

CANADA / JUDGMENT

Cardinal v. Attorney General of Alberta

[1974] SCR 695**COURT**

Supreme Court of Canada

DECIDED

29 June 1973

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Cardinal v. Attorney General of Alberta

Collection

Supreme Court Judgments

Date

1973-06-29

Report

[1974] SCR 695**Judges**

Fauteux, Joseph Honoré Gérard; Abbott, Douglas Charles; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Hall, Emmett Matthew; Spence, Wishart Flett; Pigeon, Louis-Philippe; Laskin, Bora

On appeal from

Alberta

Subjects

Aboriginal law

Decision Content

Supreme Court of Canada

Cardinal v. Attorney General of Alberta, [1974] S.C.R. 695

Date: 1973-06-29

Charlie Cardinal Appellant;

and

The Attorney General of Alberta Respondent.

1972: December 7; 1973: June 29.

Present: Fauteux C.J. and Abbott, Martland, Judson, Ritchie, Hall, Spence, Pigeon and Laskin JJ.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Indians—Constitutional law—Provincial Statute prohibiting trafficking in big game—Validity of legislation—Applicability to Indians on Reserve—Wildlife Act, R.S.A. 1970, c. 391—B.N.A. Act.

The appellant, a treaty Indian, at his home on an Indian Reserve in Alberta, sold a piece of moose meat to a non-Indian. He was charged with unlawful trafficking in big game, in breach of s. 37 of the Wildlife Act, R.S.A. 1970, c. 391. It is uncontested that what he did was, in fact and in law, within the prohibitions of that Act. The appellant was acquitted at trial on the ground that the Wildlife Act was ultra vires of the Legislature in its application to the appellant as an Indian on an Indian Reserve. An appeal by way of a stated case was dismissed. On a further appeal to the court of Appeal, the judgment at trial was reversed. The appellant was granted leave to appeal to this Court.

Held (Hall, Spence and Laskin JJ. dissenting): The appeal should be dismissed.

Per Fauteux C.J. and Abbott, Martland, Judson, Ritchie and Pigeon JJ.: Section 12 of the Alberta Natural Resources Agreement of 1929, between the Government of Canada and the Government of Alberta, made the provisions of the Wildlife Act applicable to all Indians, including those on Reserves, and governed their activities throughout the province, including Reserves. By virtue of s. 1 of the B.N.A. Act, 1930, it has the force of law, notwithstanding anything contained in the B.N.A. Act, 1867, any amendment thereto, or any federal statute.

Section 91 (24) of the B.N.A. Act, 1867, gave exclusive legislative authority to the Canadian Parliament in respect of Indians and over lands reserved for the Indians. A provincial Legislature could not enact legislation in relation to Indians, or in relation to Indian Reserves, but this is far from saying that the effect of s. 91(24) was to create enclaves within a Province within the boundaries of which provincial legislation could have no application. Section 91(24) does not purport to define areas within a province within which the power of a province to enact legislation, otherwise within its powers, is to be excluded. Section 37 of the Wildlife Act does not relate to Indians, qua Indians, and is applicable to all Indians, including those on Reserves.

The purpose of s. 12 of the Agreement is to secure to the Indians of the province a continuing supply of game and fish for their support and subsistence. It could not have been intended that the controls which would apply to Indians in relation to hunting and fishing for purposes other than for their own food, should apply only to Indians not on Reserves.

Per Hall, Spence and Laskin JJ., dissenting: Apart entirely from the exclusive power vested in the Parliament to legislate in relation to Indians, its exclusive power in relation also to Indian Reserves puts such tracts of land beyond provincial competence to regulate their use or to

control resources thereon. It is only Parliament that may legislate in relation to Reserves once they have been recognized or set aside as such. Indian Reserves are enclaves which are withdrawn from provincial regulatory power. During its existence as such a Reserve is no more subject to provincial legislation than is federal Crown property or any other enterprise falling within exclusive federal competence. Not only provincial game laws but other provincial regulatory legislation can have no application, of its own force, to such Reserves, at least where it is sought to subject Indians thereon to such legislation.

Section 10 of the Agreement provides that all Indian Reserves are to continue to be administered by the Government of Canada for the purposes of Canada. That points clearly to the exclusion of Reserves from provincial control. Section 12 is concerned with Indians as such, and with guaranteeing to them a continuing right to hunt, trap and fish for food regardless of provincial game laws which would otherwise confine Indians in parts of the province that are under provincial administration. Section 12 of the Agreement cannot, in view of s. 10 thereof and in view of s. 91(24) of the B.N.A. Act, have the effect of subjecting Indians on a Reserve to the Alberta Wildlife Act.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], overruling the judgment of the Court below. Appeal dismissed, Hall, Spence and Laskin JJ. dissenting.

R.F. Roddick and L.R. Cunningham, for the appellant.

W. Henkel, Q.C., and B.A. Crane, for the respondent.

The judgment of Fauteux C.J. and of Abbott, Martland, Judson, Ritchie and Pigeon JJ. was delivered by

MARTLAND J.—On December 8, 1970, the appellant, a treaty Indian, at his home on an Indian Reserve, in the Province of Alberta, sold a piece of moose meat to a non-Indian. He was charged with a breach of s. 37 of the Wildlife Act, R.S.A. 1970, c. 391, which provides:

37. No person shall traffic in any big game or any game bird except as is expressly permitted by this Act or by the regulations.

The trial judge found that the appellant had trafficked in big game within the meaning of this section. The appellant was acquitted on the ground that the Wildlife Act is ultra vires of the Alberta Legislature in its application to the appellant as an Indian on an Indian Reserve. A case was stated on this legal issue, which was considered by a judge of the Supreme Court of Alberta, who held that the decision was correct. An appeal was taken to the Appellate Division of the Supreme Court of Alberta, which allowed the appeal and overruled the judgment of the Court below. The present appeal is brought, with leave, to this Court.

Section 91(24) of the British North America Act, 1867, gives to the Parliament of Canada exclusive authority to legislate in respect of:

24. Indians, and Lands reserved for the Indians.

An agreement was made between the Government of Canada and the Government of Alberta, dated December 14, 1929, hereinafter referred to as “the Agreement”, for the transfer by the former to the latter of the interest of the Crown in all Crown lands, mines and minerals within the Province of Alberta, and the provisions of the Alberta Act were modified as in the Agreement set out.

Sections 10 to 12 inclusive appear in the Agreement under the heading “Indian Reserves”, and it is sections 10 and 12 which are of importance in considering this appeal. They provide as follows:

10. All lands included in Indian Reserves within the Province including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may in agreement with the appropriate Minister of the Province, select, as necessary to enable Canada to fulfil its obligations, under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof.
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 fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

This Agreement was approved by the Parliament of Canada and the Legislature of the Province of Alberta and, thereafter, it and also agreements between the Government of Canada and the Provinces of Manitoba, Saskatchewan and British Columbia were confirmed by the British North America Act, 1930. Section 1 of that Act provided:

1. The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the British North America Act, 1867, or any Act amending the same, or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid.

Sections 10 and 12 of the Agreement were, therefore, given the force of law, notwithstanding anything in the British North America Act, 1867. The question in issue on this appeal is as to whether s. 12 was effective so as to make the provisions of the Wildlife Act applicable to the appellant, a treaty Indian, in respect of an act which occurred on an Indian Reserve in the Province of Alberta.

The submission of the appellant is that the Parliament of Canada has exclusive legislative authority to legislate to control the administration of Indian Reserves and that Provincial laws cannot apply on such a Reserve unless referentially introduced through Federal legislation. It is contended that the phrase “on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access” does not include Indian Reserve lands and that the only laws to which Indians are subject, while on a Reserve, are the laws of Canada. Section 12, it is said, can only have application to Indians in Alberta outside the Indian Reserves.

In support of this proposition the case of *R. v. Wesley*[2], is cited. This is a judgment of the Alberta Appellate Division. In my opinion it is not of assistance in determining the issue in the present appeal. The accused, an Indian, was charged with breaches of the Game Act of Alberta in respect of his hunting activities on unoccupied Crown land. The deer which he had killed was used for food. The issue was as to the scope of the protection provided to him by s. 12 of the Agreement with respect to hunting for food. The Crown contended that the right to hunt “game” did not include animals the killing of which was totally prohibited by the Game Act. It was also urged that when the right to hunt was given “at all seasons of the year” this only conferred the right to hunt out of season, but that such hunting was still subject to the limits imposed by the Game Act. These submissions were rejected. The Court’s conclusions are stated in the judgment of McGillivray J.A. at p.344:

If the effect of the proviso is merely to give to the Indians the extra privilege of shooting for food “out of season” and they are otherwise subject to the game laws of the province, it follows that in any year they may be limited in the number of animals of a given kind that they may kill even though that number is not sufficient for their support and subsistence and even though no other kind of game is available to them. I cannot think that the language of the section supports the view that this was the intention of the law makers. I think the intention was that in hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but, in hunting wild animals for the food necessary to his life, the Indian should be placed in a very different position from the white man who, generally speaking, does not hunt for food and was by the proviso to sec. 12 reassured of the continued enjoyment of a right which he has enjoyed from time immemorial.

This passage was quoted with approval in this Court in *Prince v. R.*[3], in which the issue was as to the meaning of the word “hunt” in s. 72(1) of the Game and Fisheries Act, R.S.M. 1954, c. 94, which had been enacted in implementation of s. 13 of the Manitoba Natural Resources Agreement, which is the same as s. 12 of the Agreement. It was admitted that the appellants were Indians, hunting for food, on land to which they had the right of access. It was held that they were not subject to restriction as to the method of hunting. The same principle was applied, recently, by the Manitoba Court of Appeal in *R. v. McPherson*[4].

The Court of Appeal for Saskatchewan, in *R. v. Smith*[5], considered the application of s. 12 of the Saskatchewan Natural Resources Agreement, which is the same as s. 12 of the Agreement. The accused was an Indian charged with carrying fire-arms on a game preserve. It was contended that he was protected by the proviso in the section, in that he was hunting on unoccupied Crown

lands or on lands to which he had a right of access. Both arguments were rejected. It was held that “unoccupied” meant “idle” or “not put to use” and that Crown lands appropriated for a special purpose were not unoccupied within the meaning of s. 12. It was also held that the only right of access to the lands in question was merely the privilege accorded to all persons to enter the preserve without carrying fire-arms.

All of the members of the Court, when considering the meaning of the words “right of access”, considered that they applied to Indian Reserves as well as to other lands. The only other case cited to us which was concerned with the interpretation of s. 12 is the judgment of this Court in *Daniels v. White and The Queen*[6], which dealt with the equivalent section (s. 13) of the *Manitoba Agreement*. The issue there, however, was as to whether the guarantee of the Indians’ right to hunt, trap and fish game and fish for food was binding upon the Federal Government, so as to exempt the appellant, who was an Indian, from the application of the provisions of the *Migratory Birds Convention Act*. It was held that it was only Provincial game laws which were subject to the proviso contained in that section. That decision has no application to the circumstances of this case.

The present appeal thus raises issues as to the application of s. 12 which have not been considered previously.

As indicated earlier, the appellant starts from the proposition that, prior to the making of the *Agreement*, Indian Reserves were enclaves which were withdrawn from the application of Provincial legislation, save by way of reference by virtue of Federal legislation. On this premise it is contended that s. 12 should not be construed so as to make Provincial game legislation applicable within Indian Reserves.

I am not prepared to accept this initial premise. Section 91(24) of the *British North America Act, 1867*, gave exclusive legislative authority to the Canadian Parliament in respect of Indians and over lands reserved for the Indians. Section 92 gave to each Province, in such Province, exclusive legislative power over the subjects therein defined. It is well established, as illustrated in *Union Colliery Company v. Bryden*[7], that a Province cannot legislate in relation to a subject matter exclusively assigned to the Federal Parliament by s. 91. But it is also well established that Provincial legislation enacted under a heading of s. 92 does not necessarily become invalid because it affects something which is subject to Federal legislation. A vivid illustration of this is to be found in the Privy Council decision a few years after the *Union Colliery* case in *Cunningham v. Tomey Homma*[8], which sustained Provincial legislation, pursuant to s. 92(1), which prohibited Japanese, whether naturalized or not, from voting in Provincial elections in British Columbia.

A Provincial Legislature could not enact legislation in relation to Indians, or in relation to Indian Reserves, but this is far from saying that the effect of s. 91(24) of the *British North America Act, 1867*, was to create enclaves within a Province within the boundaries of which Provincial legislation could have no application. In my opinion, the test as to the application of Provincial legislation within a Reserve is the same as with respect to its application within the Province and that is that it must be within the authority of s. 92 and must not be in relation to a subject-matter

assigned exclusively to the Canadian Parliament under s. 91. Two of those subjects are Indians and Indian Reserves, but if Provincial legislation within the limits of s. 92 is not construed as being legislation in relation to those classes of subjects (or any other subject under s. 91) it is applicable anywhere in the Province, including Indian Reserves, even though Indians or Indian Reserves might be affected by it. My point is that s. 91(24) enumerates classes of subjects over which the Federal Parliament has the exclusive power to legislate, but it does not purport to define areas within a Province within which the power of a Province to enact legislation, otherwise within its powers, is to be excluded. There have been a number of cases in Provincial Courts in which s. 12 of the Agreement, or its equivalent in the Manitoba and Saskatchewan Agreements, was not applicable, which have considered the question of the application of Provincial laws to Indians, and their application within Indian Reserves. Counsel for the appellant cites *R. v. Jim*[9]. In this case Hunter C.J.B.C. held that a charge of hunting deer, without a licence issued pursuant to the British Columbia Game Protection Act, would not lie against an Indian hunting on an Indian Reserve. The ground of the decision was that the Indian Act, enacted pursuant to s. 91(24) of the British North America Act, 1867, had provided that all Indian lands should be managed as the Governor-in-Council directs and that management included the regulation of hunting on a Reserve.

R. v. Rodgers[10] is a decision of the Manitoba Court of Appeal, to the like effect, involving the trapping of mink on an Indian Reserve without a Provincial licence.

In *R. v. Morley*[11], the British Columbia Court of Appeal held that a Provincial game law applied to a non-Indian on a charge of killing a pheasant during the closed season on an Indian Reserve.

In *Corporation of Surrey v. Peace Arch Enterprises Ltd.*[12], the situation was different. It involved lands in an Indian Reserve which had been “surrendered” in trust to the Federal Crown for the purpose of leasing. The issue was as to whether the lands were subject, in their use by the lessees, who were non-Indians, to certain municipal by-laws and to regulations under the Provincial Health Act. The Court found that the lands in question were still “lands reserved for the Indians” and, that being so, only the Federal Parliament could legislate as to the use to which they might be put. The *Morley* case is not mentioned in the judgment and I presume that this was so because the cases were not considered as parallel. Once it was determined that the lands remained lands reserved for the Indians, Provincial legislation relating to their use was not applicable. The game law considered in the *Morley* case governed the conduct of persons hunting game in British Columbia and was held to apply in all parts of the Province.

The Quebec Court of Sessions of the Peace, in *R. v. GrosLouis*[13], convicted an Indian merchant, who resided and operated a retail store on an Indian Reserve, of an offence under the Quebec Retail Sales Tax Act in respect of a sale of goods on the Reserve to a non-Indian. The Court suggested, however, that, when selling to a non-Indian, he did an action which theoretically caused him to go outside the Reserve.

The Ontario Court of Appeal held in *R. v. Hill*[14] that an unenfranchised treaty Indian, resident on a Reserve, was subject to the provisions of the Ontario Medical Act when he practised medicine for hire, but not upon the Reserve. That Court also held, in *R. v. Martin*[15] that an Indian, not on a Reserve, could be convicted of an offence under the Ontario Temperance Act. Riddell J., at p. 83, applied the language of the decision of the Privy Council in *Canadian Pacific Railway Company v. Corporation of the Parish of Notre Dame de Bonsecours*[16] *mutatis mutandis*, in the case before him. The passages in the Canadian Pacific Railway case are as follows:

The British North America Act, whilst it gives the legislative control of the appellants' railway quâ railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures.

* * *

It therefore appears to their Lordships that any attempt by the Legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorized works would be legislation in excess of its powers. If, on the other hand, the enactment had no reference to the structure of the ditch, but provided that, in the event of its becoming choked with silt or rubbish, so as to cause overflow and injury to other property in the parish, it should be thoroughly cleaned out by the appellant company, then the enactment would, in their Lordships' opinion, be a piece of municipal legislation competent to the Legislature of Quebec.

Riddell J. then went on to say:

In other words, no statute of the Provincial Legislature dealing with Indians or their lands as such would be valid and effective; but there is no reason why general legislation may not affect them.

In none of these cases is it decided that a Provincial game law, of general application, would not affect an Indian outside a Reserve. Legislation of this kind does not relate to Indians, quâ Indians, and the passage above quoted would, in my opinion, be applicable to such legislation. The *Jim* case and the *Rodgers* case held that such legislation did not apply to an Indian on an Indian Reserve. The *Morley* case is inconsistent with the idea that no Provincial legislation can apply within an Indian Reserve, save by reference in a Federal statute.

I now turn to a consideration of the effect of s. 12 of the Agreement.

It has been noted that this section, along with ss. 10 and 11, appears under the heading "Indian Reserves". It begins with the words:

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, ...

The opening words of the section define its purpose. It is to secure to the Indians of the Province a continuing supply of game and fish for their support and subsistence. It is to achieve that purpose that Indians within the boundaries of the Province are to conform to Provincial game laws, subject, always, to their right to hunt and fish for food. This being the purpose of the section, it could not have been intended that the controls which would apply to Indians in relation to hunting and fishing for purposes other than for their own food, should apply only to Indians not on Reserves.

Furthermore, if the section were to be so restricted in its scope, it would accomplish nothing towards its purpose. Cases decided before the Agreement, such as *R. v. Martin*, supra, had held that general legislation by a Province, not relating to Indians, qua Indians, would apply to them. On their facts, these cases dealt with Indians outside Reserves. The point is that the provisions of s. 12 were not required to make Provincial game laws apply to Indians off the Reserve. In my opinion, the meaning of s. 12 is that Canada, clothed as it was with legislative jurisdiction over “Indians, and Lands reserved for the Indians”, in order to achieve the purpose of the section, agreed to the imposition of Provincial controls over hunting and fishing, which, previously, the Province might not have had power to impose. By its express wording, it provides that the game laws of the Province shall apply “to the Indians within the boundaries thereof”. To me this must contemplate their application to all Indians within the Province, without restriction as to where, within the Province, they might be.

This view is supported by an examination of the state of the law, in Alberta, at the time the Agreement was made. At that time, s. 69 of the Indian Act, R.S.C. 1927, c. 98, provided as follows:

69. The Superintendent General may, from time to time, by public notice, declare that, on and after a day therein named, the laws respecting game in force in the province of Manitoba, Saskatchewan or Alberta, or the Territories, or respecting such game as is specified in such notice, shall apply to Indians within the said province or Territories, as the case may be, or to Indians in such parts thereof as to him seems expedient.

The Superintendent General was thus empowered to declare that Alberta laws respecting game should apply to “Indians within the said province” or “in such parts thereof as to him seems expedient”. Being a provision of the Indian Act, the section must have contemplated the possible exercise of the power with respect to Indians on Reserves when it spoke of “Indians within the said province”.

When s. 12 was drafted, it stated its general purpose and then went on to provide that the game laws of the Province should apply “to Indians within the boundaries thereof”. This is practically the same as the words “Indians within the said province” in s. 69, and, in my opinion, it was intended to have the same meaning and application. Section 69 ceased to have any effect in Alberta, Saskatchewan and Manitoba after the enactment of the British North America Act, 1930, which gave the agreements therein mentioned the force of law, notwithstanding anything in the British North America Act, 1867, or any amendments to it, or any Act of the Parliament of Canada. Section 69 disappeared from the Indian Act enacted in 1951, c. 29, S.C. 1951, which then

introduced s. 87 (now s. 88) to which reference will be made later, and which provided:

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.

The appellant places emphasis on the words in the proviso to s. 12 of the Agreement “on any other lands to which the said Indians may have a right of access”. The contention is that s. 10 provided for continuance of the vesting of title in Indian Reserves in the Federal Crown, as well as for the creation of additional Reserves, and that, in these lands, the Indians who reside thereon have an interest considerably greater than a mere “right of access”. The use of that phrase, it is submitted, is inconsistent with any reference to Reserve lands, and therefore, as the proviso, by the terms used, does not apply to Indian Reserves, the section, as a whole, must be taken not to have application to them.

I am unable to agree that the broad terms used in the first portion of s. 12 can be limited, inferentially, in this way. In my view, having made all Indians within the boundaries of the Province, in their own interest, subject to Provincial game laws, the proviso, by which the Province assured the defined rights of hunting and fishing for food, was drawn in broad terms. The proviso assures the right to hunt and fish for food on Indian Reserves, because there can be no doubt that, whatever additional rights Indian residents on a Reserve may have, they certainly have the right of access to it. This view was expressed by the Saskatchewan Court of Appeal in the Smith case to which reference has already been made.

For these reasons, I am of the opinion that s. 12 of the Agreement made the provisions of the Wildlife Act applicable to all Indians, including those on Reserves, and governed their activities throughout the Province, including Reserves. By virtue of s. 1 of the British North America Act, 1930, it has the force of law, notwithstanding anything contained in the British North America Act, 1867, any amendment thereto, or any Federal statute.

Having reached this conclusion, it is not necessary, in the circumstances of this case, to determine the meaning and effect of s. 88 (formerly s. 87) of the Indian Act, R.S.C. 1970, c. I-6.

I would dismiss the appeal.

The judgment of Hall, Spence and Laskin JJ. was delivered by

LASKIN J. (dissenting)—This appeal raises, for the first time in this Court, the question whether provincial game laws apply to a Treaty Indian on an Indian Reserve so as to make him liable to their penalties for engaging on the Reserve in activities prohibited by the provincial legislation. Although the issue in this case involves Alberta legislation, and hence requires a consideration of the Natural Resources Agreement between Canada and Alberta, as approved respectively by 1930 (Can.), c. 3 and 1930 (Alta.), c. 21 and confirmed by the British North America Act, 1930 (U.K.), c.

26, it eddies out to sister western Provinces which have like agree- ments with Canada and, in my opinion, is of equal import to Treaty Indians living on Reserves in Provinces east of Manitoba.

The Alberta Natural Resources Agreement is part of the constitutional order under which Canada and its respective Provinces exist, and the question arises whether and to what extent it affects and is affected by the distribution of legislative power under ss. 91 and 92 of the British North America Act. The issue in the present case engages, therefore, not only the relevant terms of the Alberta Natural Resources Agreement but also the exclusive federal power under s. 91(24) in relation to “Indians, and lands reserved for the Indians”. In my opinion, there are parallel questions here of the extent, if any, to which provincial game laws may apply to Indians on a Reserve either in the face of the Alberta Natural Resources Agreement (or the Manitoba Natural Resources Agreement or the Saskatchewan Natural Resources Agreement, which have like provisions on the matter in issue) or in the face of unexercised federal legislative power under s. 91(24). In this latter respect, I repeat time-tested words from *Union Colliery Co. v. Bryden*[17], which express what is now a constitutional axiom: The abstinence of the Dominion Parliament from legislating to the full limit of its powers, could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91 of the Act of 1867.

There is a subsidiary question that arises here if it be held that the relevant provincial statute, the Wildlife Act, 1970 (Alta.), c. 113 (now R.S.A. 1970, c. 391), applies to Indians on a Reserve under the Alberta Natural Resources Agreement. That question is whether, in that event, it is excluded or overborne by the provisions of the Indian Act, R.S.C. 1970, c. I-6, and especially ss. 73, 81 and 88 thereof.

One of the preambles to the Alberta Natural Resources Agreement (and similarly in the Saskatchewan Natural Resources Agreement and as well, albeit in a somewhat different context, in the Manitoba Natural Resources Agreement) provides that “it is desirable that the Province should be placed in a position of equality with the other Provinces of Confederation with respect to the administration and control of its natural resources as from its entrance into Confederation in 1905”.

The provisions of the Agreement which directly raise the question for decision in this case are ss. 10 and 12 which read, respectively, as follows:

10. All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never

passed to the Province under the provisions hereof. 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 fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

There are several other sections of the Alberta Natural Resources Agreement which are worth reproducing as indicators of its purpose to put Alberta in a position of equality with other Provinces respecting administration and control of its natural resources. They are ss. 14, 15 and 18 which are, in their material terms, in these words:

14. The parks mentioned in the schedule hereto shall continue as national parks and the lands included therein, as the same are described in the orders in council in the said schedule referred to (except such of the said lands as may be hereafter excluded therefrom), together with the mines and minerals (precious and base) in each of the said parks and the royalties incident thereto, shall continue to be vested in and administered by the Government of Canada as national parks, but in the event of the Parliament of Canada at any time declaring that the said lands or any part thereof are no longer required for park purposes, the lands, mines, minerals (precious and base) and the royalties incident thereto, specified in any such declaration, shall forthwith upon the making thereof belong to the Province, and the provisions of paragraph three of this agreement shall apply thereto as from the date of such declaration.
15. The Parliament of Canada shall have exclusive legislative jurisdiction within the whole area included within the outer boundaries of each of the said parks notwithstanding that portions of such area may not form part of the park proper; the laws now in force within the said area shall continue in force only until changed by the Parliament of Canada or under its authority, provided, however, that all laws of the Province now or hereafter in force, which are not repugnant to any law or regulation made applicable within the said area by or under the authority of the Parliament of Canada, shall extend to and be enforceable within the same, and that all general taxing acts passed by the Province shall apply within the same unless expressly excluded from application therein by or under the authority of the Parliament of Canada.
18. Except as herein otherwise expressly provided, nothing in this agreement shall be interpreted as applying so as to affect or transfer to the administration of the Province (a) any lands for which Crown grants have been made and registered under the Land Titles Act of the Province and of which His Majesty the King in the right of His Dominion of Canada is, or is entitled to become the registered owner at the date upon which the agreement comes into force, or (b) any ungranted lands of the Crown upon which public money of Canada has been expended or which are, at the date upon which this agreement comes into force, in use or reserved by Canada for the purpose of the federal administration.

The accused in this case, who is a Treaty Indian, was charged with unlawful trafficking on his Reserve in big game (he sold a piece of moose meat to a provincial game law officer) contrary to s. 37 of the Wildlife Act. It is uncontested that what he did was, in fact and in law, within the prohibitions of that Act. The Act establishes a system of control over wildlife in Alberta by regulatory licensing and prohibitions to which all persons in Alberta are *ex facie* subject. Neither Indians nor Indian Reserves are mentioned in the Act. In its generality, it extends to them but, as in other situations where generally expressed provincial legislation must be construed to meet the limitations on provincial authority because of exclusive federal competence or because of precluding or supervening federal legislation, the inquiry is whether the *ex facie* scope of the Act must be restricted in recognition of federal power, whether unexercised or exercised. I propose to deal first with the effect of s. 91(24) upon the reach of provincial game laws. Apart entirely from the exclusive power vested in the Parliament of Canada to legislate in relation to Indians, its exclusive power in relation also to Indian Reserves puts such tracts of land, albeit they are physically in a Province, beyond provincial competence to regulate their use or to control resources thereon. This is not because of any title vested in the Parliament of Canada or in the Crown in right of Canada, but because regardless of ultimate title, it is only Parliament that may legislate in relation to Reserves once they have been recognized or set aside as such. The issue of title to Indian lands, whether the loosely defined lands referred to in the Royal Proclamation of 1763 or the more precisely defined tracts known as Indian Reserves, was considered by the Privy Council in *St. Catherines Milling and Lumber Co. v. The Queen*[18]. The present case involves a Reserve in the special sense of lands expressly set aside as such, and it was the result of the *St. Catherines Milling* case that where such lands are within the limits of a Province, it is only when they are surrendered to the Crown that the full proprietary interest of the Province may be asserted, and that they then become subject to its control and disposition: see also *Ontario Mining Co. v. Seybold*[19].

However, as was noted in *Attorney-General of Canada v. Giroux*[20], in the reasons of Duff J., with whom Anglin J. concurred, there may be Indian title in a Reserve beyond the mere personal and usufructuary interest found to exist in the *St. Catherines Milling* case. Indians may have the beneficial ownership which is held for them in trust, and if that be so the legislative authority of Parliament under s. 91(24) would remain upon the surrender of the Reserve land to the Crown to permit it to effectuate the trust. Surrender would not, in such a case, be to the Crown in right of the Province, as it was in the *St. Catherines Milling* case where the land in question was unaffected by any trust in favour of the Indians. In any event, as was pointed out by this Court in *Reference re Saskatchewan Natural Resources*[21], “a distinction [is] recognized between legislative powers and proprietary rights, and the Crown may, for one purpose, be represented by the Dominion and, for the other purpose, by a Province, as in the case of Inland Fisheries or Indian lands”.

Where land in a Province is, as in the present case, an admitted Indian Reserve, its administration and the law applicable thereto, so far at least as Indians thereon are concerned, depend on federal legislation. Indian Reserves are enclaves which, so long as they exist as Reserves, are withdrawn from provincial regulatory power. If provincial legislation is applicable at all, it is only by referential incorporation through adoption by the Parliament of Canada. This is seen in the Indian Act, with which I will deal later in these reasons.

The significance of the allocation of exclusive legislative power to Parliament in relation to Indian Reserves merits emphasis in terms of the kind of enclave that a Reserve is. It is a social and economic community unit, with its own political structure as well according to the prescriptions of the Indian Act. The underlying title (that is, upon surrender) may well be in the Province, but during its existence as such a Reserve, in my opinion, is no more subject to provincial legislation than is federal Crown property; and it is no more subject to provincial regulatory authority than is any other enterprise falling within exclusive federal competence.

I do not wish to overdraw analogies. It would strike me as quite strange, however, that when provincial competence is denied in relation to land held by the Crown in right of Canada (see *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*[22]), or in relation to land upon which a federal service is operated (see *Reference re Saskatchewan Minimum Wage Act*[23]), or in relation to land integral to the operation of a private enterprise that is within exclusive federal competence (see *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.*[24]), there should be any doubt about the want of provincial competence in relation to lands that are within s. 91(24). There is, in my opinion, nothing in such cases as *C.P.R. v. Notre Dame de Bonsecours*[25] that shake this view since that case dealt with the application of provincial legislation to a railway within federal jurisdiction in a matter not integral to its operation.

Nor need I in this case consider whether, in the absence of federal legislation, provincial legislation touching the personal status and relationships of persons on a Reserve, as for example, respecting marriage or custody or adoption of children, is validly applicable; or, similarly, whether provincial commercial law would apply, absent federal legislation. The present case concerns the regulation and administration of the resources of land comprised in a Reserve, and I can conceive of nothing more integral to that land as such. If the federal power given by s. 91(24) does not preclude the application of such provincial legislation to Indian Reserves, the power will have lost the exclusiveness which is ordained by the Constitution.

I think it is important here, no less than in relation to other heads of federal power, to scotch any notion that s. 91(24) exists by subtraction from some larger head of provincial authority, e.g. property and civil rights in the Province, and hence is of limited scope, leaving an area of competence to the Province where there has been no federal legislation. My brother Judson dealt with this very point in another context in *Nykorak v. Attorney-General of Canada*[26].

Since federal power in relation to “lands reserved for the Indians” is independent and exclusive, its content must embrace administrative control and regulatory authority over Indian Reserves. Hence, not only provincial game laws but other provincial regulatory legislation can have no

application, of its own force, to such Reserves, at least where it is sought to subject Indians thereon to such legislation. The Manitoba Court of Appeal held in *Rex v. Rogers*[27] that the provincial Game Protection Act could not apply on an Indian Reserve. The context of this holding is important because the accused was a non-Indian who took in payment of goods, bought from him off the Reserve by a Treaty Indian, the skin of a mink which had been trapped by the Indian on his Reserve. The pertinent question in that case, whether the Indian was a trapper within the provincial Act, was answered in the negative on the principle that provincial legislation could not apply to land over which the Province has no jurisdiction. In a more recent decision the British Columbia Court of Appeal held that municipal by-laws enacted under the provincial Health Act did not apply to an Indian Reserve, even in relation to a non-Indian lessee: see *Surrey v. Peace Arch Enterprises*[28]. Although I need come to no conclusion in this case on the application of provincial legislation to non-Indians for actions or conduct on a Reserve, it appears to me that the decision in *Surrey v. Peace Arch Enterprises* undermines the majority judgment of the British Columbia Court of Appeal in *Rex v. Morley*[29], which held that provincial game laws applied to a non-Indian who shot game on a Reserve in a closed season.

A number of other cases may be mentioned on the question of the application of provincial laws to Indians on a Reserve. *Rex v. Hill*[30], an Ontario County Court judgment held that the provincial game and fisheries statute could not apply to an Indian, found on his Reserve in possession of two seine nets, so as to make him liable to a penalty for unlicensed possession. The Court followed *Rex v. Jim*[31], where Chief Justice Hunter of British Columbia held that the provincial game law did not apply to an Indian on a Reserve and hence the accused was not liable for killing a buck out of season in violation of the provincial statute. A different result on principle was reached by a Quebec Sessions Court judge in *Rex v. GrosLouis*[32] when he convicted an Indian under a provincial tax statute for failing to have a provincial permit when selling goods to a non-Indian on the Reserve. I note, however, that the Court viewed the situation as one where the Indian accused, because he was a retail merchant who sold to a non-inhabitant of the Reserve, had, so to speak, gone outside the Reserve to effect the transaction. Another point made in that case, which goes to the issue of the exclusiveness of the federal power to which I have already alluded, was that the federal Indian Act did not cover the situation and hence provincial general law applied. In this aspect of the matter, the Quebec Court relied on the dissenting judge in *Rex v. Rodgers*, *supra*. This approach ignores the preclusive effect of s. 91(24).

I turn now to the Alberta Natural Resources Agreement which deals separately in its ss. 10 and 12 with Reserves and with unoccupied Crown lands and other lands to which Indians may have a right of access. The Alberta Appellate Division simply mentioned and then completely ignored s. 10 in its reasons in this case, dealing with it as if the only question was whether lands to which Indians had a right of access included Indian Reserves as not being dealt with elsewhere in the Agreement. Even in such a frame of reference, I would find it a hardy conclusion to subsume Indian Reserves within the phrase “any other lands to which the ... Indians may have a right of access”. It would mean federal adoption of provincial laws for Reserves without express mention and in a situation where there was already in existence a federal Indian Act which itself provided for a limited incorporation of provincial law to operate upon and in the Reserves.

But the fact is that Indian Reserves were specifically dealt with in the Alberta Natural Resources Agreement as they were expressly dealt with in that of Manitoba and in that of Saskatchewan. The words used in the two sections which are directly of concern here are the same in respect of all three Provinces.

History, which is highly relevant here, denies the equation of Indian Reserves with lands to which Indians may have a right of access. Legal logic also denies the equation in a situation where they are separately dealt with as they are here and in the same document. To treat Indian Reserves as coming within the description of “lands to which Indians have a right of access”, as did the Alberta Appellate Division, is to describe them in terms of their lowest rather than of their highest legal signification. Indians have at least a right of occupancy of Reserves, and this is a larger interest than a mere right of access which, as this Court held in *Prince and Myron v. The Queen*[33], may exist in privately-owned lands. I see no justification for enlarging the category of what I may call, for short, access lands beyond lands which strictly fall within that description and have no higher legal quality. It would be odd, for example, to find the kind of land considered in the *Giroux* case, referred to earlier in these reasons, as being aptly described as access lands; they would be that, of course, but much more besides.

Section 10 of the Alberta Natural Resources Agreement itself negates the view taken by the Court below. All Indian Reserves are to continue to be administered by the Government of Canada for the purposes of Canada; there is here no qualification to admit any provincial purpose. Moreover, any further Reserves that may be established from unoccupied Crown land transferred to the Province are to be administered by Canada in the same way in all respects as if they had never passed to the Province. That points clearly to the exclusion of Reserves from provincial control.

They do not return to that control under s. 12 in respect of the application of provincial game laws. That section deals with a situation unrelated to Indian Reserves. It is concerned rather with Indians as such, and with guaranteeing to them a continuing right to hunt, trap and fish for food regardless of provincial game laws which would otherwise confine Indians in parts of the Province that are under provincial administration. Although inelegantly expressed, s. 12 does not expand provincial legislative power but contracts it. Indians are to have the right to take game and fish for food from all unoccupied Crown lands (these would certainly not include Reserves) and from all other lands to which they may have a right of access. There is hence, by virtue of the sanction of the British North America Act, 1930, a limitation upon provincial authority regardless of whether or not Parliament legislates.

It is worth looking at ss. 14 and 15 of the Alberta Natural Resources Agreement, previously quoted and dealing with national parks, as having an operation analogous to s. 10. Existing national parks mentioned in a schedule were to continue under federal administration; only if any of the lands comprised in the parks was surrendered as no longer required by the Government of Canada for park purposes would provincial administration come into play. (The same holds true, of course, for Indian Reserves.) Moreover, federal legislative jurisdiction existing in relation to such park land was to extend beyond the parks proper and apply to their outer boundaries. On the facts of this case we are not concerned with the proviso to s. 12 because

the accused was not hunting for food, and hence the overriding question is whether provincial game laws apply simply because the Reserve where the accused trafficked in big game is in the Province. In my opinion, s. 12 does not, either in its generality or in its proviso, cover “lands reserved for the Indians”, which are separately brought under exclusive federal authority under s. 91(24) of the British North America Act; and it does not modify federal power in relation thereto. Even if the words in s. 12, “any other lands to which the said Indians may have a right of access”, are taken in a broad general sense as capable, if s. 12 stood alone, of embracing Indian Reserves, they must be read to exclude such Reserves which are specially dealt with in s. 10. The canon of construction enshrined in the maxim *generalalia specialibus non derogant* is particularly apt here.

History, however, is even more telling, and I refer, first, to the canvass by McGillivray J.A. in *Rex v. Wesley*[34]. This was a unanimous decision of the Alberta Appellate Division, holding that the Alberta Game Act in force at the time did not apply to a Treaty Indian hunting for food on unoccupied Crown land. After referring to the Royal Proclamation of 1763 which reserved various lands to Indians and enjoined any private purchase thereof from the Indians, McGillivray J.A. noted that there was excluded from such lands the territory granted to the Hudson’s Bay Company in 1670. This territory, later ceded to Canada, included the unoccupied Crown land upon which the accused in *Rex v. Wesley* hunted. This land was included in a Treaty of September 22, 1877 between certain Indian tribes and the Queen under which hunting rights were assured to them in the lands which were the subject of the Treaty upon the surrender of such rights therein as the Indians had. The Treaty qualified the hunting rights according to such regulations as might be made by the Government of the country, and saved and excepted such tracts as might be required or taken up for settlement, mining, trading or any other purposes by the Government of Canada. What is particularly significant about this Treaty is a provision therein “that reserves shall be assigned” to the Indians. McGillivray J.A. adverted in that connection to the fact that the Governor who negotiated the Treaty said at the time to the Indian Chiefs that “it is your privilege to hunt all over the prairies and that should you desire to sell any portion of your land or any coal or timber from off your reserves the Government will see that you receive just and fair prices”; and again, “the reserve will be given to you without depriving you of the privilege to hunt over the plains until the land be taken up”. The history recounted in *Rex v. Wesley* prompted Lunney J.A., who also wrote reasons in that case, to say that “the [Alberta Natural Resources] Agreement did not nor was there any intention that it should alter the law applicable to Indians”.

I would refer in this connection also to the majority judgment of this Court in *Daniels v. White and The Queen*[35], which involved the relationship between s. 13 of the Manitoba Natural Resources Agreement (which is similar to s. 12 of the Alberta Agreement) and the federal Migratory Birds Convention Act. The question there was whether a Treaty Indian who had shot and killed birds on his Reserve for food was protected against culpability under the federal Act by virtue of s. 13 of the Manitoba Agreement. In holding that he was not so protected, Judson J., who spoke for the majority, referred to the Agreement and to the legislation of 1930 confirming it and stated that “it did no more than impose specified obligations and restrictions upon the transferee province”. This accords with the view I take here that nothing in the Alberta Agreement increases

the legislative power of the Province in diminution of that of the Parliament of Canada in relation to “Indians and lands reserved for the Indians”.

Nor is my view inconsistent with the position of the minority of the Court in the Daniels case, which held that s. 13 of the Manitoba Agreement expressed a federal assurance to Indians as well as a provincial one, and that by virtue of s. 1 of the British North America Act, 1930, confirming the Agreement, the right of Indians to hunt for food, as expressed in s. 13, prevailed against the Migratory Birds Convention Act and regulations thereunder. That minority view does not touch the additional limitations upon provincial legislative authority residing in s. 91(24) of the British North America Act.

The Daniels case deserves notice on another point which I touched upon early in these reasons, that is the purpose of the various Natural Resources Agreements to give equality of position to the Western Provinces with the other Provinces in respect of control and administration of their natural resources. A consideration in the majority judgment in Daniels was the desirability of uniformity in the operation of the federal Migratory Birds Convention Act in the various parts of Canada as against any special position of advantage sought under the Manitoba Natural Resources Agreement involved in the case. I do not think, therefore, that a construction of the Alberta Agreement should be strained for here that would unbalance the exclusive authority of Parliament in relation to Indian Reserves. It is clear from cases like *Rex v. Wesley*, supra, and from the Daniels case and from others like *Rex v. Smith*[36], in which the history of Indian cession Treaties is narrated, that Indians who ceded their lands were assured of hunting privileges over them. I need not consider whether such privileges are themselves property interests of a kind which bring them exclusively within federal jurisdiction under s. 91(24) as coming within the phrase “lands reserved for the Indians”, or whether the jurisdiction attaches because the rights involved are those of Indians: see *Regina v. White and Bob*[37]. What is evident is that the existence of such privileges in such surrendered lands gives subject matter to s.12 of the Alberta Natural Resources Agreement without compelling the inclusion therein of Reserves which are of a different order than lands in respect of which there are only hunting rights or in respect of which hunting rights are assertable by the force of s. 12 alone.

In *Rex v. Wesley*, McGillivray J.A. declined the invitation to deal as well with the rights of Indians on their Reserves. That was not before the Court, and in my view was a question unrelated to the application of s. 12 of the Natural Resources Agreement. Rather, it invited the application of s. 10 and hence of exclusive federal authority of which there has been an exercise under the Indian Act.

The Indian Act, now R.S.C. 1970, c. I-6, defines “reserve” in s. 2(1) to mean a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of an Indian band. Sections 18 and 36 of the Act are as follows:

18. (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.
- (2) The Minister may authorize the use of lands in a reserve for the purpose of Indian schools, the administration of Indian affairs, Indian burial grounds, Indian health projects or, with the consent of the council of the band, for any other purpose for the general welfare of the band, and may take any lands in a reserve required for such purposes, but where an individual Indian, immediately prior to such taking, was entitled to the possession of such lands, compensation for such use shall be paid to the Indian, in such amount as may be agreed between the Indian and the Minister, or, failing agreement, as may be determined in such manner as the Minister may direct.
36. Where lands have been set apart for the use and benefit of a band and legal title thereto is not vested in Her Majesty, this Act applies as though the lands were a reserve within the meaning of this Act.

These, and related provisions which deal with possession by Indians of land within a Reserve, reinforce my opinion that provincial regulatory legislation cannot, *ex proprio vigore*, apply to a Reserve.

This opinion is unaffected by s. 88 of the Indian Act which 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.

The section deals only with Indians, not with Reserves, and is, in any event, a referential incorporation of provincial legislation which takes effect under the section as federal legislation. I do not read s. 88 as creating any exception to the operation of federal legislation by making way for otherwise competent provincial legislation, as is the case under the Lord's Day Act, now R.S.C. 1970, c. L-13. If the Wildlife Act of Alberta is such an enactment as is envisaged by s. 88, an Indian who violated its terms would be guilty of an offence under federal law and not of an offence under provincial law.

It was contended by the respondent Attorney-General of Alberta that federal power in relation to "Indians" was akin to its power in relation to aliens (s. 91(25)) and that Indians like aliens were subject to provincial laws of general application. I do not pursue the analogy because it breaks down completely when regard is had to the fact that we are dealing here not only with Indians but with "lands reserved for the Indians". The fact that s. 88 of the Indian Act makes provincial laws of general application "applicable to and in respect of Indians in the Province", and hence could be construed as applicable to them on their Reserves as well, does not add anything to the

case for the application of provincial game laws to Indians on a Reserve. Parliament's exercise of its legislative power under s. 91(24) does not enlarge the constitutional scope of provincial legislation that has been adopted by Parliament where the Province seeks to rely on it for its own purposes.

I do not find it necessary to come to a conclusion on the appellant's submission that the power to make regulations for the protection and preservation of fur-bearing animals, fish and other game on reserves, vested in the Governor in Council under s. 73(1)(a) of the Indian Act, and the like power to make by-laws vested in an Indian band by s. 81(o) of the Act have, although unexercised, a preclusive effect upon otherwise valid and applicable provincial legislation. The conclusion to which I have come does not compel me to rely on the Indian Act in order to set aside the conviction of the appellant. I have made it abundantly plain that s. 12 of the Alberta Agreement cannot, in view of s. 10 thereof and in view of s. 91(24) of the British North America Act, have the effect of subjecting Indians on a Reserve to the Alberta Wildlife Act.

Accordingly, I would allow the appeal and restore the order of Sinclair J. who answered favourably to the accused the point of law which was the subject of a stated case.

Appeal dismissed, HALL, SPENCE and LASKIN JJ. dissenting.

Solicitors for the appellant: Lefsrud, Cunningham, Patrick & Roddick, Edmonton.

Solicitor for the respondent: The Attorney General of Alberta, Edmonton.

[1] [1972] 1 W.W.R. 536, 5 C.C.C. (2d) 193, 17 C.R.M.S. 110, 22 D.L.R. (3d) 716.

[2] [1932] 2 W.W.R. 337, 58 C.C.C. 269, [1932] 4 D.L.R. 774.

[3] [1964] S.C.R. 81 at 84, 46 W.W.R. 121, 41 C.R. 403, [1964] 3 C.C.C. 1.

[4] [1971] 2 W.W.R. 640.

[5] (1935), 64 C.C.C. 131, [1935] 2 W.W.R. 433, [1935] 3 D.L.R. 703

[6] [1968] S.C.R. 517, 64 W.W.R. 385, 4 C.R.N.S. 176, [1969] 1 C.C.C. 299, 2 D.L.R. (3d) 1.

[7] [1899] A.C. 580.

[8] [1903] A.C. 151

[9] (1915), 22 C.C.C. 236, 22 B.C.R. 106.

[10] [1923] 2 W.W.R. 353, 40 C.C.C. 51, [1933] 3 D.L.R. 414.

[11] [1932] 4 D.L.R. 483, [1932] 2 W.W.R. 193, 58 C.C.C. 166.

[12] (1970), 74 W.W.R. 380.

[13] (1943), 81 C.C.C. 167,

[14] (1907), 15 O.L.R. 406.

- [15] [1944] R.L. 12. (1917), 41 O.L.R. 79, 29 C.C.C. 189, 39 D.L.R. 635.
- [16] [1899] A.C. 367 at 372-3.
- [17] [1899] A.C. 580 at 588.
- [18] (1889), 14 App. Cas. 46.
- [19] [1903] A.C. 73.
- [20] (1916), 53 S.C.R. 172, 30 D.L.R. 123.
- [21] [1931] S.C.R. 263 at 275, [1931] 1 D.L.R. 865.
- [22] [1933] S.C.R. 629 at 643, [1933] 4 D.L.R. 545.
- [23] [1948] S.C.R. 248 at 253, 91 C.C.C. 366, [1948] 3 D.L.R. 801.
- [24] [1954] S.C.R. 207, [1954] 3 D.L.R. 481.
- [25] [1899] A.C. 367.
- [26] [1962] S.C.R. 331 at 335, 37 W.W.R. 660, 33 D.L.R. (2d) 373.
- [27] [1923] 3 D.L.R. 414, [1923] 2 W.W.R. 353, 40 C.C.C. 51.
- [28] (1970), 74 W.W.R. 380.
- [29] [1932] 4 D.L.R. 483, 46 B.C.R.28, [1932] 2 W.W.R. 193, 58 C.C.C. 166.
- [30] (1951), 101 C.C.C. 343, 14 C.R. 266, [1951] O.W.N. 824.
- [31] (1915), 26 C.C.C. 236, 22 B.C.R. 106.
- [32] (1944), 81 C.C.C. 167, [1944] R.L. 12.
- [33] [1964] S.C.R. 81, 46 W.W.R. 121, 41 C.R. 403, [1964] 3 C.C.C. 1.
- [34] [1932] 4 D.L.R. 774, [1932] 2 W.W.R. 337, 58 C.C.C. 269.
- [35] [1968] S.C.R. 517, 64 W.W.R. 385, 4 C.R.N.S. 176, [1969] 1 C.C.C. 299, 2 D.L.R. (3d) 1.
- [36] [1935] 2 W.W.R. 433, 64 C.C.C. 131, [1935] 3 D.L.R. 703.
- [37] (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193; *aff'd.* (1965), 52 D.L.R. (2d) 481.

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