach to any grant or loan any conditions it chooses, including conditions it could not directly legislate.... There is no compelling reason to confine spending or lending or contracting within the limits of legislative power, because in those functions the government is not purporting to exercise any peculiarly governmental authority over its subjects.[13]

Hogg's view finds support from a recent Supreme Court of Canada decision. In Brown v. YMHA,[14] the Court found that the job creation scheme funded by the federal government was derived from the federal spending power. This did not, however, have the effect of bringing a matter that is otherwise provincial into federal legislative competence.

In most of the literature, and the few applicable cases, the spending power is discussed in terms of grants or loans. Even where federal programs are at issue, the spending is characterized as grants. For example, in Brown v. YMHA, at issue was a job creation project whereby unemployed persons continued to receive money in the form of benefits under the Unemployment Insurance Act, 1971[15] while performing work for the YMHA pursuant to an agreement between that organization and the federal government. The payment

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[13] Ibid., at 126.

[14] [1989] 4 W.W.R. 673.

[15] S.C. 1970-71-72, c. 48, now R.S.C. 1985, c. U-1.

of these benefits was described as a "job creation grant" in the judgment.[16]

This raises the question of whether federal programs that provide services can also be said to derive from the federal spending power. To find support for federal jurisdiction over Aboriginal health, it would be necessary to establish that it did because, except for the few cases where control of the health programs and the money to run them has been transferred to an Indian Band or Tribal Council, the federal spending here at issue is in the form of services, not grants. Since it is clear from Brown and YMHA[17] and Four B Manufacturing v. U.G.W.[18] that the exercise of the federal spending power does not affect legislative competence, it seems fruitless to embark on such an enquiry. Even if it was established that the federal spending power was represented by program expenditures, it would not give the federal government legislative jurisdiction where it did not previously exist. Additionally, even if the federal health program was found to be an exercise of the federal spending power, since the bulk of the federal program is provided only to status Indians, it would be of limited assistance in supporting jurisdiction for the health of **all** Aboriginal people that did not otherwise exist.

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[16] Supra, note 14, at 686.

[17] Supra, note 14.

[18] [1980] 1 S.C.R. 1031.

2. Treaty-Making Power

Nowhere in the Constitution Act, 1867 is there reference to either federal or provincial treaty-making powers.[19] This appears not to have been an oversight. Treaty-making is an aspect of statehood, of "independent international personality".[20] Apparently, the possibility that Canada might one day achieve international status and the concomitant treaty-making power was not entertained in 1867. It was not until 1947 that treaty-making powers were transferred to Canada by Letters Patent. "By virtue of this instrument, the British Crown effectively delegated the prerogative powers over foreign affairs to the Governor General of Canada to be exercised upon the advice of Parliament."[21]

However, Canada's right to make treaties with the Indians "does not appear to have been questioned".[22] As Cummings and Mickenberg write:

> Both historically and legally, it seems that the Indian treaties are not international treaties in the sense of agreements between two or more independent nations.... Historically, it also seems clear that the Government did not consider the Indians to be independent nations at the time the original treaties were made, and in the

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[19] Section 132 of the Act gives Parliament and the Government of Canada "all Powers necessary or proper for performing the Obligations of Canada or of any other Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries."

[20] Susan McDonald, "The Problem of Treaty-Making and Treaty Implementation in Canada" (1981), 19 Alta L.R. 293, at 297.

[21] Ibid., at 296.

[22] Peter Cummings and Neil Mickenberg, eds., Native Rights in Canada, 2nd ed., (1972), at 55.

> Commissioners reports on the post-Confederation treaties, both the Government representatives and the Indian negotiators indicate that they considered the Indian peoples to be subjects of the Queen....
>
> By virtue of the British North America Act, the Federal Government has authority over "Indians, and Lands reserved for the Indians". Consequently, there has been no need to justify the Federal authority to engage in agreements with the Indians under its power to enter into international treaties.[23]

Whatever its source, between 1871 and 1921, the Government of Canada used its treaty-making power to enter into eleven numbered treaties with Indian people in the northern and western parts of the country. All of the treaties were basically the same, differing only in detail. As indicated earlier, only Treaty 6 contains any reference to health matters, although similar verbal representations were made by treaty commissioners when Treaties 7, 8, 10, and 11 were being negotiated and thus form part of the treaties.[24]

Does the making of these treaties somehow give the federal government jurisdiction over Aboriginal health it would not

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[23] Ibid., at 54-55. The decision in Guerin, supra, note 2, supports this characterization of the Indian treaties. However, with respect to the Government's view that the Indians were not independent nations, Mr. Justice Lamer, as he then was, made the following comments in R. v. Sioui, [1990] 1 S.C.R. 1025, at 1052-1053:

> I consider that we can conclude from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations.

[24] Per R. v. White and Bob (1965), 52 W.W.R. 193 (B.C.C.A.); R. v. Taylor and Williams (1981), 35 O.R. (2d) 360 (C.A.); Guerin, supra, note 2, etcetera.

otherwise have? It appears unlikely. In the Labour Conventions[25] case, the Privy Council "affirmed that the federal government, although competent to conclude treaties, could not adopt legislation implementing those treaties whose subject matter fell within the exclusive jurisdiction of the provinces".[26] Therefore, although the federal government has the power to make treaties with Aboriginal people concerning **all** matters, even those within provincial competence, no greater jurisdiction accrues to Parliament as a result.[27] Legislation implementing treaties covering subjects falling within both federal and provincial jurisdictions would have to be passed by both levels of government unless implementing the treaty is seen as coming within subsection 91(24), so that jurisdiction comes from that provision rather than the treaty alone.[28]

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[25] A.G. for Canada v. A.G. for Ontario, [1937] A.C. 326.

[26] McDonald, supra, note 20, at 294.

[27] Today, it is unlikely that the federal government would negotiate a treaty, or any other major agreement, with Aboriginal people without provincial participation. Indeed, it is federal policy to include the provinces in land claims and self-government negotiations. Some provincial governments insist that they have a right to participate even in the negotiation of international treaties. Others go even further, arguing that they are competent to unilaterally conclude agreements with other nations. See McDonald, supra, note 20, and Gerald Morris, "The Treaty-Making Power: A Canadian Dilemma", (1967) 45 Can. Bar Rev. 478.

[28] This is consistent with the implementation of self-government arrangements (e.g. Sechelt), and ratification of comprehensive lands claims settlements (e.g. James Bay and Northern Quebec Agreement).

3. Fiduciary Obligation

In 1984, the Supreme Court of Canada recognized that a fiduciary relationship existed between the federal Crown and the Aboriginal people of Canada.[29] As Johnston points out, the existence of a trust relationship between Native people and the Crown "is not a novel idea to anyone acquainted with the history of the relations between them".[30] In her article, she cites authors who were writing about the trust relationship between the federal Crown and the Aboriginal peoples of Canada in the early 1970s.[31]

Of the fiduciary relationship, Morse writes:

> The fiduciary concept is closely related to the law of trust, although there are some important distinctions. One becomes a fiduciary in relation to another person by holding a special expertise (e.g. as a stockbroker, financial advisor or lawyer); or through acquiring property of another subject to particular obligations (e.g. for its protection); or because of a special relationship between the parties.[32]

In Guerin, Mr. Justice Dickson, as he then was, said:

> [W]here by statute, agreement or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and the obligation carries with it a discretionary power, the party thus empowered becomes a

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[29] Guerin v. The Queen, supra, note 2.

[30] Darlene Johnston, "A Theory of Crown Trust Towards Aboriginal Peoples" (1986) 18 Ottawa L.R. 307.

[31] For example, D.M. Brans, The Trusteeship Role of the Government of Canada (Ottawa: Indian Claims Commission, 1971) and D.R. Lowry, Native Trust: The Position of the Government of Canada as Trustee for Indians, A Preliminary Analysis (1973) unpublished.

[32] Bradford Morse, "Government Obligations, Aboriginal Peoples and Section 91(24) of the Constitution Act, 1867" in David Hawkes, ed., Aboriginal Peoples and Government Responsibility, (1989), at 80.

> fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.[33]

3.1 The American Experience

Although relatively new to Canadian jurisprudence, the existence of a fiduciary duty owed by the United States to the Indians of that country has long been recognized by the American courts. Its beginnings are traced to the decisions of Chief Justice Marshall in Cherokee Nation v. Georgia[34] and Worcester v. Georgia.[35] Bartlett writes:

> In those cases the Chief Justice referred to the Indians as "wards" of the government and in the latter case employed that notion to deny the application of state legislation. The corollary of this view was the "paramount authority" of the United States over the Indians as their guardian.[36]

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[33] Guerin v. The Queen, supra, note 2, at 384.

[34] 30 U.S. (5 Pet.) 1 1831.

[35] 31 U.S. (6 Pet.) 515 (1832).

[36] Richard Bartlett, "The Fiduciary Obligation of the Crown to the Indians" (1989) 53 Sask. L.R. 301, at 309, footnote omitted. In footnote 46, Bartlett adds the caveat that "the ascription of the origins of the federal trust responsibility to the Marshall decisions of the 1830s is somewhat misleading". He continues:

> [T]hose decisions justified federal power, **not** responsibility, by reference to the perceived needs of United States Indian policy. It only then became necessary to determine whether or not the Unites States should be considered to be able to exercise such power without responsibility and accountability. That determination has come only in modern times and without reference to those early decisions. It has been made not on the basis of some vague notion of "wardship" but upon an assessment of the precise degree of power and control exercised by the United States. (emphasis in the original)

Originally, the federal fiduciary duty arose "only in the circumstances of special jurisdictional statutes".[37] That is, the government was accountable for the exercise of its power over Indians "in a context where the statute declared a jurisdiction to hear 'any and all legal and equitable claims'".[38]

In the 1973 case, Pyramid Lake Paiute Tribe v. Morton,[39] it became clear that there was a federal fiduciary duty outside of situations where special jurisdiction existed. In that case, the court found "that the Secretary of the Interior was under a fiduciary obligation to the Indians with respect to water rights to Pyramid Lake".[40]

In United States v. Mitchell I[41] and United States v. Mitchell II[42] the Supreme Court clarified the source of the federal government's fiduciary duty. It is based on the power and discretion of the government, in these cases, over Indian timber lands. Government control of the timber lands and resources was

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[37] Ibid., at 309. The following discussion of United States cases, and the conclusions drawn from them, is based on Bartlett, ibid.

[38] Ibid., at 310. See Seminole Nation v. United States, 316 U.S. 286 (1942); Navajo Tribe v. United States, 364 F. 320 (Ct. C. 1966).

[39] 354 F. Supp. 252 (D.D.C. 1973).

[40] Bartlett, ibid., at 310.

[41] 100 S.Ct. 1349 (1980).

[42] 103 S.Ct. 2961 (1983).

"pervasive" and "comprehensive", thus establishing a fiduciary relationship.[43]

3.2 Foundations of the Fiduciary Duty in Canada

For Johnston, the Crown's fiduciary duty is grounded in the early colonial period with recognition by the British Crown of the rights of the Aboriginal inhabitants, "motivated primarily by enlightened self interest".[44] She bases her assertion on the code of instructions that was issued to the colonial governors in 1670. Like the Royal Proclamation of 1763, the code was concerned with peaceful relations with the Indians and cited fair dealings with them as a means of preserving the peace. To assure fair dealings, the Proclamation prohibited any private person from purchasing reserved land from the Indians. This action had the effect of making the Crown liable for the protection and management of Indian lands, thereby establishing the basis for trusteeship.[45]

Further support for a trust relationship between the Crown and Aboriginal people can be found in both the pre- and post-Confederation legislation relating to the management of Indian lands. Johnston writes:

> Even a cursory analysis of legislation relating to the management of Indian lands suggests the existence of a trust relationship. Of the pre-Confederation statutes, An Act for the better protection of the Lands and

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[43] Bartlett, ibid., at 313.

[44] Johnston, supra, note 30, at 308.

[45] Ibid., at 310.

Property of Indians in Lower Canada[46] contains in its preamble the most explicit reference to a trusteeship of Indian reserve lands. This statute authorized the Governor to appoint:

> a Commissioner of Indian Lands for Lower Canada, in whom and in whose successors by the name of the aforesaid, all lands or property in Lower Canada which are or shall be set apart or appropriated to or for the use of any Tribe or Body of Indians, shall be and are hereby vested in trust for such Tribes or Body, and who shall be held in law to be in the occupation and possession of any lands...for the use and benefit of such Tribe or Body.[47]

Support for the existence of a trust relationship can be found in several provisions of the first Indian Act, including section 2 that assigned to the Superintendent General of Indian Affairs "the control and management of the reserves, lands, moneys and property of Indians in Canada"; section 59, that empowered the Governor in Council to "direct how, and in what manner, and by whom the moneys arising from sales of Indian lands, and from the property held in trust for the Indians...shall be invested"; and the provision that land vested in the Crown in trust be exempt from taxation (section 65).[48]

In 1951, major revisions were made to the Indian Act.[49] The new Act introduced, as a successor to similar provisions in previous acts, subsection 18(1) that stated:

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[46] P.C.S. 1850-51, c. 42.

[47] Johnston, supra, note 30, at 311.

[48] Ibid., 312-313.

[49] S.C.. 1950-51, c. 29.

> Subject to the provisions of this Act, reserves shall be held by His Majesty for the use and benefit of the respective bands of which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are to be used is for the use and benefit of the band.

This provision "has become the focal point of the assertion that the Indian Act creates an express trust with the federal Crown as trustee for reserve lands".[50] Indeed, the Musqueam Band based its charge that the federal Crown was in breach of trust on that subsection.[51]

Johnston also finds support for the existence of a trust relationship between the Crown and Indians in the government's Indian policy. For most of Canada's history, the cornerstone of that policy was cultural and economic assimilation of Indian people into the "mainstream" of Canadian life.[52] It began with An Act to Encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians.[53] It was restated in the infamous White Paper in 1969,[54] and although it ceased to be government policy earlier, mainly due to the furore raised by that paper, the agent of assimilation - enfranchisement -

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[50] Johnston, supra, note 30, at 314.

[51] Guerin v. The Queen, supra, note 2.

[52] Supra, note 30, at 310.

[53] R.S.C. 1857, c. 26.

[54] Statement of the Government of Canada on Indian Policy, 1969.

was not removed from the Indian Act until 1985.[55] Johnston writes:

> [T]his policy involved drastic government interference with virtually every aspect of native existence.... Quite apart from any express statutory recognition of a trust relationship..., it is submitted that the intent to create a fiduciary duty can be inferred from the existence of this self-imposed, comprehensive **civilization** scheme.[56]

It is submitted that the special relationship that exists between Aboriginal people and the Canadian government is another indication of the fiduciary duty the Crown owes to Native people. That a special relationship exists has long been asserted by Aboriginal people and accepted by the federal government. Indeed, it is one of the pillars of the Indian Health Policy.

This special relationship has its roots in the Royal Proclamation, 1763, termed "the Indian Bill of Rights" by the

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[55] Bill C-31, An Act to Amend the Indian Act, 1st Sess., 33rd Parliament, 1984-85, c.27, s.19. A person who became enfranchised ceased to be an "Indian" under the Indian Act. His or her name was removed from the Band list or the Indian register. Among other things, enfranchisement meant loss of the right to participate in any government programs for status Indians and the right to live on a reserve. With enfranchisement came the right to vote in federal and provincial elections, something that was denied status Indians until the 1960s, freedom from the restrictions of the Indian Act, and a small amount of money. For men, enfranchisement was usually voluntary, although there were periods when the government, frustrated by the slow pace at which assimilation was taking place, enfranchised them against their will. For example, subs. 86(1) of An Act to amend and consolidate the laws respecting Indians, (1867) 39 Vic., cap. 18 provided that any Indian that received a university degree, was admitted to the practice of medicine or law, became a notary public, a priest, or a minister "shall ipso facto become and be enfranchised under this Act". Veterans of World Wars I and II enfranchised in order to be eligible for the same benefits as non-Indians. If a man enfranchised, his wife and dependent children were also enfranchised.

[56] Johnston, supra, note 30, at 310, emphasis in the original.

Supreme Court of Canada in the St. Catherines Milling case.[57] The treaties, government Indian policy, subsection 91(24) of the Constitution Act, 1867, and the "drastic interference with virtually every aspect of native existence"[58] also contribute to this special relationship.

Although they did not explicitly mention a fiduciary duty, as early as 1939 the judiciary recognized that, through its policies and legislation, the Crown had assumed a guardianship role vis à vis the Indians.[59] In Re Kane,[60] Mr. Justice McArthur stated:

> For reasons which are quite apparent, the Indian has been placed under the guardianship of the Dominion Government. He is its ward, so long as he remains unenfranchised, and the Minister of the Interior, as Superintendent General of Indian Affairs, is given control and management of all lands and property of Indians in Canada. They are looked upon and treated as requiring friendly care and directing hand of the Government in the management of their affairs. They and their property are, so to speak, under the protecting wing of the Dominion Government.[61]

A similar characterization of the Crown-Indian relationship can be found in the judgment of Mr. Justice Rand (Estey J. concurring) in the St. Ann's Island Shooting and Fishing Club Ltd. v. R.:[62]

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[57] St. Catherines Mill & Lumber Co. v. The Queen (1887), 13 S.C.R. 577, at 652, per Gwynne, J..

[58] Johnston, supra, note 30, at 310.

[59] Ibid., at 310.

[60] [1940] 1 D.L.R. 390 (N.S. Co. Ct.).

[61] Ibid., at 397.

[62] [1950] S.C.R. 211.

> The language of the statute embodies the accepted view that these aborigenes [sic] are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation. For that reason, every such dealing with their privileges must bear the imprint of government approval, and it would be beyond the power of the Governor in Council to transfer that responsibility to the Superintendent General.[63]

Of these decisions Johnston writes: "Although the Crown-Indian relationship was characterized as a guardianship, the legal implications of the relationship remained ambiguous."[64]

3.3 The Fiduciary Duty In Canadian Case Law

3.3.1 The Source

In Guerin,[65] writing for himself and three other members of the court, Dickson J., as he then was, roots the Crown's fiduciary duty in "the concept of aboriginal, native or Indian title".[66] But that in itself is not sufficient to give rise to the duty: "The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest is inalienable except upon surrender to the Crown."[67] Later in the judgment, Dickson J. states, with respect to subsection 18(1) of the Indian Act:

> Through the confirmation in the Indian Act of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interest in transactions with third parties, Parliament

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63 Ibid., at 219.

64 Johnston, supra, note 30, at 311.

65 [1984] 2 S.C.R. 335.

66 Ibid., at 376.

67 Ibid.

> has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s.18(1) of the Act.
>
> This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one.[68]

Wilson, J. agrees that the fiduciary duty has its roots in aboriginal title.[69] However, far from being dependent upon the statutory framework to give it expression, upon surrender this duty crystallizes into an express trust.[70]

With respect to subsection 18(1) she writes:

> It seems to me that s.18 presents no barrier to a finding that the Crown became a full-blown trustee by virtue of the surrender. The surrender prevails over the s.18 duty but in this case there is no incompatibility between them. Rather the fiduciary duty which existed at large under the section to hold the land in the reserve for the use and benefit of the Band crystallized upon the surrender into an express trust of specific land for a specific purpose.[71]

In Sparrow,[72] writing for the court, Dickson, C.J. and LaForest, J. state:

> In Guerin, supra, the Musqueam Band surrendered reserve lands to the Crown for lease to a golf club. The terms obtained by the Crown were much less favourable than those approved by the Band at the surrender meeting. This Court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The sui generis nature of Indian title, and the historic

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68 Ibid., at 383-384.

69 Ibid., 349.

70 Ibid., at 355.

71 Ibid.

72 Supra, note 2.

> powers and responsibilities as Crown constituted the source of such a fiduciary obligation.[73]

They went on to find "that the words 'recognition' and 'affirmation' in section 35 of the Constitution Act, 1982 incorporate the fiduciary relationship referred to earlier".[74]

3.3.2 The Character and Standard of Conduct

Weinrib states that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion".[75] In Guerin,[76] Mr. Justice Dickson stated:

> [W]here by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.[77]

Later in his judgment, he describes the fiduciary obligation that is owed by the Crown to the Indians as sui generis, with aspects of both trust and agency. He concludes that "[g]iven the unique character both of the Indians' interest in land and of their

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[73] Ibid., at 1108.

[74] Ibid., at 1109.

[75] E. Weinrib, "The Fiduciary Obligation", (1975) 25 U.T.L.J. 1, at 4.

[76] Supra, note 2.

[77] Ibid., at 384.

historical relationship with the Crown, the fact that it is so should occasion no surprise".[78]

In Frame v. Smith,[79] Wilson J. characterized the fiduciary obligation in the following way:

> 1) The fiduciary has scope for the exercise of some discretion or power.
>
> 2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> 3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[80]

Although the fiduciary obligation of the Crown to Aboriginal people has been described as sui generis, there is no reason to believe that it is inconsistent with the characterization in Frame.[81]

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[78] Ibid., at 387.

[79] [1987] 2 S.C.R. 790.

[80] Richard Bartlett, supra, note 32, at 302. Of this characterization, Bartlett writes:

> The formulation does not go so far as to suggest that when one has power to control the interests of another, a fiduciary obligation exists. It is unnecessary to go that far in the circumstances of the aboriginal people of Canada. There is no question that they are "peculiarly vulnerable to or at the mercy" of the Crown. Their disadvantaged and dispossessed circumstances and their subjugation to Crown powers are not relatively different from a century ago. In Frame the majority did not uphold a fiduciary obligation because a "comprehensive scheme" had been devised by the legislature for maintaining accountability at law. There is no such scheme for accountability at law declared in the Indian Act.

[81] Ibid.

The law requires a high standard of conduct of the private fiduciary. A fiduciary must act in the best interests of the beneficiary when exercising his or her discretion. Weinrib writes:

> The desirability of deterring the fiduciary from using his discretion except for the benefit of the principal or beneficiary is often mentioned in...judgments and this aspect is also enshrined in the prohibition against allowing a conflict of interest and duty. The wide leeway afforded to the fiduciary to affect the legal position of the principal in effect puts the latter at the mercy of the former, and necessitates the existence of a legal device which will induce the fiduciary to use his power beneficially. In this area, discretion and obligation are correlative concepts.[82]

In situations like the one in Guerin, it appears that the standard of conduct required of the Crown will closely resemble that of a private fiduciary. In his judgment in that case, Mr. Justice Dickson stated:

> In the present case the relevant aspect of the required standard of conduct is defined by a principle analogous to that which underlies the doctrine of promissory or equitable estoppel. The Crown cannot promise the Band that it will obtain a lease of the latter's land on certain stated terms, thereby inducing the Band to alter its legal position by surrendering the land, and then simply ignore that promise to the Band's detriment....
>
> In obtaining without consultation a much less valuable lease than that promised, the Crown breached the fiduciary obligation it owed the Band. It must make good the loss suffered in consequence.[83]

The standard of conduct required of the Crown in situations analogous to Sparrow appears to be something less than that of a private fiduciary. The aboriginal interests need not be the only consideration of the Crown when exercising its discretion.

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[82] Weinrib, supra, note 75, at 389.

[83] Ibid., at 389.

Infringement of rights recognized and affirmed by subsection 35(1) of the Constitution Act, 1982 can be justified by a valid legislative objective, e.g. conservation.[84]

3.3.3 The Scope

In Guerin, the Supreme Court of Canada found that the Crown has a fiduciary duty when dealing with surrendered Indian lands. In Sparrow, the Court found "that the words 'recognition and affirmation' incorporate the fiduciary relationship" that exists between the Crown and Aboriginal people into subsection 35(1) of the Constitution Act, 1982.[85]

Incorporation of the fiduciary relationship into subsection 35(1) means that the government owes that duty to Aboriginal people with respect to existing aboriginal and treaty rights that are thereby given constitutional protection; but the recognized rights are not absolute. The effect of the fiduciary duty is to place limits on the exercise of Parliamentary sovereignty: the government must justify "any legislation that has some negative effect on any aboriginal right protected under s.35(1)".[86] The Court said:

> Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s.91(24) of the Constitution Act, 1867.

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[84] However, there must be "as little infringement as possible in order to effect the desired result". Sparrow, supra, note 2, at 1119.

[85] Supra, note 2, at 1109.

[86] Ibid., at 1110.

> These powers must, however, now be read together with s.35(1). In other words, federal power must be reconciled with federal duty and the way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in Nowegijick,...and the concept of holding the Crown to a high standard of honourable dealings with respect to the aboriginal peoples of Canada as suggested by Guerin v. The Queen....[87]

It is now clear that the government is under a fiduciary duty when dealing with surrendered Indian land and existing aboriginal and treaty rights. However, in Sparrow, there is some language that arguably points to a much broader duty. Dickson C.J. and LaForest J. write:

> In our opinion, Guerin, together with R. v. Taylor and Williams (1981), 34 O.R. (2d) 360 ground a general guiding principle for s.35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and

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[87] Ibid., at 1109. Of this apparently broad protection for aboriginal and treaty rights, Ian Binnie ("The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 Queen's L.J. 217, at 217) warns:

> It is the proposition of this paper,...that the Sparrow doctrine, significant and important though it is in the narrow scope of hunting, fishing, and gathering rights, will undermine seriously achievement of the broader section 35 vision asserted by Native organizations - namely, achievement of self-government and an economic base. Having determined that the section 35 rights of Aboriginal people successfully survived years of government regulation, and having held that governments will in future be precluded from regulating **existing** treaty and Aboriginal rights except within narrow limits, the courts will now be reluctant to read into section 35 a sufficient catalogue of protected activities to provide Aboriginal peoples with the expected "constitutional solution" to the problems that beset many Native communities.

> aboriginals is trustlike, rather than adversarial....[88]

The federal government has taken the position that "Sparrow does not say that the Crown has fiduciary obligations in all of its dealings with aboriginal people regardless of their nature".[89] It argues that the above fiduciary language must be analyzed in the context of the decision. Although the Court in Sparrow did not analyze the fiduciary duty, relying instead upon existing understanding, it is my submission that these words may also represent judicial recognition of a general fiduciary duty.

It is submitted that the historic bases of the trust relationship discussed above, particularly the special relationship[90] between the Crown and Aboriginal People, and Parliament's legislative interference in virtually every aspect of Indian life, are sufficient to support the existence of a general fiduciary duty, the scope of which encompasses all aspects of Crown-Aboriginal relations. In my opinion, the fiduciary duty extends even to programs, such as the post-secondary education program provided by Indian and Northern Affairs Canada, and the health program run by Health and Welfare Canada. Although the duty

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[88] Ibid., at 1108.

[89] Department of Justice, The Fiduciary Relationship of the Crown Toward Aboriginal People, October 26, 1990, unpublished, at 1.

[90] Although the special relationship has been described as "elusive" with "an uncertain legal content" (Allan Pratt, "Federalism in an Era of Aboriginal Self-Government" in David Hawkes, ed., Aboriginal Peoples and Government Responsibility, 1989, at 24), its existence is beyond question and its importance to Aboriginal people cannot be overstated.

probably would not require the government to implement a particular program, once it is in place and Aboriginal people come to rely on it, the government is under a fiduciary duty to ensure that it continues, or that the needs of the people are met in some other equally satisfactory way. The Crown has broad discretionary powers in program areas. It is not unreasonable to expect that this discretion can give rise to a fiduciary obligation. Although this situation differs from that in either Guerin or Sparrow in that Indian-specific programs are not statutory, and in most cases, are not constitutionally protected by subsection 35(1),[91] in many other ways the character of the relationship resembles that articulated in Frame v. Smith.[92] Unlike the situation in that case, there is no comprehensive legislative scheme for maintaining accountability at law with respect to Indian programs. As one American commentator observes:

> [O]nce the government has assumed responsibilities in Indian affairs, those responsibilities can define the scope of its trust duties. Once having undertaken control in specific areas of Indian affairs, the government should be held to the high standard of care appropriate to its fiduciary relationship with Indians. Logic and fairness both suggest that the government should be responsible to the extent of fiduciary responsibility actually assumed.[93]

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[91] It is possible that some of them, like education and health care, may be treaty rights.

[92] Supra, note 79.

[93] K.T. Ellwanger, "Money Damages for Breach of the Federal-Indian Trust Relationship After Mitchell II", (1984) 59 Wash. L. Rev. 675, at 686.

The fiduciary duty may go even further. A fiduciary's duty, like that of a trustee, is to advance the interests of the beneficiary.[94] Therefore, its existence may make it possible for Aboriginal groups to argue that the federal government is required to implement programs to ameliorate untenable conditions that exist among them. For example, allowing the poor health status of a group of Aboriginal people to go unaddressed may place the government in breach of its fiduciary duty, and give the affected Native people a remedy.

Weinrib states that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion".[95] This certainly describes the relationship between the federal Crown and Aboriginal people in Canada.

3.3.4 To Whom Is the Duty Owed?

At issue in Guerin was the Crown's dealings with reserve lands. Given Mr. Justice Dickson's finding that the fiduciary duty, while rooted in aboriginal title, required the statutory scheme that applies only to status Indians to blossom into full existence, it may appear that the Guerin-type fiduciary duties would not apply to other groups of Aboriginal people. The better

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[94] In Sparrow, supra, note 2, at 1108, the Court described the relationship between the Crown and Aboriginal people as "trust-like rather than adversarial".

[95] Weinrib, supra, note 75, at 7.

view, however, is that the Crown owes the duty to all Aboriginal people because of its roots.

Since section 35 of the Constitution Act, 1982 expressly recognizes and affirms the Aboriginal and treaty rights of the Indians, Inuit and the Métis, it is clear that the fiduciary duty that the court in Sparrow imported into that section is owed to all three groups. In that case, the Court stated:

> [T]he Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.[96]

Given the opinion I expressed earlier about the bases of the special relationship that exists between the federal Crown and the Native people in Canada, and my view that this gives rise to a fiduciary duty that encompasses the full panoply of Crown-Aboriginal relations, it will come as no surprise that I consider that this duty is owed to **all** Aboriginal people - status and non-status Indians, Inuit, and Métis. This is consistent with the federal government's view:

> Although Guerin was a case about status Indians, there is no reason in principle why fiduciary obligations of that type could not be owed to any group of aboriginal people, be they status or non-status Indians, Inuit or Metis. In our view, the Crown will be held to strict standards of fiduciary conduct whenever the elements of such an obligation...are in place.
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> In the case of s.35 it is equally clear that the constitutional protection is extended to all aboriginal people. Fiduciary obligations arising under s.35 may

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[96] Ibid., at 1108.

therefore be owed to any of these groups, provided they can establish a particular aboriginal or treaty right.[97]

3.4 The Provincial Fiduciary Duty

Bartlett suggests that Guerin declares the Crown in right of the Province incurs liability for the implementation of a surrender. Further:

> It is suggested that the Crown in right of Canada **and** in right of the Province may both be liable for breach of the fiduciary obligation in the event of the non-fulfilment of conditions attached to a surrender. Liability vests, of course, in the Crown, **not** merely the Crown in right of Canada or Crown in right of the Province. The liability of the Crown in right of Canada arises per se from the non-fulfilment of the conditions attached to the surrender in spite of the assurances and promises made by the Crown in right of the Province arises upon its failure to perform its fiduciary obligation, by ensuring that the conditions of surrender are met.[98]

The federal Department of Justice is also of the view that there is a provincial fiduciary duty:

> The question arises as to whether provincial governments are also impressed with fiduciary obligations toward aboriginal people. There seems to be no reason that the logic of the Guerin and Sparrow judgments not be applied to provincial as well as federal governments, although the jurisprudence on the issue of provincial responsibility for aboriginal people is rather limited. In practice, it will usually be the federal government that has Guerin-type fiduciary obligations to status Indians, since it is with respect to this group that Parliament exercises greatest control through the Indian Act. However, where a provincial government has an obligation to act on behalf of, for example, a non-status

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[97] Department of Justice, supra, note 88, at 16.

[98] Richard Bartlett, "You Can't Trust the Crown: The Fiduciary Obligation of the Crown to the Indians: Guerin v. The Queen" (1984-85) 49 Sask. L.R. 367, at 374, emphasis in the original.

> Indians or Metis group, coupled with the discretion to affect their legal interests, and the group is vulnerable to the exercise of that discretion, the provincial government would likely be held to strict standards of fiduciary conduct.
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> Similarly, to the extent that provincial government action is capable of infringing the exercise of s.35 rights, it seems reasonable to expect that these governments should be subject to the same obligations as is the federal government. Many aboriginal and treaty rights exist over provincial Crown lands, and the exercise of these rights may be significantly affected by provincial government activity.[99]

In Sparrow, there is ample language to support the assertion of a provincial fiduciary relationship. The Court observes:

> It is clear, then, that s.35(1) of the Constitution Act, 1982 represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights.... Section 35(1) at the least, provides a solid constitutional base upon which subsequent negotiations can take place. **It also affords aboriginal peoples constitutional protection against provincial legislative power.**[100]

And further:

> [W]e find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power.[101]

And finally:

> Section 35(1) suggests that while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective.... By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are

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[99] Department of Justice, supra, note 88, at 17.

[100] Ibid., at 1105, emphasis added.

[101] Ibid., at 1109.

> affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be obtained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.[102]

In Delgamuukw v. British Columbia,[103] the plaintiffs were 35 hereditary chiefs of a group claiming ownership of, and the right to govern, an area covering approximately 22,000 square miles of land in northwest British Columbia. The plaintiffs admitted the underlying title of the provincial Crown, but asserted that the Crown title was burdened by the obligation to them and that the Chiefs had the right to govern the land. Chief Justice McEachern noted that both in colonial and provincial times, the Indians of British Columbia were permitted to use vacant Crown lands for lawful purpose, "subject to the general law, so long as such lands were not dedicated to an adverse purpose".[104] This permission was characterized as a "valuable right".[105]

Following a determination that aboriginal rights had been extinguished in the Province before it joined Confederation, and after discussion of the fiduciary obligation in the Guerin decision, McEachern C.J. stated:

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[102] Ibid., at 1110.

[103] Delgamuukw et al. v. The Queen in right of British Columbia et al. (1991), 79 D.L.R. (4th) 185 (B.C.S.C.).

[104] Ibid., at 479.

[105] Ibid.

> It is often dangerous to apply principles found in one case to the facts of a different case, but there are similarities between Guerin and this case. In both cases the Indians had a legal right, both with their roots in aboriginal rights. In both cases they lost that right, in Guerin by surrender, and in this case by extinguishment. In the former, the court imposed a fiduciary duty upon the Crown; in this case the Crown promised the Indians they could use the land of the colony and province for aboriginal purposes until it was required for other purposes. Keeping in mind the general obligation of the Crown towards Indians, and that "the categories of fiduciary, like those of negligence should not be considered closed" (Guerin, p.341), it is my view that a unilateral extinguishment of a legal right, accompanied by a promise, can hardly be less effective than a surrender as the basis for a fiduciary obligation....
>
> The Crown's obligation, in my judgment, is to permit aboriginal people, but subject to the general law of the province, to use any unoccupied or vacant Crown land for subsistence purposes until such time as the land is dedicated to another purpose. The Crown would breach its fiduciary duty if it sought arbitrarily to limit aboriginal use of vacant Crown land.[106]

It is clear, then, that the provincial Crown has a fiduciary duty to Aboriginal people. In this case, it is based on extinguishment of a legal right - aboriginal title - and permission to use unoccupied Crown land, the title to which is vested in the Crown in right of British Columbia.

What is not clear is the scope of the provincial fiduciary duty. Is it as broad as that of the federal government? Does it extend to all aspects of provincial-Aboriginal relations? As I indicated earlier, the basis for my proposition that the federal duty is broad enough to cover all aspects of the federal-Aboriginal relationship is, for the most part, the special relationship

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[106] Ibid., at 481-2.

between the two. Some components of that relationship, in particular, the assimilation policy and the early treaties, pre-date Confederation and could, therefore, be seen as devolving to an undivided Crown in 1867, rather than only to the Crown in right of Canada. On the other hand, many aspects of the special relationship, like the post-Confederation treaties, subsection 91(24), and intervention into all aspects of Indian life, apply only to the federal government.[107] However, there appears to be no reason to limit the provincial fiduciary duty to Crown land and its use by Aboriginal people as in the Delgamuukw case, and to the exercise of legislative power that would infringe the aboriginal and treaty rights protected by section 35 of the Constitution Act, 1982. As Slattery states:

> The Crown's general fiduciary duty binds both the federal Crown and the various provincial Crowns within the limits of their respective jurisdictions. The federal Crown has primary responsibility toward native peoples under section 91(24) of the Constitution Act, 1867, and thus bears the main burden of the fiduciary trust. But insofar as provincial Crowns have the power to affect native peoples, they also share in the trust.[108]

Since it has the same source and character as the federal duty, it is submitted that the fiduciary obligation attaches to the

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[107] The Department of Justice, supra, note 88, at 18, writes:

> While it is the federal government that, historically, has most often had special relations with aboriginal people, certain provinces have also had special relations with them (for example, through treaties in Ontario and Quebec, or by statute and agreement with regard to the Metis in Alberta).

[108] Brian Slattery, "Understanding Aboriginal Rights", (1987) 66 Can. Bar Rev. 727, at 755.

provincial Crown in its dealings with Aboriginal People in the same way it does to the federal Crown.

3.5 Jurisdictional Effect

Does the existence of the fiduciary duty affect jurisdiction for Aboriginal health? As with the spending and treaty-making powers, it is unlikely that any court would find that the existence of this duty disturbed the constitutional distribution of exclusive legislative jurisdiction set out in sections 91 and 92 of the Constitution Act, 1867. However, the fiduciary duty could be a factor weighing in favour of federal jurisdiction over a matter. This may be especially true with respect to Aboriginal health jurisdiction because, as seen in Chapter 4, the courts have already identified public health as a matter over which both the federal and provincial governments have jurisdiction in some situations.

Before the fiduciary relationship can assist in this way, it must be found to exist in the particular circumstances. In this case, it could flow from the provision of health services by the federal government to status Indians and Inuit. If health care is a treaty right, protected by section 35 of the Constitution Act, 1982, then the fiduciary obligation would attach and, jurisdiction for Aboriginal health may follow. On the other hand, since, as Mr. Justice Dickson pointed out in Guerin,[109] the government's fiduciary obligation is trust-like, it could flow from an

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[109] Supra, note 2, at 386.

obligation to act in the best interests of the beneficiary. In essence, this means that the courts would have to find a general fiduciary duty. I am convinced that it exists, but whether or not the courts will agree is another matter. There are indications they will not. In 1988, Apsassin was decided. The Court said:

> The Indian Act was passed pursuant to the exclusive jurisdiction to do so granted to the Parliament of Canada by section 91(24) of the Constitution Act, 1867. This does not carry with it the legal **obligation** to legislate or to carry out programs for the benefit of indians [sic] anymore [sic] than the existence of various disadvantaged groups in society creates a general legally enforceable duty on the part of governments to care for those groups although there is a course of moral and political duty to do so in a democratic society where the welfare of the individual is regarded as paramount.[110]

This case was decided before Sparrow broadened the fiduciary obligation from dealings with land to section 35 rights. In more recent cases, the courts have applied the reasoning in Guerin and Sparrow to find the existence of a fiduciary obligation owed by the Crown to the Aboriginal People involved, but mainly in analogous situations.[111] However, the judgment in the 1990 case of Bruno v. Canada (Minister of Indian Affairs and Northern Development,[112] appears to suggest that Parliament may be compelled to legislate in order to adequately discharge the Crown's fiduciary obligation. In that case, Strayer J. stated:

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[110] Apsassin v. The Queen in Right of Canada, [1988] 1 C.N.L.R. 73 (F.C.T.D.), at 93, emphasis in the original.

[111] See R. v. McIntyre, [1991] 1 W.W.R. 548 (Sask. Prov. Ct.); Lower Kootenay Indian Band v. Canada (1991), 42 F.T.R. 241; and Delgamuukw et al. v. The Queen in right of British Columbia et al., supra, note 103.

[112] [1991] 2 C.N.L.R. 22.

> The second issue to be addressed...is that of whether the government can in any context be liable for a failure to legislate. The defendant relies mainly on the general principle that the failure to pass regulations cannot be the subject of an action and it is not open to a court to say that there should have been regulations and award damages for failure to adopt them.[113] The basis for this principle is, I take it, that legislatures and those having delegated legislative powers have the discretion to adopt or not adopt laws and that it is not for the courts to second-guess them. This excellent principle, while no doubt generally sound, may some times have to give way in light of the decision in the Guerin case.... Accepting, then, that normally neither Parliament nor those exercising delegated legislative powers have a legal obligation to legislate, here in this sui generis relationship, as the Supreme Court called it, the Governor in Council at least may be in a different position.[114]

From this language, it appears that, since the existence of a fiduciary duty has been clearly established in law, the possibility exists that the courts will expand it to cover new areas of Crown-Aboriginal relations.

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[113] Kwong et al. v. Her Majesty the Queen et al., [1979] 2 W.W.R. 1 (Alta. C.A.), confirmed by [1979] 2 S.C.R. 1010.

[114] Supra, note 112, at 28-29.

CHAPTER 8

CONCLUSION

Determining which level of government has legislative jurisdiction for Aboriginal health is difficult. On one hand, there is the attitude of the courts toward the validity of "Indian" legislation. As was seen in Chapter 5, when subsection 91(24) powers are at issue, the courts have not always conducted the "pith and substance" identification with vigour and, there are no examples of federal Indian legislation being declared unconstitutional. Alternatively, there is the apparently ever expanding applicability of provincial legislation to "Indians, and Lands reserved for the Indians". The concern expressed by Hughes[1] that the courts would apply the principles she identified in such a way as to seriously limit the applicability of provincial laws to Indians did not materialize. Rather, the decisions in Dick[2] and Francis[3] illustrate how far the courts have gone in the other direction.

After considering the countervailing factors, I have come to the conclusion that jurisdiction for Aboriginal health does not rest exclusively with either level of government. Rather, it is a double aspect matter, with the provinces having exclusive

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[1] Patricia Hughes, "Indians and Lands Reserved For the Indians: Off Limits to the Provinces?" (1983) 21 Osgoode Hall L.J. 82. See the discussion at 95-99 of this thesis.

[2] (1985), 23 D.L.R. (4th) 33 (S.C.C.).

[3] [1988] 1 S.C.R. 1025.

jurisdiction over some aspects of health while the federal and provincial legislatures have concurrent jurisdiction over others.

The provinces have exclusive jurisdiction over control of health disciplines and treatment services, including the practice of medicine by Aboriginal people.[4] Provincial authority over these things comes from subsection 92(13) of the Constitution Act, 1867, "Property and Civil Rights in the Province",[5] and subsection 92(16), "Generally all Matters of a merely local or private Nature in the Province".[6] Laws regulating the practice of modern medicine, in pith and substance in relation to health, are laws of general application and apply to Aboriginal people of their own force and effect. Since they do not impair "Indianness", they do not rely on section 88 of the Indian Act to make them applicable to Indians and are not, therefore, subject to the exceptions contained in that section.

This raises an interesting question with respect to traditional healers. If, for some reason, it ever became desirable, or necessary, to regulate the practice of traditional medicine, which level of government would have jurisdiction? On one hand, there is still the provincial power over health. On the other, traditional healing certainly has an "Indianness" factor.

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[4] R. v. Hill, (1907), 15 D.L.R. 406 (Ont. C.A.), but see the discussion of this case in Chapter 6, note 1.

[5] Peter Hogg, Constitutional Law of Canada, 2nd ed., 1985, at 124.

[6] Schneider v. the Queen, [1982] 2 S.C.R. 112.

Another consideration might be the need for national as opposed to regional regulation of the practice of traditional healing.

It is also possible that the fiduciary relationship between the Crown and Aboriginal people attaches to it, that the practice of traditional medicine falls within the bundle of existing aboriginal and treaty rights protected by section 35 of the Constitution Act, 1982, and is not, therefore, amenable to government regulation except with justification.[7]

Another area of exclusive provincial jurisdiction is the "Establishment, Maintenance, and Management of Hospitals" (subsection 92(7)). Legislation that is, in pith and substance, in relation to hospitals would be intra vires the provincial governments. It should apply equally, of its own force and effect, to an Aboriginal facility.[8] Since the Medical Services Branch of Health and Welfare Canada is currently involved in transferring management of some of its hospitals to tribal councils and other Aboriginal groups, to be run by local hospital boards, this is an important consideration. However, as we saw in the labour relations cases, particularly Qu'Appelle Indian Residential School Council v. Canada,[9] the courts have frequently found activities that would normally fall within provincial jurisdiction to come

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[7] Per Sparrow v. The Queen, [1990] 1 S.C.R. 1075.

[8] For example, An Act to Ratify the Agreement Concerning the Building and Operation of a Hospital in the Kahnawake Territory, S. Q. 1984, c. 13.

[9] [1988] 2 F.C. 226.

within federal competency when a Band Council is involved, when there is federal funding, or when there is a cultural component.

In order to determine the level of funding from provincial health insurance plans, facilities must meet certain criteria regarding, among other things, the types and mix of services offered, number of beds and their designation (i.e. acute or chronic care), and utilization rates. Federal Indian hospitals are subject to these regulations too, and will continue to be following transfer. They receive payments from the provincial and territorial health insurance plans in respect of the services they deliver, which go into the Consolidated Revenue Fund. In passing, it is interesting to note that most federal hospitals do not fully meet the provincial criteria and so receive a much lower per diem rate than the maximum. The exception is the Fort Qu'Appelle Hospital in Saskatchewan.

In A.G. Canada v. A.G. Ontario,[10] the Privy Council held that the right to control a contributory insurance scheme, in that case, unemployment insurance, fell within provincial legislative competence through the power over property and civil rights within the province (subsection 92(13)), such that a constitutional amendment was necessary for the federal unemployment insurance plan. Therefore, the provinces have exclusive legislative competence over the health insurance plans that are in place in each province as part of universal medicare. However, the federal government initiated medicare, makes a sizeable contribution toward

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[10] [1937] A.C. 355.

it under the Federal-Provincial Fiscal Arrangements and Established Programs Financing Act[11] (EPF), and through the Canada Health Act[12], has legislated most of the important terms of the plan, including what and who is covered by them.

The Act creates the hospital and medical insurance plan and defines who is an "insured person". Explicitly excluded from the definition are inmates in federal penitentiaries, members of the Armed Forces, and members of the Royal Canadian Mounted Police. All other residents of the province are covered, subject to certain requirements. The provinces receive per capita funding from the federal government under EPF, and Aboriginal people are included in the population figures used to determine the total amount payable. They are subject to the provincial rules and regulations with respect to coverage by the plans.

In recent years, some Tribal and Band Councils[13] have suggested to the federal government that Indians should be removed from the definition of "insured person" under the Canada Health Act, and that First Nations receive directly the per capita amount for health that is currently paid to the provinces and territories under EPF so that they can provide health services to their members, or alternatively, that the federal government keep the

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[11] R.S.C. 1985, c. F-8.

[12] R.S.C. 1985, c. C-6.

[13] For example, the Dakota-Ojibway Tribal Council, the Swampy Cree Tribal Council, and the Long Plain Band Council.

money and provide and regulate all health services for Indian people in Canada, whether they are on or off-reserve.

Although the federal government could probably remove Aboriginal people from the definition of "insured person" under the Act, it does not follow that it could regulate all health services. It could certainly provide them, but they would be subject to regulation by the provincial governments.

It is my opinion that the goal of some Aboriginal people to be removed from the operation of the Canada Health Act is misguided. If the federal government amended the Act to exclude them, they would no longer have access to the health care system that benefits from the substantial contribution by the provincial governments. As the federal government is for the RCMP, the Armed Forces and inmates in penitentiaries, First Nations that opted out of medicare would be responsible for the full cost of all health and hospital care for their people, a very costly proposition. The per capita amount paid for health care under EPF is very low ($539.49 in 1991/92, made up of $226.60 in cash grant and $312.89 in tax point transfer). This represents only a small portion of the cost of health service, with the rest coming from the provinces and territories.[14] Also, the other advantages of the medicare scheme -

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[14] The Department of National Defence (DND) provides health services to members of the Armed Forces using military hospitals and health professionals. In areas where there are no DND facilities, or for specialized treatment, personnel are treated at general hospitals and DND pays the full cost of the service. Inmates in federal correctional facilities are treated by physicians and nurses that are hired by Correctional Services Canada either as employees or on contract. For specialized treatment, inmates are escorted out of the facility to visit health

universality, portability, comprehensiveness, and accessibility - would be lost.

It is in the area of public health that the federal government has some jurisdiction as do the provinces. In Schneider[15], Estey J. described health as "an amorphous topic which can be addressed by valid federal and provincial legislation, depending in the circumstances of each case on the nature and scope of the health problem in question".[16] For the majority, Mr. Justice Dickson wrote:

> This view that the general jurisdiction over health matters is provincial (allowing for a limited federal jurisdiction either ancillary to the express heads of power in s.91 or the emergency power under peace, order and good government) has prevailed and is not now seriously questioned.[17]

Mr. Justice Estey gave examples of heads of power that raised health concerns: subsection 91(11), "Quarantine and the Establishment and Maintenance of Marine Hospitals; 91(7), "Militia, Military and Naval Service, and Defence"; and 91(2), "The Regulation of Trade and Commerce".[18] Although section 91(24) is

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professionals and general hospitals. Correctional Services pays the full cost of the services. However, members of the RCMP receive all health services from the same physicians and hospitals that serve the general population in the area where they live. The RCMP pays the full cost of the services directly to the service provider. In all cases, this is considerably more expensive than coverage by the provincial health insurance plan would be.

15 [1982] 2 S.C.R. 112.

16 Ibid., at 142.

17 Ibid., at 137.

18 Ibid., at 142.

not among those mentioned, it is submitted that it is not unreasonable to suggest that it, too, is a head of power where federal jurisdiction over public health is ancillary. It is submitted that "health concerns are directly raised by the jurisdiction attributed to Parliament" by subsection 91(24) in the same way they are by the heads of power mentioned by Mr. Justice Estey.[19] The connection may be even stronger because one of the powers in that subsection relates to people.

Support for federal jurisdiction for Aboriginal public health can be found in the case law relating to health,[20] in the reasoning found in the labour relations cases,[21] and from the apparent willingness of the courts to allow the federal government to define the scope of its jurisdiction over "Indians, and Land reserved for the Indians".[22] I do not believe, however, that the courts would extend this policy so far as to give validity to federal legislation that impinged on the areas I have identified as coming within exclusive provincial jurisdiction. I base this conclusion on the judgment of Mr. Justice Beetz in Four B. Manufacturing.[23] He stated:

> [N]either Indian status is at stake nor rights so closely connected with Indian status that they should be regarded as necessary incidents of status such for instance as

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19 Ibid.

20 See Chapter 4.

21 See Chapter 6.

22 See Chapter 5.

23 (1979), 102 D.L.R. (3d) 385.

> registrability, membership in a band, the right to participate in the election of chiefs and band councils, reserve privileges, etc. For this reason, I have reached the conclusion that the power to regulate the labour relations in issue does not form an integral part of primary federal jurisdiction over Indians or lands reserved for the Indians.[24]

Given the conclusion I have come to that the federal government has concurrent jurisdiction for Aboriginal public health, it follows that the Indian Act delegation of power to the council of a Band to make by-laws "to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases" (paragraph 81(1)(a)) is intra vires the federal government. It means that the delegation of regulatory power to the Governor and Council "to prevent, mitigate and control the spread of diseases on reserves, whether or not the diseases are infectious or communicable" (73(1)(f)) and "to provide compulsory hospitalization and treatment for infectious disease among Indians" (73(1)(h)) are also intra vires.

More uncertain is the validity of paragraph 73(1)(g) of the Indian Act that delegates to the Governor in Council the power to make regulations "to provide medical treatment and health services for Indians", paragraph 14(1)(i) of the Sechelt Indian Band Self-

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[24] Ibid., at 397. It appears that to Mr. Justice Beetz, "Indianness" is synonymous with the "necessary incidents" of status, i.e. registrability, membership in a band, the right to participate in the election of chiefs and band councils, etc. It is submitted that the better view is that "Indianness" includes not only those things but existing aboriginal and treaty rights that are protected by section 35 of the Constitution Act, 1982, and incidents of aboriginal culture, i.e. language, traditions, customs, etcetera.

Government Act[25] that gives the Sechelt Indian Band Council the power to make laws in relation to "health services on Sechelt lands", and paragraph 43(1)(c) of the Cree Naskapi (of Quebec) Act[26] that gives the band council the power to make by-laws respecting "health and hygiene".[27] With respect to the Indian Act delegation, it is probably ultra vires the federal government because jurisdiction over these matters lies exclusively with the provinces. It may be possible for the Governor in Council to make regulations purely for the administration of medical treatment and health services that are provided to status Indians, but even that seems unlikely. However, if a regulation was passed with respect to public health services, then the federal government would have jurisdiction. With respect to the delegations in the other Acts, the delegations themselves may be intra vires the federal government since they do not specifically mention medical treatment, but it is submitted that if legislation passed pursuant to the delegated powers provided by the Acts dealt with anything other than public health, it would be ultra vires.

A finding that the federal government has exclusive jurisdiction for the public health of Aboriginal people would

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[25] S.C. 1986, C. 27.

[26] S.C. 1984, c. 18.

[27] "Health and hygiene" includes, inter alia, "the sanitary condition of public and private property" (clause 45(1)(a)(ii)), and "the control or prohibition of activities or undertakings that constitute a danger to public health" (clause 45(1)(a)(iii)). Most of the things that are listed relate to public health, but the general power appears to be much broader.

create a vacuum with respect to the Inuit, Métis and non-status Indians, since the federal government has only exercised this jurisdiction with respect to status Indians. Section 88 of the Indian Act would be of no assistance because it applies only to Indians as defined by the Act. However, unlike labour relations, there is no exclusive sphere of federal jurisdiction with respect to Aboriginal public health. It is clear from Schneider that the federal and provincial legislatures have concurrent jurisdiction with respect to public health in some areas. Since general jurisdiction over health matters is provincial, provincial public health laws will apply to Aboriginal people of their own force and effect with the doctrine of paramountcy applying to allow federal enactments to prevail over provincial legislation to the extent of any express inconsistency between them. Since Band by-laws are part of the federal legislative scheme, they would oust inconsistent provincial public health laws on-reserve. The same would be true of public health legislation passed under the Sechelt and Cree Naskapi Acts.

Since provincial public health legislation applies to Aboriginal people of its own force and effect, then it does not need the assistance of section 88 of the Indian Act to apply to status Indians, and therefore, is not subject to the exceptions set out in that section. However, the effect of the doctrine of paramountcy and the constitutional protection of treaty rights mean that legislation that applies of its own force and effect has an impact that is not much greater than laws that are referentially

incorporated by section 88. One important difference is that provincial laws that apply by virtue of section 88 are inapplicable to Indians if they "make provision for any matter for which provision is made by or under" the Indian Act while provincial laws that apply of their own force and effect are ousted by the doctrine of paramountcy only to the extent of any express inconsistency.

Although the courts have long held that Parliament cannot be forced to exercise its jurisdiction, it is possible that the fiduciary duty that the federal government owes Aboriginal people could be used as a lever, particularly if failure to take jurisdiction has placed them in jeopardy.

In closing, I think it is appropriate to reiterate that, in this thesis, jurisdiction for Aboriginal health is considered only as between the federal and provincial governments. It leaves unaddressed the possibility that Aboriginal people may themselves have jurisdiction as an aspect of the inherent right to self-government that they assert is embodied in section 35 of the Constitution Act, 1982.

APPENDIX I

GOVERNMENT OF CANADA

INDIAN HEALTH POLICY

The following statement represents current Federal Government practice and policy in the field of Indian health. It differs from the Indian Health Policy statement of November 1974 in that it emphasizes issues which the Federal Government considers to be of greatest significance in the immediate future. Studies relating to Indian Health Policy and practice are being undertaken by the National Indian Brotherhood and some provincial Indian associations, studies which National Health and Welfare supports. The Federal Government is committed to joining with Indian representatives in a fundamental review of issues involved in Indian health when Indian representatives have developed their position, and the policy emerging from the review could supersede this policy. As an indication of good faith, the Federal Government has withdrawn the Guidelines for the Provision of Uninsured Health Benefits to Indian and Inuit people of September 1978, which will be replaced by professional medical or dental judgement, or by other fair and comparable Canadian Standards.

The Federal Indian Health Policy is based on the special relationship of the Indian people to the Federal Government, a relationship which both the Indian people and the Government are committed to preserving. It recognizes the circumstances under which many Indian communities exist, which have placed Indian people at a grave disadvantage compared to most other Canadians in terms of health, as in other ways.

Policy for federal programs for Indian people, (of which the health policy is an aspect), flows from constitutional and statutory provisions, treaties, and customary practice. It also flows from the commitment of Indian people to preserve and enhance their culture and traditions. It recognizes the intolerable conditions of poverty and community decline which affect many Indians, and seeks a framework in which Indian communities can remedy these conditions. The Federal Government recognizes its legal and traditional responsibilities to Indians, and seeks to promote the ability of Indian communities to pursue their aspirations within the framework of Canadian institutions.

The Federal Government's Indian Health Policy reflects these features in its approach to programs for Indian people. The over-riding fact from which the policy stems is the intolerably low level of health of many Indian people, who exist under conditions rooted in poverty and community decline. The Federal Government realizes that only Indian communities themselves can change these root causes and that to do so will require the wholehearted support of the larger Canadian community.

Hence, the goal of Federal Indian Health Policy is to achieve an increasing level of health in Indian communities, generated and maintained by the Indian communities themselves.

The increasing level of health in Indian communities must be built on three pillars. The first, and most significant, is community development, both socio-economic development and cultural and spiritual development, to remove the conditions of poverty and apathy which prevent the members of the community from achieving a state of physical, mental and social well-being.

The second pillar is the traditional relationship of the Indian people to the Federal Government, in which the Federal Government serves as advocate of the interests of Indian communities to the larger Canadian society and its institutions, and promotes the capacity of Indian communities to achieve their aspirations. This relationship must be strengthened by opening up communication with the Indian people and by encouraging their greater involvement in the planning, budgeting and delivery of health programs.

The third pillar is the Canadian health system. This system is one of specialized and interrelated elements, which may be the responsibility of federal, provincial or municipal governments, Indian bands, or the private sector. But these divisions are superficial in the light of the health system as a whole. The most significant federal roles in this interdependent system are in public health activities on reserves, health promotion, and the detection and mitigation of hazards to health in the acute and chronic disease and in the rehabilitation of the sick. Indian communities have a significant role to play in health promotion, and in the adaptation of health services delivery to the specific needs of their community. Of course, this does not exhaust the many complexities of the system. The Federal Government is committed to maintaining an active role in the Canadian health system as it affects Indians. It is committed to encouraging provinces to maintain their role and to filling gaps in necessary diagnostic, treatment and rehabilitative services. It is committed to promoting the capacity of Indian communities to play an active, more positive role in the health system and in decisions affecting their health.

These three pillars of community development, the traditional relationship of the Indian people to the Federal Government, and the interrelated Canadian health system provide the means to end the tragedy of Indian ill-health in Canada.

FOREWORD

This Indian and Inuit Health Benefits Manual is for the use of Medical Services Branch staff. It defines the benefits available through the Medical Services Branch (MSB) Non-Insured Health Benefits (NIHB) Program and sets out the terms and conditions for their provision.

The purpose of the manual is two-fold:

- to foster consistency in the benefits provided and in the administration of the program by communicating to MSB staff the national NIHB program framework. This is achieved through Program Directives, prepared by MSB Headquarters, which are contained in the first section; and

- to provide MSB staff with detailed instructions on how to administer NIHB in their Region, within the national framework. This is achieved through Administrative Procedures, prepared by each region, contained in the second section.

Changes to the content of the first section (Program Directives) of this manual will be issued by the Director, NIHB, at MSB Headquarters, after approval by the Branch Executive Committee. Any questions concerning this section should be addressed to the Director, NIHB.

Any questions concerning section two (Administrative Procedures) should be sent to the appropriate Regional Director.

The Indian and Inuit Health Benefits Manual is an important milestone towards our goal of improving the administration of the NIHB program and services to our clients. I look for the cooperation of Medical Services Branch staff in using the manual to help us achieve this goal.

Assistant Deputy Minister
Medical Services Branch

March 1990

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MEDICAL SERVICES BRANCH

PROGRAM DIRECTIVES

PROGRAM DIRECTIVE

THE MEDICAL SERVICES BRANCH (MSB) NON-INSURED HEALTH BENEFITS (NIHB) PROGRAM

1.1.1 PURPOSE

PURPOSE

The purpose of this program directive is to define Non-Insured Health Benefits (NIHB), the principles of the MSB NIHB program and foster program uniformity throughout Canada.

1.1.2 DEFINITION OF NIHB

DEFINITION OF NON-INSURED HEALTH BENEFITS

1. MSB provides or arranges for the provision of non-insured health benefits (NIHB) for eligible beneficiaries who require medical services for the purposes of maintaining health, preventing disease, diagnosing or treating an illness, injury or disability.

2. NIHB are a limited number of health related goods and services not provided to Inuit and Registered Indians by other agencies.

3. NIHB currently include the following:

   (a) prescription drugs, medical supplies and equipment;

   (b) medical transportation;

   (c) optometric services and eyeglasses;

   (d) dental care;

   (e) health insurance premiums and co-insurance fees.

1.1.3 PRINCIPLES OF THE NIHB PROGRAM

PRINCIPLES

All Canadians are eligible to receive a variety of health services from the Canadian Health System, for example, universally insured hospital and physician services.

The principles of the NIHB program are:

ASSISTANCE WITH ACCESS TO HEALTH BENEFITS

1. MSB will assist Inuit and registered Indians to access health services from other providers.

EXCLUSIONS

2. MSB will not provide or pay for health services for Inuit and registered Indians when they are provided to provincial or territorial residents under provincial or territorial health plans or other programs.

3. NIHB are provided on the basis of professional medical or dental judgement or on the basis of other fair and comparable provincial health services. **MEDICAL JUDGEMENT**

4. To be eligible to receive NIHB, a person must: **ELIGIBILITY**

   (a) be a registered Indian according to the Indian Act or be an Inuit recognized as such by the Department of Indian and Northern Affairs and;

   (b) be currently registered or eligible for registration, under a provincial or territorial health insurance plan.

5. Changes to the current benefits as described in section 1.1.2 (3) require the prior approval of the Director, Non-Insured Health Benefits, Medical Services Branch, Headquarters. **BENEFIT CHANGES**

6. The NIHB Program is administered by sound management practices that ensure: **MANAGEMENT PRACTICES**

   (a) procedures are established to provide benefits only to eligible recipients;

   (b) benefits are medically necessary and are not available from other providers;

   (c) benefits are delivered in an economic, efficient manner in accordance with the terms and conditions of the NIHB program; and

   (d) the program and financial audits are conducted on a regular basis.

PROGRAM DIRECTIVE

1/2

VISION CARE

1.2.1 PURPOSE

PURPOSE

The purpose of this directive is to assist clients to obtain vision care goods and services.

1.2.2 BENEFITS

BENEFITS

1. Lenses and frames.
2. Contact lenses (includes lens maintenance supplies).
3. Repairs to frames.
4. For monocular clients only, sports frame with polycarbonate lenses or other safety lenses.
5. Eye prosthesis as specified in Directive 1/5 (includes ongoing maintenance).
6. High index lenses.

1.2.3 NON BENEFITS

NON BENEFITS

The following are some of the vision care benefits which MSB will not provide:

1. Provincially insured or other third party insured vision care goods and services.
2. Sports frame with polycarbonate lens (except as specified above).
3. Tinted lenses for cosmetic purposes.
4. Safety glasses for occupational purposes.
5. Progressive (graduated) lenses.
6. Two pairs of glasses instead of bifocals unless an unsuccessful trial of bifocals has been attempted or is contraindicated for facial or ocular motility reasons.
7. Ultraviolet coating.

1.2.4 ASSISTANCE CRITERIA

ASSISTANCE CRITERIA

MSB will assist in paying for some or all of the non-insured vision care benefits described in section 1.2.2, in accordance with the NIHB Program principles, which include prior approval for all benefits, and on the following terms and conditions:

NOTE: The criteria for prior approval is subject to possible variation when the Claims Processing System (CPS) for Vision Care is implemented.

1. Eyeglasses

EYEGLASSES

(a) Initial Eyeglasses

MSB will assist in the provision of frames and lenses for clients, according to the terms and rates of regional payment schedules, if the lenses will provide a correction in vision, defined as a change in the spherical equivalent of the refractive error of at least plus or minus 0.5 diopters. This correction must be substantiated by a written prescription issued by an ophthalmologist or optometrist.

High index lenses will be provided if necessary to correct a refractive error with a total power in any meridian of at least plus or minus 7.00 diopters.

(b) Repairs to Eyeglasses

REPAIRS TO EYEGLASSES

MSB will assist in the cost of repairs to frames for clients, according to the terms and rates of regional payment schedules and according to the criteria in (i) and (ii) below:

(i) the total cost to MSB (material plus professional fees) does not exceed the cost for replacement of frames as specified within the regional payment schedule;

AND

(ii) the repairs will render the frames in an acceptable condition.

(c) Replacement Eyeglasses

REPLACEMENT EYEGLASSES

MSB will assist in the provision of replacement lenses and/or frames, according to the terms and rates of regional payment schedules, when:

(i) there is a correction in vision, defined as a change in the spherical equivalent of the refractive error of at least plus or minus 0.5 diopters;

OR

(ii) the client is 18 years old or over and 24 months have elapsed since the last lenses and/or frames have been authorized;

OR

(iii) the client is under 18 years of age and 12 months have elapsed since the last lenses and/or frames have been authorized.

2. Contact Lenses

CONTACT LENSES

MSB will assist in the provision of contact lenses for clients, according to the terms and rates of regional payment schedules, under the following conditions:

(a) Initial Contact Lenses

INITIAL CONTACT LENSES

MSB will assist in the provision of hard or soft regular wear or piggy-back contact lenses when:

prescribed by an ophthalmologist for the following medical conditions:

- aphakia (post cataract surgery)
- corneal irregularities
- astigmatism

OR

prescribed by an optometrist for the following condition:

- astigmatism which is inadequately corrected by glasses

For those requiring contact lenses, back-up eyeglasses are a benefit and should be provided according to the terms and rates of regional payment schedules for initial eyeglasses.

(b) Replacement Contact Lenses

REPLACEMENT CONTACT LENSES

MSB will assist n the replacement of contact lenses for the conditions noted in (a), according to the terms and rates of regional payment schedules, when there is a written prescription from an ophthalmologist or optometrist, and the rationale for replacement is documented in the request for prior approval.

1.2.5 MANAGEMENT PRACTICES

MANAGEMENT PRACTICES

The administration of vision care benefits is governed by the following management practices:

1. Where MSB brings health professionals into an area under contractual arrangements or where MSB is in a position to control access to services, basic vision screening should be conducted and further eye examinations provided only for those individuals, determined by the screening or by reported symptoms, to require examination.

2. The terms and rates of the Regional payment schedules are established with reference to equivalent provincial government rates and where possible through negotiation with provincial provider associations.

3. Negotiation about costs with the suppliers of frames and corrective lenses is undertaken at the regional level in view of the large volume of these products required by MSB.

4. MSB regions should ensure that vision care providers are aware of MSB'S terms and conditions, including client identification criteria, and should request that they advise their clients of these terms and conditons.

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PROGRAM DIRECTIVE

1/3

MEDICAL TRANSPORTATION

1.3.1 PURPOSE

PURPOSE

The purpose of medical transportation benefits is to assist beneficiaries to access medically required services.

1.3.2 BENEFITS

BENEFITS

1. MSB will assist by paying some or all of the expenses of a beneficiary to travel return to the nearest appropriate health facility, using the most efficient and economical method of transportation, consistent with the beneficiary's health condition.

2. Transportation to access health services that cannot be obtained in the beneficiary's home community.

3. Emergency transportation for non-elective medical care.

4. Transportation for an escort required for medical or legal reasons.

5. Meals and accommodation while in transit for health care services.

1.3.3 NON BENEFITS

NON BENEFITS

MSB will not assist in the provision of medical transportation in the following circumstances including, but not limited to:

1. Transportation on-reserve or in-community; Discretion should be used to ensure clients are not denied access to health services and that if assistance is provided, it should be for available scheduled transportation to the nearest, appropriate health facility. If this is not available, Regions should arrange it;

2. Transportation for compassionate travel;

3. Transportation to return to the home community of the beneficiary, if the beneficiary has discharged himself/herself from a health services program, against medical advice before the completion of the treatment course.

1.3.4 ASSISTANCE CRITERIA

ASSISTANCE WITH COSTS

MSB will assist in the provision of medical transportation, in accordance with the NIHB Program principles and on the following terms and conditions:

1. General Medical Transportation

   (a) The medical transportation is pre-authorized by an MSB designated authority. — PRE-AUTHORIZATION

   (b) The beneficiary is responsible to provide certification of receipt of diagnostic or treatment services by approved health professionals. — CERIFICATION OF SERVICES RENDERED

   (c) Where pre-authorization has not been obtained by the beneficiary, some or all medical transportation costs may be reimbursed where medical justification is provided and approved after the fact by designated MSB personnel.

2. Emergency Medical Transportation — EMERGENCY TRANSPORTATION

   MSB will assist in payment for emergency medical transportation on verification after the fact by designated MSB personnel.

3. Escorts for Beneficiaries — ESCORTS

   MSB will assist in the provision of an escort for a beneficiary in accordance with the criteria set out in section 1.3.4, sub-section 1 (a)(b)(c) and 2 and under the following conditions:

   (a) The escort is required for medical or legal reasons; and

   (b) Prior approval of the escort has been provided by the MSB designated authority.

4. Payment Schedules

   MSB will reimburse suppliers or beneficiaries for approved medical transportation provided by private vehicles, taxis or airline companies and other forms of public transportation in accordance with regionally established rates. — PAYMENT SCHEDULES

5. Meals and Accommodation — MEALS AND ACCOMMODATION

   MSB will assist in the provision of meals and accommodation for beneficiaries in accordance with Regionally established rates under the following conditions:

   (a) Regionally approved accommodation is used; and

   (b) Reimbursement will only be provided when itemized receipts for expenses incurred by the beneficiary are provided to MSB.

1.3.5 MANAGEMENT PRACTICES

MANAGEMENT PRACTICES

The administration of transportation benefits is governed by the following management practices:

1. A standard transportation warrant is used for all carriers in all MSB Regions. — STANDARD WARRANTS

2. Patient transportation is scheduled and coordinated to the nearest appropriate health facility, including transportation provided through contribution agreements or contracts. — SCHEDULING AND COORDINATION

3. Transportation, accommodation and meal costs are negotiated with providers of these services. — NEGOTIATED SERVICE RATES

4. In order to encourage the use of scheduled and/or coordinated transportation, in those situations where it is available, no private mileage will be paid unless it is more efficient and/or economical.

5. In the situation where there is no public transportation or where Medical Services Branch has no arrangements for medical transportation, private mileage can be paid at a rate not to exceed the employer-requested Treasury Board rate for the region. — PRIVATE MILEAGE RATES

6. Regions should examine the transportation alternatives for each community and take action to negotiate transportation agreements where there is no public transportation available or where it is not frequent enough to be an acceptable alternative.

7. Assistance with meal costs is not provided to eligible beneficiaries or their escorts staying in boarding homes if meals are included in the per diem boarding home rates.

8. Selected MSB staff are identified as having authority to initiate referral. Specimen signature cards for these individuals are to be kept on file in the Regional Finance Unit. — DESIGNATED AUTHORITIES FOR REFERRALS

9. Designated band authorities for referrals and accompanying signature cards are part of band administered transportation services.

PROGRAM DIRECTIVE

1/4

DENTAL SERVICES

1.4.1 PURPOSE — PURPOSE

The purpose of dental benefits is to assist eligible recipients to access dental services.

1.4.2 BENEFITS — BENEFITS

MSB will assist eligible beneficiaries with payment of some or all dental services for the Indian and Inuit population of Canada according to the attached MSB Schedule of Dental Services (Annex "A") and at rates consistent with MSB Regional payment schedules.

1.4.3 ASSISTANCE CRITERIA — ASSISTANCE

MSB will assist in payment for the above benefits for eligible beneficiaries according to Regional payment schedules when the conditions of the preamble of the Schedule of Dental Services are met and within the limits of the terms included in the Schedule.

1.4.4. MANAGEMENT PRACTICES — MANAGEMENT PRACTICES

The administration of the dental benefits is governed by the following management practices:

1. The terms of Regional payment schedules are established with reference to equivalent provincial government rates, and where possible, through agreement with professional associations or individual services providers. — PAYMENT SCHEDULES

2. Where dental services are not readily available through the offices of private practitioners, MSB will endeavour to provide dental services to eligible beneficiaries utilizing dental teams or resident dental therapists. — DENTAL TEAMS AND THERAPISTS

3. Medical Services Branch ensures that private dental practitioners are aware of Medical Services Branch assistance criteria for the provision of dental care and also of the levels of services that are available. — LIAISON WITH SERVICE PROVIDERS

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ANNEX "A"

SCHEDULE OF DENTAL SERVICES

FOR THE INDIAN AND INUIT POPULATION OF CANADA

1.0 POLICY

1. The dental services covered by this schedule are those which are routinely performed in the offices of private dental practitioners and are consistent with contemporary Canadian service delivery.

2. Private practitioners may provide to registered Indians and to Inuit people the emergency and elective dental services covered in this schedule without prior approval from MSB if they are provided within the limitations stated.

3. It is recognized that in cases where the attending dentist is reimbursed for services rendered to a patient by a third party other than Medical Services Branch (MSB) and where such reimbursement is less than the standard fee paid by MSB that the dentist may bill MSB for the difference. MSB is always the agency of last resort in all such situations.

4. Regional remuneration levels exist between the MSB and the Provincial Dental Associations, therefore, dentists should not extra bill the patient for authorized services. Where cost-shared provision for services exists within this schedule, practitioners should render accounts to patients up to the limit established within these regional agreements provided that such limit does not exceed the practitioner's customarily normal fee.

5. Dental accounts must be submitted within three months of the last date of treatment.

6. Payment by MSB for dental services will be made only where eligibility is established and it is deemed that the patient is not eligible for equivalent coverage under any other provincial or third party dental plan.

7. It will be the responsibility of the practitioner to verify that a patient is a registered Indian or Inuit and to confirm the patient's current available level of coverage (i.e. services previously paid by MSB) prior to the commencement of treatment.

8. The objective of coverage under this schedule is to permit the achievement and maintenance of sound oral health. Achievement of this objective requires the cooperation of individual patients, bands and the providers of dental care.

ANNEX "A"

2.0 SERVICES PROVIDED

The following services will be paid by MSB for eligible patients without prior approval, if they are provided within the limitations stated.

2.1 DIAGNOSTIC SERVICES

1. Complete/Extended Oral Examination

   Limited to once in any thirty-six month period.

2. Standard/Recall Examination

   Limited to a maximum of two in any twelve month period.

3. Emergency/Specific Examination

   Limited to once for any specific sextant for the problem in question.

4. Specialist's Examinations

   Limited to one examination for the problem in question. More than one Orthodontic examination must have special approval from MSB.

2.2 RADIOGRAPHS

1. Intra-oral

   MSB will fund for up to six films (periapical, occlusal and/or bitewing) in any twelve month period.

   Radiographic surveys in excess of six films will be permitted once in any sixty month period.

2. Panoramic

   Limited to once in any sixty month period.

   NOTE: In Québec the costs of radiographs, films, and vital tests are included in the fees for a complete examination and in the fee for the Standard/Recall examination (codes 01110, 01120, 01130 and 01200) (taken from the fee guide).

2.3 BIOPSIES

As required.

ANNEX "A"

2.4 PREVENTIVE SERVICES

1. Dental Prophylaxis

Limited to a maximum of two in any twelve month period.

Where patient is partially edentulous, the full fee will be paid when more than sixteen teeth are present. One half this fee will be paid when the total number of teeth in both arches is less than sixteen.

2. Topical fluorides

Limited to two in any twelve month period for children under eighteen years of age.

3. Pit and fissure sealants

Limited to children under 14 years of age for recently-exposed permanent molar teeth where the occlusal surface is unrestored.

4. Caries Control

Limited to a maximum of two teeth as emergency treatment.

5. Interproximal discing of teeth

Limited to two code units per patient in any twelve month period.

6. Fixed Space Maintainers

Limited to once per quadrant.

2.5 RESTORATIVE SERVICES

1. Amalgam Restorations - As per the fee guide

Where at the same sitting, in order to conserve tooth structure, separate amalgam restorations are performed on the same tooth, the fee should be determined by counting the total number of surfaces restored. Maximum allowable for amalgam restorations is five surfaces per tooth.

Payment for restoration of primary teeth will not exceed the cost of stainless steel/polycarbonate crowns.

2. Retentive pins

Limited to a maximum of three per tooth.

3. Tooth Coloured Restorations - As per the fee guide

Payment for the restoration of permanent molar teeth will not exceed the cost of the equivalent amalgam restoration. Prefabricated/composite veneer application is not an eligible benefit.

4. Stainless steel crowns

5. Cast Crowns/Porcelain Crowns

Limited to two permanent teeth in any sixty month period.

6. Recementation

Allowed once only for bridges, crowns and space maintain.

7. Posts and Cores

Limited to two permanent teeth in any sixty month period.

2.6 ENDODONTICS

1. Pulp Capping

Limited to teeth where a carious pulp exposure is evident or suspected because caries has progressed well beyond the dentino-enamel junction.

2. Pulpotomies

Open and Drainage

3. Root Canal Therapy/Apexification

Limited to two permanent teeth in any sixty month period.

4. Periapical Services

Limited to a maximum of two permanent teeth in any sixty month period.

2.7 PERIODONTAL SERVICES

As per the fee guide.

2.8 PROSTHODONTICS - REMOVABLE

1. Complete/Partial/Immediate Dentures

Limited to one of the above per arch in any sixty month period.

Transitional or other non-standard prostheses require prior approval.

The fee paid for complete, immediate and partial dentures includes three months post-insertion adjustments and modifications.

2. Denture Adjustments

More than three months after insertion.

3. Repairs and Additions

Limited to once per twelve month period per appliance.

4. Rebase or Reline with/without Tissue Conditioning

Limited to one of the above per appliance, within a twenty-four month period.

5. Immediate dentures

As immediate dentures include three months post-insertion care, MSB does not cover any additional fees such as tissue conditioners or relines during this period.

In the case of immediate dentures, relines are permitted after 3 months post insertion, after which the 24 month period applies.

2.9 PROSTHODONTICS - FIXED (Alternate benefit to removable prosthodontics)

Provided that all prosthetic requirements are satisfied within an arch, MSB will contribute up to the value of a free end cast partial denture, (including the equivalent laboratory cost for a cast partial denture) once per arch in any sixty month period. This requires prior approval and the amount will be determined regionally.

2.10 ORAL SURGERY

1. Minor

Uncomplicated removal

Surgical removal and uprighting or repositioning of a tooth

Frenectomy

2. Major

Alveoplasty, tuberosity reduction

Removal of excess mucosa

Surgical excision as per the fee guide

Removal of cyst

Surgical incision and drainage

Repair of soft tissue

Dislocations

Vestibuloplasty (stretching of the mucosa folds)

ANNEX "A"

2.11 ORTHODONTICS

Orthodontic care will be limited to individuals under 18 years of age. Cases will be submitted to a committee for review to establish the relative merit for assistance for the cost of treatment. Committee requirements for assessment purposes will be determined regionally.

2.12 ADJUNCTIVE SERVICES

1. General Anesthesia/Conscious Sedation/Neuroleptanalgesia/Parenteral Administration/Therapeutic Intravenous or Intramuscular drug injection.

2. Emergency services as per the fee guide.

3. Professional visits (hospital calls and visits outside normal office hours).

4. Laboratory fees.

2.13 IMPLANTS

Implants are not a benefit.

PROGRAM DIRECTIVE

1/5

DRUGS AND MEDICAL SUPPLIES AND MEDICAL EQUIPMENT

1.5.1 PURPOSE

PURPOSE

The purpose of these benefits is to assist clients to obtain drugs or medical supplies and medical equipment, through a medical prescription.

1.5.2 BENEFITS

BENEFITS

1. Prescription Drugs

PRESCRIPTION DRUGS

Drugs for which a prescription is required by provincial or federal law and which are considered medically necessary by the treating physician or dentist.

Drugs which may not require a prescription by law in every province but which are traditionally supplied on prescription only, e.g. insulin, nitroglycerine.

See Annex "A" for listing of NIHB prescription drug benefits.

(Omitted)

2. Over-The Counter (OTC) Drugs

OVER-THE COUNTER (OTC) DRUGS

OTC are drugs with a drug identification number (DIN) which are prescribed for a specific therapeutic purpose:

(a) antihistamine drugs [04]
(b) anti-infective agents [08]
(c) antitussives, expectorants & mucolytic agents [48]
(d) autonomic agents [12]
(e) blood formation & coagulation [20]
(f) cardiovascular drugs [24]
(g) central nervous system agents [28]
(h) diagnostic agents [36]
(i) electrolytic, caloric & water balance [40]
(j) eye, ear, nose & throat preparations [52]
(k) gastrointestinal drugs [56]
(l) hormones & synthetic substitute [68]
(m) oxytocics [76]
(n) serums, toxoids & vaccines [80]
(o) skin & mucous membrane agents [84]
(p) smooth muscle relaxants [86]
(q) vitamins [88]
(r) unclassified therapeutic agents [92]
(s) devices [94]

(See Annex "A" for listing of NIHB OTC drug benefits.)

(omitted)

3. Proprietary Medicines

PROPRIETARY MEDICINES

These are products bearing a general products number (GP) which are prescribed for a specific therapeutic purpose.

(a) central nervous system agents [28]
(b) hormones & synthetic substitute [68]
(c) skin & mucous membrane agents [84]

See Annex "A" for a listing of NIHB GP drug benefits. (Omitted)

Extemporaneous products are covered only if there is no commercially available product.

4. Medical Supplies

MEDICAL SUPPLIES

Products for personal use listed in Annex "B".

5. Medical Equipment

MEDICAL EQUIPMENT

Items not consumed or used up by the individual on a regular basis as listed in Annex "C". (omitted)

6. Product Limitations

PRODUCT LIMITATIONS

1. Vitamins are not covered for those over two years of age unless they are prescribed in a therapeutic dose for a specific pathology e.g. vitamin C deficiency.

2. Prenatal vitamins are available only during pregnancy for females between 12 and 50 years of age.

3. The following are some but not all of the items which are not covered under this directive and the cost of which is not reimbursed by Medical Services Branch (MSB) :

(a) **Prescription Drugs**

- anorexiants
- evening primrose oil
- isotretinoin preparations
- megavitamins
- minoxidil topical lotion
- pentazocine hydrochloride compound
- tretinoin. retinoic acid preparations

(b) **OTC Drugs**

Any categories of OTC drugs with DIN numbers not listed in "Annex A" of the NIHB drug benefit formulary.

(c) **Proprietary Medicines**

Any products not listed in "Annex A" of the NIHB drug benefit formulary.

(d) **Medical Equipment**

Installation of permanent aids in the home of the beneficiary (e.g. ramps, bars screwed into the walls etc.).

7. Exceptions — EXCEPTIONS

(a) Exceptions, on a case-by-case basis to Section 1.5.2, subsections 1 to 6 may be given consideration, if there is a demonstrated medical need.

(b) Each case requires prior review and approval of a Medical Services Branch medical or dental officer.

1.5.3 ASSISTANCE CRITERIA — ASSISTANCE WITH COSTS

MSB will assist in the payment for some or all of the benefits described in section 1.5.2, in accordance with the NIHB program principles and subsections 1 to 5 according to the following terms and conditions:

1. Prescription Drugs, OTC Drugs and Proprietary Medicine — DOCUMENTATION REQUIRED

The beneficiary must present the pharmacist with a prescription from a physician or dentist. Prescriptions may be either written or made verbally to the pharmacist. When a verbal request is made, regional administration should ensure that a written record is made to support each verbal prescription in accordance with provincial pharmacy legislation. — PRESCRIPTIONS

2. Medical Supplies and Medical Equipment — WRITTEN ORDERS

All medical supplies and medical equipment listed in Annexes "B" and "C" require a written order. Details pertaining to the provision of these products are described in the annexes.

1.5.4 **MANAGEMENT PRACTICES** — **MANAGEMENT PRACTICES**

The administration of drugs and medical supplies and medical equipment benefits is governed by the following management practices:

1. **The Regional Director with the advice of the Regional Medical Officer (RMO), shall be responsible for determining who will be the authorizing officer(s) for medical supplies and medical equipment.** — **AUTHORIZING OFFICER**

2. In all cases the pharmacist is required to dispense the least expensive generic equivalent unless the prescriber directs otherwise in writing. In all cases, the pharmacist must follow the provincial requirements for substitution. GENERIC EQUIVALENTS

3. Each Regional Director will negotiate a dispensing fee with the Provincial Pharmacy Association in line with prevailing provincial fees.

4. Dispensing Fees

DISPENSING FEES

Pharmacies will be reimbursed one dispensing fee on the basis of one fee per prescription up to a maximum of a 3 month supply.

Pharmacists should not dispense more than a 3 month supply unless prior approval has been obtained from an MSB authorized officer.

5. Continuing Requirement for Medical Supplies and Medical Equipment

CONTINUING REQUIREMENT FOR MEDICAL SUPPLIES AND MEDICAL EQUIPMENT

If, in the judgement of the authorizing officer a client requires medical supplies and medical equipment on a continuing basis, a standing order may be issued and approval may be given by the authorizing officer for a time period to be determined by the Regional authorizing officer.

6. Regional Directors will ensure that appropriate periodic review of continuing requirement approvals for supplies and equipment are conducted to ensure that any abnormalities in supply issuance are corrected quickly. PERIODIC REVIEW

7. Where possible, the Regional Director shall identify authorized suppliers of medical supplies and medical equipment, keeping in mind the dual objectives of both acceptable quality and reasonable cost. AUTHORIZED SUPPLIERS

8. Major equipment items, such as wheelchairs or home care items (such as commodes) may be rented from a supplier on a temporary basis or purchased outright, where it is determined that the client will have a continuing long term need for their use. BUYING OR RENTING EQUIPMENT

9. Leasing Equipment

LEASING EQUIPMENT

(a) Where an item is leased, it is the responsibility of the Regional Director or Zone Director to designate a contact person.

(b) The contact person shall be responsible for determining the lease conditions and ensuring that the leased item(s) are returned on time, in order to avoid a penalty to the crown.

10. Reporting Exceptions

REPORTING EXCEPTIONS

(a) Drugs or medical supplies and medical equipment which are not eligible benefits as described in section 1.5.2 and which have been approved as exceptions by a Regional Medical Officer (RMO), shall be recorded.

(b) Exceptions shall be reviewed on a monthly basis by the RMO.

(c) Exceptions shall be reported to the Director General, Indian and Northern Health Services on a quarterly basis.

PROGRAM DIRECTIVE

1/6

PAYMENT OF NON-INSURED HEALTH BENEFITS OUTSIDE CANADA

1.6.1 PURPOSE

PURPOSE

The purpose of this directive is to define Medical Services Branch's (MSB) responsibility for the payment of Non-Insured Health Benefits (NIHB) for registered Indians and Inuit when these benefits are received outside Canada.

1.6.2 BENEFITS

BENEFITS

Generally, NIHBs are only available in Canada. However, when the assistance criteria (1.6.4) are met, the following benefits will be provided:

1. Some costs related to health services received outside the country because the client is referred out of the country for medically necessary services not available in Canada.

2. NIHBs for students or migrant workers provided under the same conditions as MSB pays for these costs in Canada, OR, the costs of privately acquired supplemental health insurance only when this is not provided as an employee benefit (for migrant workers) or provided by another agency (for post-secondary students).

1.6.3 NON BENEFITS

NON BENEFITS

1. Any NIHBs for which an eligible client has not received prior approval from MSB before leaving Canada.

2. Medical transportation to transport a client to health care services outside Canada or, to return clients to Canada after receiving health care services, when these clients were neither referred outside Canada nor prior approved.

3. Benefits which are elective in nature (i.e. do not require immediate action), should be accessed in Canada.

4. Supplementary health insurance coverage for all other outside of country travel is not a benefit.

1.6.4 ASSISTANCE CRITERIA

ASSISTANCE CRITERIA

MSB will assist in the provision of outside Canada health benefits in accordance with the NIHB program directives on the following terms and conditions:

1. The client must be:

   (a) a registered Indian according to the Indian Act or be an Inuit recognized as such by DIAND; and

   (b) currently enrolled in a provincial or territorial health insurance plan and continue to meet the residency requirement for provincial/territorial medicare coverage; and

   (c) a student following a course of postsecondary training or education; or

   (d) a migrant worker; or

   (e) referred by a physician, licensed to practice in the region where the service is requested, for outside of country health services, only when the possibilities for treatment in Canada have been exhausted and these services are recognized by provincial governments as insured services.

2. The prior approval for payment of outside Canada NIHBs is obtained by the client before leaving Canada.

3. All benefits available from provincial/territorial or other sources must be utilized before accessing the MSB NIHB program. MSB will only pay the difference between the full cost of health services received and the amount which is recoverable from provincial/territorial or third party plans.

1.6.5 MANAGEMENT PRACTICES

MANAGEMENT PRACTICES

1. Regions should inform DIAND about MSB limitations for health coverage outside Canada.

2. Regional procedures should be established to ensure that benefits are provided only after clients have obtained prior approval from MSB.

3. Medical Services Branch will reimburse providers or clients for health services only upon receipt of original claim vouchers or sales slips.

4. Before giving prior approval for benefits outside Canada, regions must confirm that the client is enrolled in the provincial/territorial health care plan.

5. In preparing the prior approval, regions should determine the range of benefits which a client may receive while they are outside Canada, and ensure that the client understands the limitations.

6. Regions should ensure that all clients are aware of the contents of this directive which defines the Branch's responsibility for provision of benefits outside Canada.

Date of issue: 01/05/91

APPENDIX III

Section 91 reads:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,-

1. Repealed.
1A. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
2A. Unemployment insurance.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts

of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

28. The Establishment, Maintenance, and Management of Penitentiaries.

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislature of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Section 92 states:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,-

1. Repealed.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes:-
    (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;
    (b) Lines of Steam Ships between the Province and any British or Foreign Country;
    (c) Such Works as, although wholly situate within

the Province, are before or after their Execution declared by the Parliament of Canada to be fore the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any matter coming with any of the Classes of Subjects enumerated in this Section.
16. Generally all Matters of a merely local or private Nature in the Province.

APPENDIX IV

COLONIAL LAWS VALIDITY ACT, 1865[22]

(28 and 29 Victoria, c. 63.)

An Act to remove Doubts as to the Validity of Colonial Laws.

[*29th June, 1865*]

WHEREAS doubts have been entertained respecting the validity of divers laws enacted, or purporting to be enacted by the Legislatures of certain of Her Majesty's Colonies, and respecting the powers of such Legislatures; and it is expedient that such doubts should be removed:

Be it hereby enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:—

Definitions: "Colony."

1. The term "colony" shall in this Act include all of Her Majesty's Possessions abroad, in which there shall exist a legislature as hereinafter defined, except the Channel Islands, the Isle of Man, and such territories as may for the time being be vested in Her Majesty, under or by virtue of any Act of Parliament for the government of India:

"Legislature." "Colonial Legislature"

The terms "Legislature" and "Colonial Legislature" shall severally signify the authority (other than the Imperial Parliament or Her Majesty in Council), competent to make laws for any colony;

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[22] Common law is to be found partly in the statutes but, also, in sections; precedents and tradition. Before 1865, there existed a theory to the effect that legislation adopted by colonial legislatures should not be contrary or repugnant to the law of England. If at any time the legal lights in the United Kingdom were of opinion that a colonial law was unconstitutional because repugnant to the common law, they immediately recommended that a bill should be adopted by the Imperial Parliament to confirm the said colonial law.

This principle was recognized in Canada although not formulated in express terms in the Union Act. As the demarcation between the fundamental and non-fundamental principles of the English law was so vague that it was impossible to define it exactly in its application the Colonial Laws Validity Act was passed in 1865 to confer upon Colonial Legislatures the power of making laws even though repugnant to the English common law, but the Act declared that a Colonial law repugnant to the provisions of an Act of the Parliament of the United Kingdom extending to the Colony either by express words or by necessary intendment should be void to the extent of such repugnancy. The Act also removed doubts which had arisen regarding the validity of laws assented to by the Governor of a Colony in a manner inconsistent with the terms of his instructions.

The Act passed in 1865 for the benefit of the colonies and for the purpose of validating certain laws which might have been annulled for their repugnancy to the English common law became restrictive of the autonomy of the Dominion due to the fact that a Colonial Act repugnant to any particular law of the United Kingdom applicable to the colony was void to the extent of such repugnancy. This Act was repealed by section two of the Statute of Westminster. *See* notes to the Statute of Westminster, 1931 in this volume, also *Problems of Canadian Sovereignty*, by Maurice Ollivier, pages 99 to 105. (With permission of the Canada Law Book Company, Toronto.)

"Representative Legislature."

The term "Representative Legislature" shall signify any Colonial Legislature which shall comprise a legislative body of which one-half are elected by inhabitants of the colony;

"Colonial Law."

The term "Colonial Law" shall include laws made for any colony, either by such Legislature as aforesaid or by Her Majesty in Council;

Act of Parliament, etc., when to extend to Colony.

An Act of Parliament, or any provision thereof, shall, in construing this Act, be said to extend to any colony when it is made applicable to such colony by the express words or necessary intendment of any Act of Parliament;

"Governor."

The term "Governor" shall mean the officer lawfully administering the Government of any colony;

"Letters Patent."

The term "Letters Patent" shall mean letters patent under the great seal of the United Kingdom of Great Britain and Ireland.

Colonial Law when void for repugnancy.

2. Any colonial law, which is or shall be repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force or effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

Colonial Law when not void for repugnancy.

3. No colonial law shall be or be deemed to have been, void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation, as aforesaid.

Colonial Law not void for inconsistency with instructions.

4. No colonial law, passed with the concurrence of or assented to by the Governor of any colony, or to be hereafter so passed or assented to, shall be, or be deemed to have been, void or inoperative by reason only of any instructions with reference to such law, or the subject thereof, which may have been given to such Governor, by or on behalf of Her Majesty, by any instrument other than the letters patent or instrument authorizing such Governor to concur in passing or to assent to laws for the peace, order, and good government of such colony, even though such instructions may be referred to in such letters patent, or last-mentioned instrument.

Colonial Legislatures may establish, etc., Courts of Law.

5. Every colonial Legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish courts of judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein; and every representative Legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such Legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required, by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the colony.

Representative Legislature may alter Constitution.

Certified copies of laws to be evidence that they are properly passed.

6. The certificate of the clerk or other proper officer of a legislative body in any colony to the effect that the document to which it is attached is a true copy of any colonial law assented to by the Governor of such colony, or of any bill reserved for the signification of Her Majesty's pleasure by the said Governor, shall be prima facie evidence that the document so certified is a true copy of such law or bill, and, as the case may be, that such law has been duly and properly passed and assented to, or, that such bill has been duly and properly passed and presented to the Governor; and any proclamation, purporting to be published by authority of the Governor, in any newspaper in the colony to which such law or bill shall relate, and signifying Her Majesty's disallowance of any such colonial law, or Her Majesty's assent to any such reserved bill as aforesaid, shall be prima facie evidence of such disallowance or assent.

Proclamation to be evidence of assent and disallowance.

Certain Acts of Legislature of South Australia to be valid.

And whereas doubts are entertained respecting the validity of certain Acts enacted, or reputed to be enacted, by the Legislature of South Australia: be it further enacted as follows:

7. All laws or reputed laws enacted or purporting to have been enacted by the said Legislature, or by persons or bodies of persons for the time being acting as such Legislature, which have received the assent of Her Majesty in Council, or which have received the assent of the Governor of the said Colony in the name and on behalf of Her Majesty, shall be and be deemed to have been valid and effectual from the date of such assent for all purposes whatever; provided that nothing herein contained shall be deemed to give effect to any law or reputed law which has been disallowed by Her Majesty, or has expired, or has been lawfully repealed, or to prevent the lawful disallowance or repeal of any law.

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