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SOME ASPECTS OF THE LEGAL STATUS OF CANADIAN INDIANS

HOWARD E. STAATS B.A.*

THE SOCIAL CONTEXT

The Committee was surprised as it made its fact-finding tours through the reserves, at its own ignorance of the way in which the Indian lives in this Province—of his relations with the non-Indian, and his problems of adjustment to modern day living. This ignorance we feel is shared by the vast majority of Ontario citizens.¹

This was a considered statement by a select committee appointed to consider the position of the Indian in Ontario. This frank admission by a government committee reveals a lack of knowledge by an authority which should be intimately acquainted with the problem of its Indian citizens.² It also indicates that the first Canadians have not, as yet, had an effective voice in bringing their problems to the attention of the authorities.

The chief problem facing the Indian today is one of social adjustment. The traditions of tribal society are increasingly eroded by innovations from the non-Indian way of life. Indian children, seeking to compete with their non-Indian neighbours are equipping themselves with technical skills and are obtaining higher education. These children tend to lose respect for parents who are ignorant of this type of learning. To their parents, these children seem to be devoting their time to unintelligible pursuits, to be lacking in traditional Indian abilities, and often to be undisciplined. An American author, Professor Felix Cohen, has described this social dislocation in the following terms: "These maladjustments do not produce 'gangsters' on Indian reservations as they do in our large cities, but they do produce shift-

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¹ Commission on Civil Liberties and Rights of Indians in Ontario. 1954. p. 7.

² To understand the nature and scope of the Indian problem it may help to know the number and location of Canadian Indians. As of September 1963, there were 198,220 in Canada; this represents an increase of 45% from 1949. Of the total Indian population 146,165 or 73% live on Reserves. Ontario has the largest number of Indians with 46,172; British Columbia is next with 39,784.

less, visionless, imitation white men, that now, to most Americans, exemplify Indian character."³

Another problem with which the Indian must cope, as indicated by the above quotation, is to change the image which the public has of him. The Indian is by nature a proud individual, and a member of a proud race. He must convey to the non-Indian public some justification for this pride.

Many non-Indians view the Indian as a social parasite, living on government handouts.

To a large extent both the social dislocation and the public image which plague the Indian in Canada today can be traced to the legal position in which the Indian finds himself. In the following pages this legal position will be described, giving consideration to the cases and statutes which govern various phases of Indian life.

STATUS

In the past the Indian has been variously described by the courts as "wards of the nation",⁴ as "faithful Indian allies",⁵ as "a British subject",⁶ and as "a Canadian citizen."⁷ Early in Canadian history most treaties between the Crown and Indian tribes referred to them as "allies". For example, in the grant by the Crown to the Six Nations Indians of all the land for six miles on either side of the river "commonly called Ouse or Grand River" in 1784, known as the Haldimand Deed, the Indians are called "His Majesty's faithful allies."

The correct position seems to be that in general Canadian Indians are Canadian citizens if they meet the qualifications set out in the *Canadian Citizenship Act*.⁸ While, for some purposes, namely the receipt and expenditure of money on behalf of Indians, the Government of Canada may act as a trustee for the Indians, this relationship should not be confused with guardianship. In the United States, the status of the Indian is clearly defined. He is a citizen of the United States and of the state where he resides and is entitled to all the rights and privileges of citizenship.⁹ It is time that the position of the Canadian Indian be made equally clear.

Lands have from time to time been set aside for Indian tribes in the form of reserves by the Dominion pursuant to Royal Proclama-

³ Felix S. Cohen: *The Legal Conscience*. (Yale University Press, New Haven, 1960) pp. 214-15.

⁴ *Province of Ontario v. Dominion of Canada and the Province of Quebec*. (1896) 25 S.C.R. 434 at p. 535.

⁵ *Ibid.*, p. 535. In this case Sedgewick J. in the same paragraph refers to the Indians as both "faithful allies" and "wards of the nation."

⁶ *Prince v. Tracey* (1913), 13 D.L.R. 818, at p. 822.

⁷ *R. v. Strongquill* (1953), 16 G.R. 194, at pp. 211-212.

⁸ R.S.C. 1952, c. 33, v. ss. 4, 5.

⁹ *Harrison v. Laveen*, 196 Pac. (2nd) 456.

tions such as that of 1763,¹⁰ treaties such as that of 1873,¹¹ and statutes such as the statute of the Province of Canada 1851 (Can.) c. 106.

The principal statute outlining those rights and duties peculiar to the Canadian Indian is the *Indian Act*.¹² This is a federal act passed pursuant to s. 91 head 24 of the British North America Act of 1867¹³ which vested in the federal government the legislative competence to deal with "Indians, and lands reserved for the Indians." The word "Indian" used in this section was originally held by the Supreme Court of Canada to include Eskimos.¹⁴ In 1951, however, Parliament amended the Indian Act in order to exclude Eskimos from the operation of the Act.¹⁵

Originally the Act was intended for the protection of the Indians who were considered incapable of managing their own affairs in the competitive and complex non-Indian society. For example, reserve lands cannot be alienated without first obtaining the consent of the Crown.¹⁶ Until very recently the Act contained provisions making it an offence for an Indian to be intoxicated on or off a Reserve.¹⁷ Other provisions of the Act provide for the punishment of persons who trespass on a reserve;¹⁸ for removing materials from the reserve such as sand and gravel;¹⁹ for the management of monies belonging to Indian bands,²⁰ and for exemption from taxes with respect to property situate on a Reserve.²¹

While the Indian Act is a source of many special exemptions, others are found in divers Proclamations, Treaties and statutes still in force. The Indians have been held to be exempt from the operation of Federal Statutes applicable to other Canadians. For example, in *R. v. Sikyea*²² it was held that the Migratory Birds Conventions Act²³

¹⁰ This proclamation is quoted from in *St. Catherine's Milling and Lumber Co. v. The Queen*, 1888 A.C. 46 and in volume 1, p. 236 following of Olmsted's *Decisions of the Judicial Committee etc.* ". . . possession of such parts of Our dominions and territories as, not having been ceded to or purchased by us, are reserved to them (the Indians) or any of them as their hunting grounds." p. 244 Olmsted.

¹¹ This treaty is referred to in the case cited *supra* footnote 10, Olmsted *op cit.* p. 250.

¹² R.S.C. 1952, c. 149.

¹³ 30-31 Victoria, c. 3.

¹⁴ *Reference Re Term Indians*, [1939] S.C.R. 104.

¹⁵ R.S.C. 1952, c. 149, s. 4(1).

¹⁶ This provision appears in the present Act as sec. 24 dealing with individuals, and s. 37 dealing with band transactions.

¹⁷ In 1956 provision was made for treating the Indian much the same as the non-Indian in this regard. But where the new provisions have not been proclaimed in force by the Governor-in-Council, the Indian is still subject to different laws respecting his right to drink. The Indian Act, R.S.C. 1952, c. 149, as amended ss. 93, 94, 95, 96, 96A, 97.

¹⁸ R.S.C. 1952, c. 149.

¹⁹ *Ibid.*, s. 92.

²⁰ *Ibid.*, ss. 61-68.

²¹ *Ibid.*, s. 86.

²² (1962) 40 W.W.R. 494. Leave to appeal to the S.C. of Canada has just been granted.

²³ R.S.C. 1952, c. 179.

did not apply to Indians in the Northwest Territories hunting on unoccupied Crown lands. In *R. v. George*²⁴ it was held that an Indian on a reserve could not be convicted under the Regulations of the Migratory Bird Conventions Act on a charge of hunting a migratory bird out of season. The Royal Proclamation of October 7, 1763 reserved the lands in question to the Indians as their hunting grounds. By a treaty in 1827 between the Indians and King George III, the lands were again declared to be "for their own exclusive use and enjoyment."

McRuer C.J.H.C. said:

. . . I think there are authorities that warrant the view that the Proclamation has even a greater force than a statute . . . this much seems clear—that the Indians' right to hunt for food on the lands reserved to them in the Treaty of 1827 cannot now be taken away by the Parliament of Canada short of legislation which expressly and directly extinguishes these rights.²⁵

He held that the Migratory Birds Convention Act did not circumscribe the Indians' right conferred in the Proclamation and the Treaty. The learned judge went on to say that it is arguable that since there was no reservation of a power of revocation on the rights given the Indians in the Proclamation, that these rights cannot now be taken away even by legislation.

EFFECT OF BILL OF RIGHTS ON SECTIONS 25A, 94 AND 96 OF THE INDIAN ACT

There have been three recent cases dealing with the contention that the provisions of s. 94 of the *Indian Act* are impliedly repealed by s. 1(b) of the *Canadian Bill of Rights*²⁶ which guarantees "the right of the individual to equality before the law and the protection of the law."

In the first case²⁷ His Honour Judge Morrow of the B.C. Cariboo County Court, dealing with this specific contention, said: "There has been no suggestion in the *Bill of Rights* that the *Indian Act* was abrogated in any way. And . . . a general enactment like the *Bill of Rights* can not and was never intended to repeal a specific enactment without expressly saying so."

²⁴ (1964) 41 D.L.R. (2d) 31.

²⁵ *Ibid.*, at p. 36. This case provides some interesting information on the history of Reserves which as His Lordship points out "have their roots very deep in Canadian history." (p. 32).

^{25A} S. 94. *Indian Act*.

An Indian who —

(a) has intoxicants in his possession

(b) is intoxicated

(c) makes or manufactures intoxicants

off a reserve is guilty of an offence and is liable on summary conviction to a fine of not less than ten dollars and not more than fifty dollars or to imprisonment for a term not exceeding three months or to both fine and imprisonment.

S. 96 deals with the same offence on a reserve.

²⁶ S.C. 1960, c. 44.

²⁷ *A.-G. of B.C. v. Macdonald* (1961), 131 C.C.C. 126, at 131, 132.

In the case of *R. v. Gonzales*²⁸ the British Columbia Court of Appeal rejected the same contention. Speaking for the Court, Tysoe J.A. explained that "equality before the law" is quite a different thing from equal laws for everyone, which the contention amounted to, and which was virtually impossible to achieve. Further, if this contention were adopted and pushed to its logical conclusion, it would have the effect of rendering inoperative practically the whole of the *Indian Act*.

The most recent case dealing with this question is *Richards v. Cote*.²⁹ This deals with an acquittal under s. 96(b) of the *Indian Act* in a Saskatchewan District Court. The Court distinguished *R. v. Gonzales* on the grounds that there was no evidence in that case that the new s. 95 had been proclaimed in force in British Columbia as it had been in Saskatchewan, and further, that case dealt with possession of intoxicants rather than intoxication.

His Honour Judge McFadden said:

I am of the opinion and hold that s. 94(b), reading it by itself only . . . is and has been since and including July 1, 1960, as applied in Saskatchewan, contrary to the provisions of the *Canadian Bill of Rights*, and is inoperative in so far as the charge herein is concerned. It is, as I see it, contrary to the *Canadian Bill of Rights* for the following reasons, namely:

- (a) It discriminates against the accused, an Indian, by reason of his race, of his right as an individual to liberty, security of his person, and the enjoyment of his property, and the consequences of such enjoyment.
- (b) It discriminates against the accused, an Indian, by reason of his race and his right as an individual to equality before the law and the protection of the law by making him subject to punishment to which non-Indians are not subject . . .

I am of the opinion that the *Canadian Bill of Rights* which comes in force on August 10, 1960, is intended to remedy a situation . . . such as that now under discussion. No amendment to date appears to have been made to the *Indian Act* which expressly (or by implication) declares that it shall operate notwithstanding the *Canadian Bill of Rights* to which reference is made in section 2 of such *Canadian Bill of Rights* . . . if there is any material conflict, as I believe there is between the *Indian Act* and the *Canadian Bill of Rights*, the latter . . . must prevail.

As an alternative ground for decision the Court decided that since s. 95 became operative in Saskatchewan, the term "intoxicated" in s. 94(b) must be interpreted so as to bring the ingredients of the offence in line with the offence as it relates to non-Indians. Therefore no offence is committed against this section unless the Indian is both intoxicated and creating a disturbance.

Some features of the Act, if they treat the Indian as a child, seem to treat him as a pampered one. What truth is there in the common complaint that the Indian is constantly receiving handouts from the federal Government? He is entitled in some cases to treaty money and in all cases to exemption from taxes (for example, see s. 86 of the *Indian Act*). Are these concessions a matter of right due to the Indian or are they in fact a form of handout? An answer is suggested by Mr. Cohen:

²⁸ (1962) 37 C.R. 56.

²⁹ (1962) 40 W.W.R. 340, at 350.

. . . whatever we have given to the Indians and whatever we give them today is not a matter of charity, but is part of a series of real estate transactions through which about ninety per cent of the land of the United States was purchased from Indians by the Federal Government. Failure to appreciate this fact leads to all sorts of ludicrous and unjust results.³⁰

The provisions mentioned and many more were intended for the protection of the Indian. It is now necessary in my opinion, to reassess the whole concept of protection and paternalism. Although, in some Reserves, perhaps those in northern Canada, the protective principle is still necessary, in others, especially in most industrialized parts of Canada like southern Ontario, the Act has outlived its usefulness. Indians should now be accepted as full citizens, the equal of their non-Indian neighbours. To achieve this they must be rid of anachronistic provisions of the Act which now only hinder progress.

Before 1951 it was generally conceded that Federal Acts applied to Indians to the same extent as to non-Indians. It was held in the case of *R. v. Bear's Shin Bone*,³¹ where the accused was convicted of polygamy, that the Criminal Code applied to Indians living on Reserves. Nine years later, the Ontario Court of Appeal clearly enunciated this in the case of *R. v. Beboning*,³² where Meredith, J.A., speaking for the Court, said, "The suggestion that the Criminal Code does not apply to Indians is also so manifestly absurd as to require no refutation." In the case of *Rex re Dillabough v. Point*,³³ the British Columbia Court of Appeal decided that an Indian, resident upon a Reserve, was liable to file an income tax return.

APPLICATION OF PROVINCIAL STATUTES TO INDIANS

No mention is made in the B.N.A. Act of the applicability of provincial statutes to Indians. However, the provinces are given legislative authority over "Property and Civil Rights in the Province" by s. 92(13). To what extent do provincial statutes affect the Indian? Does it make a difference whether he is on or off a Reserve? In the case of *R. v. Hill*³⁴ the Ontario Court of Appeal decided that the Medical Act of Ontario applied to Indians living outside a Reserve. As a result the accused Indian was convicted of practising medicine without a licence. Osler, J.A. said:

. . . I find nothing in the (Indian) Act to indicate that except where provisions are made which expressly or by implication declare his obligations and the consequences which attach to their breach or otherwise specially deal with him, the conduct and duty of an Indian in his relation with the public outside the Reserve are not subject to the control of the provincial laws in the same manner as those of ordinary citizens. Parliament may, I suppose, remove him from their scope, but to the extent to which it has not done so, he must in his dealings outside the Reserve govern himself by the general law which applies there.

³⁰ *Supra* footnote 31 *op. cit.* at p. 255.

³¹ (1899) 3 C.C.C. 329, S.C. N.W.T.

³² (1900) 13 C.C.C. 405.

³³ (1957) 119 C.C.C. 117.

³⁴ (1907) 15 O.L.R. 406, at 410, 414.

However, lest this decision be taken too far, Meredith J.A. pointed out, "The defendant has been convicted of practising medicine . . . not upon any lands reserved for the Indians nor on any other Indian, but away from such reservation and upon those who are not Indians."

In a later case in an Ontario County Court,³⁵ an Indian was acquitted of a charge of being in possession of a seine net without a licence, contrary to the Ontario *Game and Fisheries Act*.³⁶ In dismissing the charge, His Honour Judge Lane said: ". . . accused here is not guilty by reason of the facts that the offence, if any, would be a breach by an Indian upon an Indian reservation of a Provincial Act, and the Parliament of Canada is the only competent legislative authority which can regulate the situation which is involved here."³⁷

A novel approach to the problem was taken in the Quebec case of *R. v. GrosLouis*.³⁸ The accused was an Indian residing on a Reserve. He operated a retail store but did not have a licence nor collect sales tax as required by the Quebec *Retails Sales Tax Act*. He was prosecuted for selling two boxes of lighter flints, at ten cents a box, to a non-Indian person who came onto the Reserve. Having taken the position that Indians outside the Reserves are subject to provincial law, and that an Indian on a Reserve selling to another Indian would not be required to comply with this Act, Pettigrew J. held that the non-Indian had come onto the Reserve to avoid paying the tax and that "when he (an Indian) sells to a non-Indian, he does an action which causes him, theoretically, to go outside the Reserve."³⁹ By thus holding that the Indian had gone outside the Reserve, the provincial Act applied to him, and a conviction was secured.

The Manitoba Court of Appeal had decided that provincial statutes even though of general application could not apply to Indian Reserves because the Province did not have jurisdiction over them.⁴⁰ Prendergast J.A., said: "But everyone understands that they can not apply to regions in the Province (if any) over which the Legislature has no jurisdiction in the particular matter, and that, however broad the terms, these regions were meant to be excepted."⁴¹

SECTION 87, INDIAN ACT: A RESOLUTION OF THE CONSTITUTIONAL ISSUE

In order to straighten out the conflicting case law on the subject, the Parliament of Canada in 1951 enacted the *Indian Act* in a revised form. Section 87 of the revised Act reads:

Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province,

³⁵ *R. v. Hill* (1952), 14 C.R. 266.

³⁶ R.S.O. 1950, c. 153.

³⁷ *Supra* footnote 35 at 274.

³⁸ (1944) 81 C.C.C. 167.

³⁹ *Ibid.*, p. 173.

⁴⁰ *R. v. Rodgers* (1923), 40 C.C.C. 51.

⁴¹ *Ibid.*, p. 61.

except to the extent that such laws are inconsistent with this Act, or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

There have been three interesting cases interpreting this section in connection with the 1930 agreement between the Federal Government and the Prairie Provinces by which the Dominion ceded natural resources to the provinces. All concerned the Indians' right to hunt for food, a right preserved by s. 12 of the agreement which reads as follows:

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

The first of these cases is *R. v. Wesley*,⁴² where an Indian was charged with killing a deer with antlers less than four inches long, hunting with dogs and hunting without a licence, all contrary to the *Alberta Game Act*. The Alberta Court of Appeal acquitted the accused on all counts. They held that the Indians were subject to the same laws as the non-Indian when hunting for sport or commerce. However, when hunting for food, the proviso to s. 12 of the agreement put him in a very different position from the non-Indian. He retained the right to hunt for food which he had held from time immemorial.

In 1962 the Manitoba Court of Appeal by a 3-2 majority took the opposite view when interpreting the very same section. In this case three Indians were charged with hunting deer by use of a "night light," contrary to the *Game and Fisheries Act* of Manitoba.⁴³ Miller C.J.M. with whom Guy and Monnin J.J.A. concurred, refused to accept the principle of *R. v. Wesley, supra*, and said that even though they were hunting for food, the Indians were in no special position with respect to the method of hunting and were therefore not permitted to use "night lights."

He said:

. . . the manner in which they may hunt and the method pursued by them in hunting, must of necessity, be restricted by the said Act. I am of opinion, though, that they have no right to adopt a method or manner of hunting that is contrary to the *Game and Fisheries Act*, because s. 13 of the *Natural Resources Act* specifically provides that the *Game Act* of the Province shall apply to Indians in some respects.

And, I am unable to agree that the Indians may hunt with the freedom indicated by that learned judge. [McGillivray J.A. in *R. v. Wesley*]. It seems to me the *Wesley* case, *supra*, failed to appreciate or recognize the important conservation principle of s. 12 of the *Natural Resources Act* of Alberta.

In a vigorous dissenting judgment, Freedman J.A., with whom Schultz J.A. concurred, pointed out that both the *Natural Resources*

⁴² (1932) 58 C.C.C. 269.

⁴³ *R. v. Prince et al.* (1963), 39 C.R. 43, at 47, 49.

Act and the *Game and Fisheries Act* recognized that the Indians had a privileged position when hunting for food and that the "important conservation principle" was subordinate thereto. Were it otherwise, he indicates, the Legislature could then limit the amount of game that the Indian took, even though this did not suffice to meet his needs. In such a case the Legislature would be putting the value of the animals' lives above those of the Indians.

On appeal to the Supreme Court of Canada,⁴⁴ a Court of nine judges was unanimous in allowing the appeal. They held that the Indians were not subject to the Provincial Act when hunting game for food. Hall J., speaking for the court, agreed with the reasons of Freedman, J.A. in his dissenting judgment in the Court of Appeal. He quoted with approval the statement of McGillivray J.A. in *R. v. Wesley* where he said that if the proviso merely gave the Indians the privilege of shooting for food "out of season" then they could still be limited in the number of animals they killed, even if the number was not sufficient for their support and subsistence. Such was not the intention of the law makers.

The third case dealing with the Natural Resources Agreement was a judgment of an Alberta District Court, *R. v. Little Bear*, in which Turcotte D.C.J. held that the phrase "right of access" in s. 12 of the Agreement included a private farm into which the Indians had received permission to enter and hunt. Since this was a Dominion Statute within the contemplation of s. 87 of the *Indian Act*, the provincial Act did not apply and they were acquitted.⁴⁵

RESIDUAL EFFECTS OF SECTION 87

Section 87 did not wipe the slate completely clean. Special laws still apply unaffected by provincial legislation. An effort is made below to sketch some of the residual effects. In many cases federal jurisdiction over Indian affairs slashes through undisputedly provincial matters like liquor and highway traffic provisions. It is constitutional niceness gone wild.

Liquor Laws

Since the enactment of s. 87 of the Indian Act, it has been held that the provision of that Act dealing with intoxicants being sold to or had in possession by Indians take precedence over provincial laws of general application, dealing with similar situations.

Section 93 of the Act makes it an offence for any person directly or indirectly (a) to sell, barter or supply an intoxicant to (i) any person on a Reserve or to (ii) an Indian outside a Reserve; or (b) to

⁴⁴ At the time of printing this case was not reported.

⁴⁵ The Ontario *Games and Fisheries Act*, R.S.O. 1960, c. 158 which had provided in s. 82(1) 29 that the Lieutenant-Governor-in-Council could make regulations exempting Indians in Northern Ontario from the provisions of the Act, has now been repealed by the *Game and Fish Act* which does not contain any provision for exempting Indians from its operations. S.O. 1961-62, c. 48.

keep a building on a Reserve in which intoxicants are sold to any person; or (c) to make or manufacture intoxicants on a Reserve.

Section 94 makes it an offence for an Indian to (a) have intoxicants in his possession; or (b) to be intoxicated; or (c) to make or manufacture intoxicants off a Reserve.

Subsection 3 of s. 95 has been proclaimed in force in Ontario, Manitoba, Saskatchewan, New Brunswick and the Yukon. It provides that it is not an offence to sell an intoxicant to an Indian off a Reserve, nor for an Indian to have possession of intoxicants off a Reserve if the intoxicants were sold to or had in possession by an Indian in accordance with the law of the Province where the sale occurs or the possession is had.

Section 96 makes it an offence for any Indian to be found (a) with intoxicants in his possession, or (b) intoxicated, on a Reserve.

Section 96A has been proclaimed in force in parts of Ontario, Manitoba, Saskatchewan, British Columbia, New Brunswick and Nova Scotia. It provides that it is no offence to have possession of intoxicants on a Reserve if such is in accordance with the law of the Province where the possession is had. Where this section is in force it is not an offence to sell intoxicants to an Indian off a Reserve nor for an Indian to have possession of intoxicants off a Reserve providing the intoxicants are sold to or had in possession by an Indian in accordance with the Provincial law where the Reserve is situated.

Section 97 provides that the provisions of this Act regarding intoxication do not apply where the intoxicant is used or intended to be used in cases of sickness or accident.

In *R. v. Shade*,⁴⁶ the accused Indian appealed his conviction of being intoxicated in a public place, under the *Government Liquor Control Act* of Alberta.⁴⁷ In acquitting the accused, His Honour Judge Fair said:

I find that the offence of intoxication as it affects Indians, whether on or off a Reserve, is fully and completely dealt with in sections 94 and 96 of the *Indian Act* and there is simply no room for the application of the provincial law in such cases. There is no jurisdiction to try the appellant under s. 88(2) of the *Government Liquor Control Act* of Alberta.

In the case of *R. v. Modeste*⁴⁸, Sissons J. of the Northwest Territories Territorial Court pointed out that in a charge under s. 94(b) of the *Indian Act*, three distinct elements must be proven; first, that the accused is an Indian; second, that he was intoxicated; and third, that he was intoxicated off a Reserve. He further held that in this case there was no evidence to indicate that the homebrew consumed by the accused was an "intoxicant" within the definition of s. 2(1) (i) of the *Indian Act*. The Court pointed out that the offence created by

⁴⁶ *R. v. Shade* (1952), 4 W.W.R. (N.S.) 430.

⁴⁷ R.S.A. 1942, c. 24, s. 88(2).

⁴⁸ (1960) 31 W.W.R. 84.

this section was not the offence of consuming liquor but depended on the effect produced by such consumption.⁴⁹

Interesting for the purposes of comparison here is the case of *R. v. Bennett*⁵⁰ where His Honour Judge Denton of the York County Court delayed the hearing of an appeal by a person charged with selling liquor to an Indian, in order to have the Indian brought before him, so the Court could have a "view". On this procedure, the Court rejected the accused's evidence that he did not know the purchaser was an Indian. The Court said: "He is typically Indian in appearance and I do not see how the accused could have very well taken him for other than an Indian."

*R. v. Benjoe*⁵¹ decided that *mens rea* is an essential element of the offence under s. 96(a) of the *Indian Act*, and that an Indian councillor who confiscated liquor from a youth could not properly be convicted simply because he had liquor in his possession which he intended to turn over to the police.

There have been a few cases dealing with the prosecution of non-Indians for selling liquor to Indians, under the *Indian Act*. Because this is an offence under the *Indian Act* the accused cannot be prosecuted under a provincial statute because of the "paramountcy" doctrine of constitutional law.⁵² In such cases, also *mens rea* must be proved.⁵³ In an earlier case in the Edmonton District Court⁵⁴ the learned Judge took judicial notice of the fact that ". . . Indians are so constituted as to be unable to withstand the appetite for liquor and unable to take it in moderation, that it has a low-moral and degrading influence over them, and there is nearly always trouble when they can get it."⁵⁵

Traffic

Section 72(1) of the *Indian Act* provides that the Governor-in-Council may make regulations for the control of traffic on the Reserves. Pursuant to this section the *Indian Reserves Traffic Regulations* were proclaimed in 1954. By the combined operations of sections 87 and 72(1) (c) of the Act it is submitted that such traffic laws as the *Highway Traffic Act* of Ontario and similar Acts in other provinces are limited in their application to Indian Reserves. For example,

⁴⁹ [On the question of admissions by counsel for the accused, the court declared that s. 562 of the *Criminal Code* permitting such admissions applied only to indictable offences, and the accused's counsel could not therefore admit that the accused was an Indian. Without such admission, the court declared that there was no evidence that the accused was an Indian within the meaning of the *Indian Act*. However, with respect, the learned Judge seems to have overlooked s. 708(5) of the *Criminal Code* which makes such admissions applicable to offences punishable on summary conviction, into which category fall the offences under s. 94 of the *Indian Act*.]

⁵⁰ (1930) 55 C.C.C. 27.

⁵¹ (1961) 34 W.W.R. 463.

⁵² *R. v. Cooper* (1925), 44 C.C.C. 314.

⁵³ *R. v. Brown* (1930), 55 C.C.C. 29; *R. v. Webb* (1943), 80 C.C.C. 151, at 153.

⁵⁴ *R. v. Pickard* (1908), 14 C.C.C. 33.

⁵⁵ *Ibid.*, p. 36.

it is submitted that the language of Section 5 of the Regulations passed under s. 72(i) (c) of the Act would preclude the offence of "speeding" under s. 59 of the Ontario *Highway Traffic Act*⁵⁶ from being applicable to Reserves. Also in appropriate circumstances the same section 5 of the Regulations would perhaps preclude the operation of "careless driving" under s. 60 of the Ontario statute. Similarly, it is submitted that section 7 of the Regulations would preclude the operation of s. 89(1) of the Ontario *Highway Traffic Act* since both sections forbid parking or leaving a vehicle standing on the roadway in stated circumstances. So, too, would section 8 of the Regulations take precedence over s. 48 of the *Highway Traffic Act* as both sections are concerned with the operation of unsafe or dangerous vehicles on the road or highway.

In *R. v. Williams*,⁵⁷ F. K. Jaspersen Q.C. in Simcoe Magistrates' Court held that as the *Police Act*⁵⁸ and *Highway Traffic Act*⁵⁹ were laws of general application and as there were no acts or regulations inconsistent therewith, they both applied to Indian Reserves. Therefore the City of Sarnia Police had authority to enter a Reserve and there charge the accused Indian with obstructing police. Even *assuming* that "speeding" on a Reserve is fully covered in the Regulations, this would not have availed the accused here since the issue was not whether he could have been charged with speeding on the Reserve, but whether or not the police had jurisdiction on the Reserve.

An interesting case with a stormy history is *R. v. Johns*⁶⁰ in which the accused Indian was charged with an offence under s. 6 of the Regulations for operating a motor vehicle without holding a licence, contrary to s. 60(1) of the *Saskatchewan Vehicles Act*.⁶¹ The magistrate acquitted the accused on the grounds that the road on which the accused was driving was not a "public" road within the definition of s. 2(25) of the *Indian Act*. The evidence established that the road was built by the Indians for their own use and was not intended to be open to the general public. On the hearing of the application for a writ of mandamus in the Court of Appeal,⁶² Woods J.A. explained the inter-action of the provincial statute and Section 6 of the Regulations. He said, "In other words, while the law of Saskatchewan relating to motor vehicles must be complied with because the regulation so directs, the driver of the motor vehicle on a Reserve is not made subject to such provincial law."⁶³

Trespass on Reserves

Section 30 of the *Indian Act* making it an offence for any person to trespass on a Reserve has been interpreted by the Alberta Court

⁵⁶ R.S.O. 1960, c. 172.

⁵⁷ (1958) 120 C.C.C. 34.

⁵⁸ R.S.O. 1950, c. 279.

⁵⁹ R.S.O. 1950, c. 167.

⁶⁰ (1963) 41 W.W.R. 385.

⁶¹ S.S. 1957, c. 93.

⁶² (1962) 39 W.W.R. 49.

⁶³ *Ibid.*, p. 52.

of Appeal in *R. v. Gringrich*.⁶⁴ In that case the Band Council⁶⁵ had established a system of permits and the accused, a missionary, had twice applied for and had been refused a permit to enter a Reserve. On appeal from his conviction for trespassing, it was held that the courts must determine what is a trespass and the Indian Council could not usurp this function merely by setting up this permit system. The power of the Council to make by-laws for the removal and punishment of trespassers under s. 80(p) of the Act did not arise until after the offence had been committed.

Ontario Marriage Act

The *Ontario Marriage Act*⁶⁶ contains a peculiar provision in s. 39, which provides:

Where both parties to an intended marriage are Indians ordinarily resident on a reserve in Ontario or on Crown lands in Ontario, and desire to avail themselves of the provisions of this Act,

- (a) before a licence is issued, one of the parties to the intended marriage shall make an affidavit (Form 9) which shall be deposited with the issuer;
- (b) notwithstanding section 38, no fee shall be paid for such licence.

The phrase "and desire to avail themselves of the provisions of this Act" seems to indicate that the Indians of Ontario are not generally subject to this Act. It will be noted the term "provisions" is plural and therefore extends to the whole Act and is not limited in its effect merely to exempting Indians from the \$5.00 nominal fee of a marriage licence. It would therefore seem to follow that Indians could not be prosecuted under s. 49 of this Act for solemnizing a marriage without being registered as a person so authorized; nor, apparently, could an Indian be prosecuted under s. 50 of this Act for knowingly making a false statement in any document required under this Act. Both sections provide fines ranging from \$200.00-\$500.00 or imprisonment up to one year, or both.

CONCLUSIONS AND RECOMMENDATIONS

The foregoing sampling has revealed that the special legal position occupied by the Indian is largely the result of the existence of Reserves and laws governing Reserves. It therefore becomes necessary to examine the advisability of continuing the present Reserve system. The Reserve system, which dates from before 1800, was originally intended to protect the Indian from a progressive society in which he was not equipped to compete. Today the Indian is able to compete, but the Reserve system discourages him from doing so

⁶⁴ (1959) 31 C.R. 306.

⁶⁵ On many of the Reserves today the Indian Councils are in almost complete control of the administration of local affairs including the expenditure of band funds. The Indian Councils consist of a chief and from two to twelve councillors. They are elected by a simple majority for a two-year term. Their legislative powers are outlined in s. 80 of the *Indian Act*. Candidates and electors must be twenty-one and ordinarily resident on the Reserve.

⁶⁶ R.S.O. 1960, c. 228.

by providing such "benefits" as free medical service, exemption from all taxes except the income tax, and freedom from execution, if he remains on the Reserve. These "benefits" are largely illusory. The medical services provided are often sub-standard. Exemption from taxes leads to lack of public utilities. Freedom from execution breeds irresponsibility in the management of individual finances and difficulty in obtaining credit. The Reserve system, in short, provides few real benefits to the Indian, which is a very real detriment to him since it discourages him from becoming integrated into the mainstream of Canadian life.

The abolition of the Reserves does not mean that Indian culture or heritage must be discarded. It is not only possible but desirable that when a minority racial group is absorbed into a multi-racial community such as Canada, it should retain its language and distinctive customs.

Should the Reserves be abolished, how would this affect the legal position of the Indian? Assuming the legislation abolishing the Reserves was silent on the matter, it would appear that all statutes and regulations presently in effect only on the Reserves would be nullified. The Indian would then be subject to the law of the Province in which he resides, to the same extent as non-Indians, save for those laws respecting the Indian as such, which apply to him, whether on or off a Reserve.

Assuming that the Reserves are not abolished, what alternative reforms are possible?

First, the special laws affecting the Indian should be repealed except where to do so would *clearly* be detrimental to the Indian.

In some Reserves the changes brought about in 1956 by sections 95 and 96A of the *Indian Act* were long overdue. Even in the Reserves where the principle of protection is still necessary, it is questionable whether the liquor laws achieve their purpose. Often such restrictions merely breed contempt and disrespect for the existing laws. If the Indian, or any person, is expected to act in a mature and responsible manner he should be treated accordingly.

The entire *Indian Act* needs to be revised to remove those sections imposing special restrictions or giving special privileges to the Indian. Indeed, the whole Act should be made inapplicable to the most advanced Reserves.

Second, the validity of many treaties with the Indian tribes should be authoritatively ascertained.

Several of the old treaties have guaranteed to the Indians concerned the right to hunt and fish as was their custom before the treaty was made. The question today is, to what extent the rights given by the treaties are still valid and subsisting. They may provide

a defence, for example, to a prosecution under a provincial Game Act.

The answer to this question depends on considerations of a varied nature; for instance, certain treaties have been considered ineffective now because the Indians concerned rebelled against the Crown, or because of a subsequent state of war, or because no legislation has been passed implementing the treaty.⁶⁷ There is also a general rule that where a statute and a treaty conflict the Court must follow the statute.⁶⁸

Accordingly, in each case where a treaty is relied on, an extensive search must be made of the statutes from the date of the treaty, to ascertain whether the treaty is still in force. Where there is no evidence that the Indian claiming exemption under the treaty is a direct descendant of the tribe of Indians with whom the treaty was made, the treaty, if valid, does not avail.⁶⁹

Perhaps one way to test the validity of these ancient and cherished documents is by way of an action for declaratory judgment.⁷⁰

Third, the Provincial Legislatures should be given authority to legislate directly for Indians. Since Indian problems are often entirely local in nature, they require the attention that only an individual province can give. The Federal Government has not been able to legislate for local problems in the field of Indian affairs. An example of a field needing provincial attention is education over which the Provinces have competence by virtue of s. 93 of the *B.N.A. Act*.

It is submitted that if the Provinces had authority to legislate directly for Indians on education, more Indians would be taking advantage of higher education.

If the Indian is to be absorbed successfully into the Canadian community, he must be shown the benefits that will flow from such a change. The Indian often fears that any encroachment upon his Reserve or upon his cherished "rights" will result in his being in an even more disadvantageous position. This, of course, need not be the case but the Indian must be convinced of this fact. Education may not be the panacea for all the Indian's problems, but it certainly is the method by which the Indian can be made to realize that this change is for his benefit.

Provincial jurisdiction would necessitate an amendment to the *B.N.A. Act*, with the usual cumbersome and protracted procedure.

Fourth, a modification of the third alternative would be to transfer only the administration of Indian affairs to the provinces. This

⁶⁷ *Francis v. The Queen*, [1954] Ex. C.R. 590; affirmed [1956] S.C.R. 618.

⁶⁸ *Walker v. Baird*, [1892] A.C. 491, at 494-5. However, see *supra*, footnote 24, *Rex v. George*.

⁶⁹ *R. v. Sylaboy*, [1929] 1 D.L.R. 307.

⁷⁰ A problem might be the *locus standi* of a petitioner to ask for such a declaration.

would not require an amendment to the *B.N.A. Act* as the Federal Parliament would retain its legislative authority. If federal legislation were passed in accordance with the wishes of the province, the latter would be free to work out administrative details in accordance with the Indian situation in the province.

Perhaps the federal legislation could empower the Province to enact regulations under general sections of the federal statute. In this way detailed attention could be directed to local Indian problems.

The Canadian Indian faces a dilemma. Socially, he is torn between conflicting cultures. Without exception he is in a period of adjustment. Legally, he does not know what statutes apply to him or when. On the one hand he is urged to accept more responsibility, on the other he is subjected to a paternalistic government administration. Often he feels that Canada owes him something, always the non-Indian feels that the Indian has been repaid generously for anything he has given up.