SOME ASPECTS OF THE LEGAL STATUS OF INDIANS

BY

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INTRODUCTION

"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 on Indian affairs in 1954, appointed by the Ontario Legislature on April 2, 1953 to consider the Indian position in Ontario. This frank admission by a Government Committee tells of a lack of knowledge by an authority which should be intimately concerned with the problem of its Indian citizens. As well, it indicates that the First Canadians have not, so far, had an effective voice in bringing their problems to the attention of the authorities.

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

The Indian has progressed in Canada to the state where he now finds himself torn between the non-Indian way of life and the traditional tribal society. He has accepted enough of the former and rejected enough of the latter, but ironically, instead of getting the best of both worlds he finds himself wondering whether there is a best. It is in this light that the Canadian Indian today must be regarded. It is this Indian faced with a conflict of cultures that the non-Indian sees. As a result the non-Indian forms his impression of the Indian as lazy, unreliable and, often, as a second-class human being.

Aware of this opinion, the Indian reacts in one of two ways; either he accepts as a fact his inferiority to his non-Indian neighbour, and thereby turns the image into a reality, or he seeks to prove this opinion wrong by competing with the non-Indian in technical skills or education.[2]

However, this competition in turn presents problems. If children are educated along lines unfamiliar to their parents, serious social maladjustments may result. The child who is taught to respect skills and types of knowledge unfamiliar to his parents inevitably acquires

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

2. In 1949 there were 9 Indians in Canadian Universities and 41 in vocational courses; in 1963 there were 57 in Universities and 582 in vocational courses.

a certain amount of disrespect for his parents; whereas, from the parent's point of view, he sees the child spending time on unintelligible pursuits and is likely to regard the younger generation as ignorant, lacking in ability and undisciplined. An American author describes the effect thus: "These maladjustments do not produce 'gangsters' on Indian reservations as they do in our large cities, but they do produce shiftless, visionless, imitation white men, that now, to most Americans, exemplify Indian character."[3]

But there is another side to the picture - a side, which, unfortunately, is all too often overlooked. Again quoting from Professor Cohen's work: "The fact is that there is probably no dependent people in any part of the world which rallied to the support of democracy with more devotion than the tribal Indians of the United States. In the rate of volunteering for the armed services (particularly in World War I and II) they far surpassed the white and black populations of the United States. They gave not only of their blood and sweat and tears, but of their brains as well."[4]

The Indian is by nature a proud individual, and a proud race; one of the colossal problems facing the Indian today is to convey to the non-Indian public some justification for this pride, starting perhaps with his history. Indian children and parents alike have the right to demand that the history of their people taught in their schools shall bear some resemblance to the facts.

In summary, the Indian's greatest immediate problem is to be accepted as an equal by his non-Indian neighbour; indeed he must be accepted as equal if he is to develop as a person and achieve personal ambition, and if certain benefits given to him are not to carry the curse of discrimination.

STATUS

What is the legal status of the Canadian Indian? Is he a ward subject to restraints, is he a second-class citizen, is he an ally of the Crown, or is he a full-fledged citizen enjoying all the rights, and subject to the same liabilities, as ordinary Canadian Citizens? Early in Canadian history most of the treaties between the Crown and the 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". However, other sources referred to the Indians as "wards". In the case of the PROVINCE OF ONTARIO v. DOMINION OF CANADA and the PROVINCE OF QUEBEC [5]

3. Felix S. Cohen; The Legal Conscience. (Yale University Press New Haven, 1960) pp.214-215

4. ibid. P.231

5. (1896) 25 S.C.R. 434, at 535.

Sedgewick J. used both terms in one paragraph when he said:

> "They (the courts) would with the consent of the Crown and of all our governments, strain to the utmost limit all ordinary rules of construction or principles of law - the governing nature being that in all questions between Her Majesty and 'the faithful Indian allies' there must be on Her part ... not only good faith, but more, there must be not only justice, but generosity. The wards of the nation must have the fullest benefit of every possible doubt".

In the case of Prince v. Tracey,[6] Prendergast J. said:

> "...I would only say that subject to special statutory limitations, the Indians are British subjects enjoying full civil rights as such".

More recently, in the case of R. v. Strongquill,[7] Proctor J. A. of the Saskatchewan Court of Appeal, said:

> "It has been the consensus of judicial opinion in Canada as expressed in many decisions of the courts that an Indian is a Canadian citizen and that, subject to the special privileges and restrictions provided in legislation such as the Indian Act .... he has the same rights, duties and obligations as any other Canadian citizen."

The true 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] As amended, section 4 of that Act reads in part:

> "A person born before the first day of January 1947 is a natural born Canadian citizen, if (a) he was born in Canada or on a Canadian ship and was not an alien before the first day of January, 1947".

Section 5 reads in part:

> "A person born after the thirty-first day of December 1946 is a natural born Canadian Citizen (a) if he is born in Canada or on a Canadian ship".

While for some purposes, namely, the receipt and expenditure of money on behalf on Indians, the Government of Canada may be trustees

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6. (1913) 13 D.L.R. 818, at 822.

7. (1953) 16 C.R. 194, at 211-212

8. R.S.C. 1952 C.33

for the Indians, this relationship is to be distinguished from that of guardianship.

A trusteeship deals with the property right of the individuals, whereas a guardianship deals with the personal rights of the ward. The fact that the Federal Government maintains a separate Indian Affairs Branch in the Department of Citizenship and Immigration does not make the Indians wards of the Government any more than veterans are wards because we have a Veterans Affairs Bureau. Until the ghost of Indian wardship is laid to rest, every benefit conferred on Indians may carry with it the curse of discrimination.

In the United States, Indians are not wards under guardianship, but on the contrary are full citizens of the United States, of the States wherein they reside, and are entitled to all the rights and privileges of citizenship.[9]

THE POSITION OF THE INDIAN IN LAW

The British North America Act, 1867,[10] as amended, provides, in Section 91, inter alia:

> "...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:-
>
> 24. Indians, and Lands reserved for the Indians."

Pursuant to this legislative authority the Parliament of Canada has enacted statutes dealing specifically with Indians, and made special provisions affecting Indians in statutes of general application. The most important and most comprehensive of these statutes is The Indian Act;[11] this Act was first enacted in 1880 and since then has been amended and expanded in scope, until now it covers numerous aspects of Indian life and behaviour.

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 this reason most of the grants of land to Indians, even before the Act was passed, contained the provision that the land comprising the Reserves could not be alienated without first obtaining the consent of the Crown.[12] Until very recently the Act contained provisions making it an offence for an Indian to be intoxicated on or off a Reserve. The reason for this prohibition was the Indian reputation of not being able to

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

10. 30 & 31 Victoria, c. 3.

11. R.S.C. 1952 c. 149

12. This provision appears in the present Act as section 24.

handle liquor. 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.[13]

Among other things, the Act provides (1) for the punishment of a person who trespasses on a Reserve;[14] (2) for removing materials from the Reserve such as sand and gravel;[15] (3) for the management of monies belonging to Indian bands;[16] (4) for exemption from taxes with respect to property situate on a Reserve.[17]

Section 1 (b) of the Canadian Bill of Rights[18] which guarantees "equality before the law" raises doubts about the validity of special laws applying only to Indians.[19]

What 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.87 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:

> "By and large, it must be remembered that 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."[19a]

For example, in these transactions the Indian generally stipulated that the payments for land be made in the form of goods and services. These stipulations have been pushed to the background by public opinion which

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13. The Indian Act R.S.C. 1952 c.149, as amended, ss.93,94,95,96,96A,97.

14. R.S.C. 1952 C.149 s.30

15. R.S.C. 1952 c.149 s. 92

16. R.S C. 1952 c.149 ss.61-68

17. R.S.C. 1952 c.149 s.86

18. S.C. 1960 c.44

19. R v. Gonzales (1962)/37 C.R.56, and Richards v. Cote (1962) 40 W.W.R. 340, discussed below at p

19a. Cohen, op. cit. p.255.

asserted that the rendering of such services was degrading and encouraged idleness. As a result the Congress of the United States passed an Act prohibiting the distribution of services to able-bodied Indians unless they performed services in exchange. Imagine the outcry that would go up if the Federal Government decided that payment of Government bonds to their holders encouraged idleness and should not be continued with respect to the able-bodied bondholders, except upon performance of equivalent services. This is a typical example of the double standard engendered by a sense of race superiority and an ignorance of history.

The laws which prohibit the sale of liquor to Indians must be viewed historically as a concession made by the counterpart of the present Federal Government in respect to solemn representations made to it by various Indian tribes asking for assistance in curbing the liquor traffic which the Indians did not create, did not want, and could not control. Even such matters as the incapacity of the Indian to dispose of his lands or funds without the consent of a government official when viewed in its historical perspective, is seen to be an inevitable incident of Indian rights resulting from promises of the Government. For, if the Government promised to protect Indian ownership of property, it must oversee the various transactions by which the Indian might be separated from his property.

What is the effect of the Indian Act today? Bearing in mind the fact that the provisions mentioned and many more were intended for the protection of the Indians, it is now necessary, in my opinion, to re-assess the whole concept of protection and paternalism. In some Reserves, perhaps those in Northern Canada, the protective principle is still necessary. However, in many Reserves, especially in the more industrialized parts of Canada, as in Southern Ontario, the wings of paternalism have served their purpose and it is now time to let the brood try their own wings. If Indians are to be accepted as full citizens and equal to their non-Indian neighbours, they must be rid of these out-moded provisions of the Act that now only hinder and retard their progress and development.

APPLICATION OF PROVINCIAL ACTS TO INDIANS

The B.N.A. Act, 1867 by s.91(24) gives the Federal Parliament legislative jurisdiction over "Indians and lands reserved for the Indians!". No mention is made 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?

Before 1951 it was generally conceded that Federal Acts applied to Indians the same as to non-Indians. It was held in the case of R. v. Bear's Shin Bone[20] 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 affirmatively asserted this in the case of R. v. Beboning,[21]

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20. (1899) 3 C.C.C. 329 S.C. N.W.T.

21. (1900) 13 C.C.C. 405

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[22] the British Columbia Court of Appeal decided that an Indian resident upon a reserve was liable to file an income tax return.

However a more difficult problem was to determine to what extent Provincial Acts applied to Indians: here there was some difference of opinion. In the case of R v. Hill[23] the Ontario Court of Appeal decided that the Medical Act of Ontario applied to Indians 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".

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 the Ontario County Court,[24] 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.[25] 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."[26]

A novel approach to the problem was taken in the Quebec case of R v. Groslouis.[27] 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 Sales Act. He sold two boxes of flint lighters at ten cents a box to a non-Indian person who came onto the Reserve, and was prosecuted. Having taken the position that Indians outside the Reserves are subject to provincial law, and that an Indian on a Reserve selling to another

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22. (1957) 119 C.C.C. 117

23. (1907) 15 O.L.R. 406, at 410, 413.

24. R v. Hill (1952) 14 C.R. 266.

25. R.S.O. 1950 C.153.

26. R.v. Hill (1952) 14 C.R. 266, at 274.

27. (1944) 81 C.C.C. 167

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 (Indian) sells to a non-Indian, he does an action which causes him, theoretically, to go outside the Reserve."[28] By thus holding that the Indian went outside the Reserve the provincial Act applied to him and he was convicted.

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.[29] 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."[30]

SECTION 87, INDIAN ACT

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, 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."

GAME LAWS

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 the 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:

> S.12 "In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and

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28. ibid p.173 (1923)

29. R v. Rodgers, 49 C.C.C. 51

30. ibid p.61

> 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,[31] where an Indian was charged with killing a deer with antlers less than four inches, 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 assured him that he was in a very different position from the non-Indian and retained this right which he 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.[32] 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 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:

> "It seems to me that 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 Act and the Game and Fisheries Act recognized that the Indians had a privileged position when hunting for food and the 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 support and sustenance. In such a case the Legislature would be putting the value of the animals' lives above those of the Indians.[33]

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31. (1932) 58 C.C.C. 269

32. R.v. Prince et al (1963) 39 C.R. 42, at 47,49.

33. (contd. on next page.)

Footnote 33 continued.

On appeal to the Supreme Court of Canada, a Court of nine judges were 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,[34] 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, and 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.

It was held in R v. Sikyea[35] that the Migratory Birds Convention Act[36] did not apply to Indians in the Northwest Territories hunting on unoccupied Crown lands.

In R v. George[36a] it was held that an Indian on a Reserve could not be convicted under the Regulations of the Migratory Birds Convention 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."

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 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 can not now be taken away even by legislation.

The Ontario Game and Fisheries Act[37] which had provided in s.82(i) (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[38] which does not contain any

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34. (1958) 28 C.R. 33

35. (1962) 40 W.W.R. 494

36. (R.S.C.) 1952 C. 179

36a. (1964) 41 D.L.R. (2d) 31

37. R.S.O. 1960 C.158

38. S.O. 1961-62 C.48

provision for exempting Indians from its operations.

LIQUOR LAWS

Since the enactment of s.87 of the Indian Act, it has been held that the provisions 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.[39]

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 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) 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 person 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, the accused Indian appealed his conviction of being intoxicated in a public place, under the Government Liquor Control Act of Alberta.[39]

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39. R.v. Shade (1952) 4 W.W.R. (n.s.) 430

39. R.S.A. 1942 c 24. s. 88(2)

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[40], 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 this section was not the offence of consuming liquor but depended on the effect produced by such consumption.[41]

An interesting comparison here is the case of R v. Bennett,[42] where His Honor Judge Denton of the York County Court delayed the hearing of an appeal of 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[43] 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 that he intended to turn over to the police.

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40. (1960) 31 W.W.R. 84.

41. (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.)

42. (1930) 55 C.C.C. 27

43. (1961) 34 W.W.R. 463

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.[44] In such cases, also, mens rea must be proved.[45] In an earlier case in the Edmonton District Court[46] 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."[47]

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

There have been three recent cases dealing with the contention that the provisions of s94 of the Indian Act are implicitly repealed by s. 1(b) of the Canadian Bill of Rights[48] which guarantees "the right of the individual to equality before the law and the protection of the law."

In the first case[49] 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."

In the case of R v. Gonzales[50] the British Columbia Court of Appeal rejected this 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.[51] This dealt with an acquittal under s.96(b) of the Indian Act, and occurred 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 and this, with being

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44. R v. Cooper (1925) 44 C.C.C. 314

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

46. R v. Pickard (1908) 14 C.C.C. 33.

47. Ibid. p. 36

48. S.C. 1960 c.144

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

50. (1962) 37 C.R. 56,

51. (1962) 40 W.W.R. 340, at 350

intoxicated.

His Honour Judge McF dden says, "...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 provision of the Canadian Bill of Rights, and is inoperative insofar 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 more broadly than previously, that is, it now must be interpreted so as to bring the ingredients of the offence in line with the offence as it relates to non-Indians, and therefore no offence is committed against this section unless the Indian is both intoxicated and creating a disturbance.

REGULATION OF TRAFFIC

The Indian Act provides in section 72(1):

"The Governor-in-Council may make regulations,

(c) for the control of the speed, operation, and parking of vehicles on roads within Reserves."

Pursuant to this section the Governor-in-Council on September 17, 1954, passed the "Indian Reserve Traffic Regulations" which provide, in part:

"s2. These regulations apply to all roads the legal title to which is vested in Her Majesty in right of Canada within Indian Reserves.

3. In these regulations
a "road" includes any roadway, driveway, street, lane, or other place open to the public for the passing of vehicles.

5. The person in charge of any vehicles shall not drive or ride such vehicle at any rate of speed that is excessive or dangerous, having regard to the conditions then prevailing, and such person shall keep such vehicle in such control when approaching a road intersection or crossing for pedestrians or other purposes as will enable him to prevent a collision with or damage to, all other persons and vehicles.

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

7. No person shall park or station any vehicle upon any road unless permission to do so is designated by signs erected over or marked on the roadway.

8. No vehicle in a dangerous or unsafe condition shall be operated on any road."

By s.87 of the Indian Act the general laws of the Provinces apply to Indians (Quaere, whether they apply to "lands reserved for Indians") except in so far as they are inconsistent with, inter alia, any regulations under the Act. By the combined operation of sections 87 and 72 (i) (c) of the Act it is submitted that such traffic laws as the Highway Traffic Act of Ontario[52] and similar Acts in other provinces are limited in their application to Indian Reserves. For example, 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[52] 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(i) of the Ontario Highway Traffic Act[52] 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 Highway Traffic Act[52] as both sections are concerned with the operation of unsafe or dangerous vehicles on the road or highway.

In R v. Williams[53] F.K. Jasperson Q.C. in Simcoe Magistrates' Court held that as the Police Act[54] and Highway Traffic Act[55] were laws of general application and as there were no acts or regulations inconsistent therewith, they both applied to Indian reserves so that the City of Sarnia Police had authority to enter a Reserve and there charge the accused Indian with obstructing police. Assuming that "speeding" on a Reserve is fully covered in the Regulations,

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52. R.S.O. 1960 c.172

53. (1958) 120 C.C.C. 34

54. R.S.O. 1950 c.279

55. R.S.O. 1950 c.167.

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[56] 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.[57] After a much debated case returned to the magistrate to try the issue in the case, he acquitted the accused on the grounds that the road on which the accused was driving was not a "public" road within the definition of s2 (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[58] 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."[59]

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 of Appeal in R v. Gringrich.[60] In that case the Band Council 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.

DEFINITION OF TERM "INDIANS"

In the Reference Re TERM "INDIANS"[61] the Supreme Court of Canada decided unanimously that "Indians" as used in s.91(24) of the B.N.A. Act

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56. (1963) 41 W.W.R. 385.

57. S.S. 1957 c.93

58. (1962) 39 W.W.R. 19
59. ibid. p.52

60. (1959) 31 C.R. 306

61. (1939) S.C.R. 104

included "Esquimoes". In 1951 Parliament put in the present s.4(i) of the Indian Act which provides:

> "A reference in this Act to an Indian does not include any person of the race of aborigines commonly referred to as Eskimos."

ONTARIO MARRIAGE ACT

The Ontario Marriage Act[62] contains a peculiar provision in s.39, new in 1956, 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: and
>
> 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 soleminizing 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 has shown that at present the Indian in Canada is subject to special laws. Should this be so?

To answer this it is necessary to consider the whole concept of the system of Reserves for the Indian. What has the system done for the Indian and what future is there in such a system for Canada's native population?

If it is thought that the protective principle as exemplified by the Reserves is still necessary, then it must be concluded that the Indian should be subject to different laws, at least with respect to matters on Reserves. However, if it is decided that the Reserves have served whatever useful role they were intended to fulfil, and that the proper objective now is to integrate the Indian into the Canadian community, then it follows that the Reserves should be abolished. It must at least be conceded that the Indian, wherever he may be, should not be subjected to special laws. It is my opinion that integration of the Indian into the

62. R.S.O. 1960 c.228

Canadian community should be achieved as soon as practicable.

The Reserves were originally intended to protect the Indian from a progressive society about which he knew very little and in which he could not long compete. The decision to set aside tracts of lands as Indian Reserves was made before the beginning of the nineteenth century and has been accepted ever since virtually without question. It is now time to re-examine the policy of Reserves.

On many of the Reserves today the Indian Councils[62a] are in almost complete control of the administration of local affairs including the expenditure of band funds. Many of the Reserves have elementary school systems comparable to, or even better than, those available to the non-Indian students. In many instances the teachers in these schools are Indians, born and raised on Reserves, who are familiar with local conditions and attitudes. Often these Indian teachers exhibit a keener personal interest in the progress of the Indian students than does the non-Indian teacher. The results of this system and interest are shown by the increasing number of Indians attending Universities in Canada.

Indians today are in professions such as law, medicine, nursing, teaching, business administration, radio and television, modelling, as well as factories and offices. Many hold skilled technical jobs. Does it not seem anomalous that they should still be treated as Indians were 150 years ago when the Reserve was intended as a protection for them?

To some, the Reserve is more than a protection; it is "home". Some who venture into urban society seeking jobs feel that the Reserve is a place to go back to if they become lonely, disappointed and unable to adjust to life off the Reserve. Should the Reserves be maintained to encourage the Indian to display a lack of responsibility to a job and to an employer? Should the Reserves be maintained to provide a false sense of security for the Indian who could otherwise hold a steady job in a factory and reap the benefits of a union and a retirement fund? Surely not!

The arguments prevalent among many Reserve Indians today who oppose the abolition of the Reserves are that they would lose the benefit of Reserve living. These include free medical services; an exemption from all taxes save income tax; freedom from execution and seizure of property situate on a Reserve, and similar benefits.

However, those who take this position must be confronted with the reality of facts. For a healthy individual in the prime of his earning years, the medical expenses saved per year may be nil, or a negligible amount. As

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62a. 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 enumerated in s.80 of the Indian Act. Candidates and electors must be twenty-one and ordinarily resident on the Reserve.

well, the complaint is often voiced that the free medical services dispensed by the Government-paid medical practitioners are not equal to those available off the Reserve offered by private doctors. As a result many families do not avail themselves of this service. They choose, instead, to bear the cost of an operation or the expenses of child birth. Therefore the free medical service is not in fact so economically advantageous as it first appears.

It is trite to say that if citizens do not pay taxes, governments do not have finances with which to improve their lot. This is especially true on Indian Reserves. Because no taxes are paid, very often the roads are sub-standard compared to roads off the Reserves where taxes are paid. If taxes are not paid, public utilities are not provided; again this is evident on Reserves. Illustrations of this sort could be multiplied. An exemption from taxes that would in any event be low for Reserve residents again is not the advantage it seems to be.

It may appear to be advantageous to have one's lands exempt from seizure. However, it may breed irresponsible arranging of one's finances and the accumulation of debts. More serious still is the fact that those with capital are unwilling to lend it to Indians because the latter's property can not be given as security to a non-Indian, with the result that a Reserve Indian finds it extremely difficult to obtain credit. A more intangible but nonetheless decided disadvantage to living on a Reserve is that it breeds complacency with one's self, and with one's environment. The Indian on the Reserve is less concerned with his individual status and condition of life than he would be off the Reserve. If the Indian is less competitive by nature than most non-Indians, nowhere is this more evident than on the Reserves where he does little to improve his surroundings.

It is submitted that where the Indian Reserves have progressed to the state where they are ready economically and socially, they should be integrated into the Canadian stream of life. The advantages of living on such Reserves are now far outweighed by the disadvantages of discrimination, apathy, absence of public utilities, inadequate highways, and the inability to obtain credit.

The abolition of the Reserves, however, 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, that they should retain their language and distinctive customs.

The abolition of the Reserves would have serious economic and social repercussions. Therefore it must be approached with caution and only after a detailed and comprehensive study of the needs and desires of the areas in which the Indian would find himself.

Should the Reserves be abolished, how will 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 where he resides, the same 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. Discriminatory laws themselves breed discrimination, a fact known all too well by many Canadian Indians. Even in the Reserves where the principle of protection is still necessary, it is questionable whether the liquor laws achieve their purpose. Often, by imposing such restrictions they merely breed contempt and disrespect for the existing laws. If the Indian, or any person, is expected to act in a nature 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[63] or because no legislation has been passed implementing the treaty.[63] There is also a general rule that where a statute and a treaty conflict the Court must follow the statute.[64]

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.[65]

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

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63. Francis v. The Queen (1954) Ex. C.R. 590; affirmed (1956)S.C.R. 641

64. Walker v. Baird (1892) A.C. 491, at 494-5

65. R v. Syliboy (1929) 1 D.L.R. 307

Another suggestion is that the Indian Claims Commission promised by the Federal Government should deal with the validity of treaties brought before it, as well as account for trust monies.

Third, the Provincial Legislatures must be given authority to legislate directly for Indians. Since Indianproblems are often entirely local in nature, they require the attention that an individual province can give. The Federal Government has not been able to legislate for local problems in the field of Indian affairs.

One of the fields where the Indian needs a great deal more development, and incentive, is the field of education. This presents a major problem because the Provincial legislatures have authority over education by virtue of s.93 of the B.N.A. Act. Therefore the problem resolves itself into one where the Federal Government should help the Indian population by way of education - a field reserved for the Provinces. It is submitted that if the Provinces had authority to legislate directly for Indians the problem of Indian education would not be what it is and 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 he must be convinced. Education may not be the panacea for all the Indians problems, but it certainly is the method by which the Indian can be made to realize that this change is for his benefit.

This of course would necessitate a change 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 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's torn between conflicting cultures. Without exception he's in a period of adjustment. Legally he does not know what statutes apply to him, or when. On the one hand he's urged to accept more responsibility, on the other he's subjected to a paternalistic government administration. Often he feels that Canada owes him something, always the non-Indian feels he has been repaid generously.

These are a few aspects of the Indian problem. My comments have been directed to ascertaining the extent to which the Indian is affected by federal and provincial laws with special emphasis on penal statutes. There is much more

to be said in this area particularly with regard to the policing of Reserves.

A few important fields have been touched upon briefly. Indian education, the payment of taxes, medical services, and the validity of treaties are areas that should be explored and developed.

Many other topics of concern to the Indian have not even been mentioned. These include welfare services for Indians, especially housing, the problems encountered with enfranchisement, a direct liason between the governments and the Indian Reserves, and many more.

This article is intended as a preliminary survey of the Indian situation. It is hoped that a more detailed and comprehensive study can be made in the near future.