Native Fishing and Hunting Rights in New Brunswick

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This article gives an overview of the law relative to native hunting and fishing rights in New Brunswick. Matters examined include the constitutional framework, the applicability of federal and provincial laws to such native rights, the status of the Maritime "Peace and Friendship" treaties, and the general issue of aboriginal rights in New Brunswick.

Le présent article examine le régime des droits des autochtones en matière de chasse et de pêche au Nouveau-Brunswick et plus particulièrement le cadre constitutionnel, l'applicabilité des lois fédérales et provinciales à ces droits, le statut des Traités de paix et d'amitié des Provinces maritimes ainsi que la question plus générale des droits des autochtones au Nouveau-Brunswick.

INTRODUCTION

On 16 June 1978, Cheryl Jean Sacobie, a Maliseet Indian from New Brunswick's Kingsclear Reserve, was charged with illegally fishing for salmon with a net, without a licence, contrary to s. 17(2) of the New Brunswick Fishery Regulations made pursuant to the federal *Fisheries Act.*[1] Cheryl Sacobie was acquitted of this offence at trial, the judge finding that pre-Confederation Maritime treaties, which gave to those Indians a privileged right to hunt and fish, were still in force.[2]

On appeal to the County Court this acquittal was overruled. Judge Earl Caughey ruled that as no treaty was raised as evidence at trial none could form the basis of a proper judgment.[3] The case of Cheryl Sacobie, while unexciting on its facts, raises yet again the issue of the constitutional and legal status of the fishing and hunting rights of New Brunswick's native people.

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[1]R.S.C. 1970, c. F-14.

[2]*R.* v. *Sacobie,* Deputy Provincial Court Judge William Tippet, August, 1978 (unreported).

[3]At her new trial Sacobie was acquitted on another ground. An appeal is pending.

THE CONSTITUTIONAL FRAMEWORK

Indians and Indian Lands

Exclusive legislative authority over "Indians and lands reserved for the Indians" is vested in the Federal Government by virtue of section 91(24) of the *British North America Act.*[4] An explanation of the nature of the title to those lands reserved for Indians is vital to an understanding of the Indian right to hunt and fish as the two are inextricably intertwined. In the early Privy Council case of *St. Catherine's Milling and Lumber Co.* v. *Reg.*[5], the Indian title was described as "a personal and usufructuary right, dependent upon the good will of the Sovereign".[6] The exact nature of this usufructuary right has never been fully settled. To Judson J. in *Calder* v. *Attorney-General of B.C.* the expression was unhelpful. He concluded that the Indian title simply described the fact "that when the settlers came, the Indians were there organized in societies and occupying the land as their forefathers had done for centuries".[7] However, the definition of *usufruct* given in *Native Rights in Canada* gives some idea of the nature of the Indian right. It reads in part as follows:

> A usufruct is a right to use property belonging to someone else and to enjoy its fruits and profits without in any way impairing or affecting the substance of the thing itself. Its chief function was to provide maintenance for an individual person . . . . It was a personal right in that it ended with the death of the holder. The right was inalienable: the holder could not transfer it. It was a real right.[8]

The use that the Indians may make of the land seems to be related to the traditional Indian habits and mode of life.[9] As such, the Indian title includes, at the very least, the right to hunt and fish.

The scope of the words "lands reserved for the Indians" was also considered in the *St. Catherine's Milling* case. Here the Privy Council pointed out that these words are not synonymous with ordinary Indian Reserves but were to be more broadly construed. Lord Watson, delivering the judgment of the Board, stated:

> [C]ounsel for Ontario referred us to a series of provincial statutes prior in date to the Act of 1867, for the purpose of shewing that the expression "Indian reserves" was used in legislative language to designate certain lands in which the Indians had, after the royal proclamation of 1763, acquired a special interest, by treaty or otherwise, and did not apply to land occupied by

[4] *British North America Act*, (U.K.), 1867, 30 & 31 Vict., c. 3, s. 91(24).

[5] (1889), 14 App. Cas. 46 (P.C.).

[6] *Ibid.*, at 54-55.

[7] [1973] S.C.R. 313, at 328.

[8] P. A. Cummings and N. H. Mickenberg, eds., *Native Rights in Canada*, (2nd ed.) (Toronto: Indian-Eskimo Association of Canada, 1972) at 40.

[9] See for example the remarks of Judson J. in *Calder* v. *A.G. B.C.*, *supra*, footnote 7, at 328.

> them in virtue of the proclamation. The argument might have deserved consideration if the expression had been adopted by the British Parliament in 1867, but it does not occur in sect. 91(24), and the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation. It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority.[10]

This point may be of particular relevance in New Brunswick should future judicial decisions establish that the Proclamation of 1763 extended to that province. A finding that the Proclamation applies, coupled with the fact that there have been no major land cessions in New Brunswick through treaties made with the Indians, would mean that the Federal Government has a much wider range of authority by virtue of the phrase "lands reserved for the Indians" than is now acknowledged.[11]

The wide legislative powers given to the federal government over Indians and Indian lands have necessarily confined the provincial power in this domain. Still, the provinces may affect persons and activities including Indians, on or off Indian lands under s. 92(13) (Property and Civil Rights) and s. 92(16) (Matters of a Local Nature) of the *British North America Act* if the legislation does not directly relate to Indians and their lands.[12]

Section 88 of the Indian Act

Accepting that the federal government has exclusive legislative rights on lands reserved for Indians, what has Parliament enacted? The relevant provision is s. 88 of the *Indian Act:*

> 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.[13]

Basically, then, whenever a federal law or an Indian treaty is silent, then any provincial law of general application is operative. Such an explanation poses more questions than it answers. Given the vast array of conflicting federal and provincial laws and the peculiar position of the treaties it is necessary to consider which of these competing jurisdictions is to be given precedence.

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[10]*Supra,* footnote 5, at 59.

[11]*Infra,* at 120.

[12]G. V. LaForest, *Natural Resources and Public Property under the Canadian Constitution* (Toronto: Univ. Toronto Press, 1969) at 176.

[13]R.S.C. 1970, c. I-6, s. 88.

INDIAN FISHING AND HUNTING RIGHTS AND FEDERAL LAWS

In *R.* v. *Francis* Hughes J.A. in the New Brunswick Court of Appeal held that federal legislation could override the treaties themselves.[14] Thus, where treaty provisions guaranteeing a right to hunt and fish are in direct conflict with various federal statutes, such as the *Fisheries Act*,[15] (under consideration in the *Francis* case), the federal enactment will prevail. This view was adopted by a judge of the New Brunswick Provincial Court in *R.* v. *Nicholas et al.*[16] The case dealt with a conflict between an alleged native right to fish and the provisions of the *Fisheries Act*. The principal contention of the defense was that the accused had a treaty right to fish in the fishing grounds of his ancestors. The trial judge concluded that treaty rights do not take paramountcy over the general law, and that Indians are subject to the *Fisheries Act* of Canada and the Regulations made thereunder.

A similar conclusion was reached by the Supreme Court of Canada in *R.* v. *Sikyea.*[17] The case dealt with the question whether the federal *Migratory Birds Convention Act*[18] had taken away the treaty protected hunting rights of an Indian in the Northwest Territories. Here it was concluded that, while legislation imposing game laws might breach a promise to the Indians, Parliament was not thereby prevented from legislating on the subject. The Nova Scotia case of *R.* v. *Isaac* also supports the proposition that where a valid federal law conflicts with an Indian treaty, the federal law must prevail.[19]

Some authorities have questioned this approach and have attempted to give more force to the saving "subject to any treaty" clause in s. 88 of the *Indian Act*. Mr. Justice Hall, dissenting in the case of *Daniels and White* v. *R.*, argued that s. 88 appears to contain a statutory guarantee of the sanctity of native rights which overrides all other federal legislation.[20] But this view can no longer be accepted. The relationship of s. 88 to other federal legislation appears to have been clearly defined by the Supreme Court of Canada in *R.* v. *George.*[21] In that case the majority held the section not to be a declaration of the paramountcy of treaties over federal legislation; rather it was intended solely to preclude any interference with rights under treaties resulting

[14](1970), 2 N.B.R. (2d) 14 (N.B.C.A.).

[15]R.S.C. 1970, c. F-14.

[16](1978), 22 N.B.R. (2d) 285 (N.B. Prov. Ct.).

[17](1964), 43 D.L.R. (2d) 150 (S.C.C.).

[18]R.S.C. 1970, c. M-12.

[19](1975), 13 N.S.R. (2d) 460 (N.S.C.A.).

[20][1968] S.C.R. 517 at 539.

[21][1963] 3 C.C.C. 109 (Ont. H.C.).

from the impact of provincial legislation. Hence s. 88 refers only to provincial laws of general application, and federal legislation such as the *Fisheries Act* and the *Migratory Birds Convention Act* can override the terms of any Indian treaty, notwithstanding what seems initially to be a saving clause. In this regard it should be noted that the strict provisions in the *Fisheries Act* have been tempered somewhat by provincial regulations, some of which have made special provisions for Indians. In New Brunswick, for example, two Indian bands have been given special rights to fish for salmon.[22]

In general, however, it can be said with some assurance that federal laws can abolish all native hunting and fishing rights that would otherwise exist pursuant to treaties. Moreover, this does not appear to violate the provisions of the Canadian *Bill of Rights.*[23] A termination of a privilege pursuant to the instrument creating it cannot be looked upon as an arbitrary revocation.[24] Those rights appear, like those expressed in the Royal Proclamation of 1763,[25] to depend solely upon the good will of the sovereign.

APPLICATION OF PROVINCIAL FISHING AND HUNTING LAWS

Because s. 91(24) of the *British North America Act* gives the Federal Government jurisdiction over "Indians and lands reserved for the Indians" it is clear that the provinces cannot legislate respecting Indians *qua* Indians or lands reserved for Indians *qua* lands reserved for Indians. At the same time, an Indian reserve remains part of the province and consequently persons on the reserve are subject to the general laws of the province. This much is clear.[26] The real problem is to determine the extent to which a province may affect persons and their activities on Indian reserves and Indians whether on or off reserves under the powers conferred by s. 92(13) and s. 92(16) of the *British North America Act.*

In the early cases the courts appeared to accept, for the most part, that hunting and fishing was a classic area of rights peculiar to native people, and was thus beyond the power of provincial laws. As such, in the early case of *R.* v. *Jim*[27] it was held that provincial game laws did not apply to Indians hunting for food on the Indian reserves, as this was within the constitutional ambit of s. 91(24) of the *British North America*

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[22]P.C. 1969-1269, S.O.R. 69-319, June 25, 1969, Regulation 3, and P.C. 1969-1712, S.O.R. 69-455, September 11, 1969, Regulation 1, both amending P.C. 1965-484, S.O.R. 65-111, March 19, 1965.

[23](1960), 8 & 9 Eliz. II, c. 44.

[24]*Supra,* footnote 12, at 158.

[25]Reprinted in R.S.C. 1952, VI, 6130.

[26]*Supra,* footnote 12, at 178.

[27](1915), 26 C.C.C. 236 (B.C.Q.B.).

Act. It was further pointed out that a lack of a federal law on a subject to which s. 91(27) truly applied did not give licence to the provincial government to fill the void.[28] The case was followed in *R.* v. *Hill*[29], and a similar approach was taken by the Manitoba Court of Appeal in *R.* v. *Rodgers.*[30] Even fishing and hunting rights enjoyed by Indians outside reserves pursuant to treaty appear to have been considered a matter peculiar to Indians and so within exclusive federal authority.[31]

Prior to 1951, the law seemed fairly straightforward: provincial game laws did not apply to Indians on reserves and probably not to Indians acting pursuant to valid treaties. In 1951, however, the new federal *Indian Act* was enacted containing s. 88 which purported to make all laws of general application apply to Indians within the province.

The interpretation of s. 88 has been a subject of great controversy. The courts' approaches to the question of what is a law of general application have been varied. Some authorities have continued to recognize the hunting and fishing rights of Indians as affecting them more directly than certain other areas which might be within provincial jurisdiction. Thus, in the case of *R. ex rel Clinton* v. *Strongquill*[32] it was held that provincial legislation which singled out Indians was *ultra vires* the province. In *R.* v. *Moses,* Little, D. C. J., adopted a similar stance:

> I am satisfied that it is only the Parliament of Canada which has power to abrogate the privilege to hunt which the Indians retained under the Robinson Treaty.[33]

On the other hand, a number of authorities have applied a much broader interpretation of the obligations of the Indians to provincial laws. Perhaps the most significant of these is the recent Supreme Court of Canada decision in *Cardinal* v. *Attorney General of Alberta.*[34] In this case an Indian was convicted of selling game in violation of the Alberta *Wildlife Act.*[35] The sale took place on a reserve. The Supreme Court upheld the conviction on the basis that the *Natural Resources Transfer Agreements*[36] made provincial game laws apply on reserves in the prairies

[28]B. Bilson, "Aboriginal Hunting Rights: Some Issues Raised by the Case of *R.* v. *Frank*", (1976-77) 41 *Sask. L. Rev.* 101 at 116.

[29](1968), 15 O.L.R. 406 (Ont. C.A.).

[30](1923), 3 D.L.R. 414 (Man. C.A.).

[31]This approach was taken at least in later authorities. See *R. ex rel Clinton* v. *Strongguill* (1953), 8 W.W.R. (N.S.) 247 at 265, 271; see also *supra,* footnote 12, at 179.

[32][1953] 2 D.L.R. 264 (Sask. C.A.).

[33][1970] 3 O.R. 314 (Ont. Dist. Ct.).

[34](1973), 40 D.L.R. (3d) 553 (S.C.C.).

[35]R.S.A. 1970, c. 391, s. 16.

[36]*British North America Act,* (U.K.), 1930, R.S.C. 1970, App. II, no. 25.

unless the Indian was hunting for food. The majority went on to say that while the federal government had legislative authority over Indians and Indian lands, this did not imply that reserve lands were "enclaves", immune from provincial laws of general application. Of this interpretation, Mr. Justice Martland stated:

> 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.[37]

The *Cardinal* case, the first decision by the Supreme Court of Canada on the applicability of provincial laws on Indian reserves, has left a number of vital questions unanswered. We now know that general provincial legislation, not in relation to Indian reserves, can apply on Indian reserves, but there are no clear guidelines as to what general provincial laws would be held to be laws relating to Indian reserves. The one conclusion that can definitely be made is that hunting and fishing rights on reserves are no longer considered to be absolutely immune from provincial fishing and hunting laws.

THE MARITIME TREATIES

New Brunswick, like the other Maritime Provinces, is often referred to as a non-treaty area.[38] Thus, outside the area of the reserves, Indian hunting and fishing rights have not been protected against provincial legislation. Only treaty protected hunting and fishing rights receive any protection from provincial fishing and game laws. The native people of New Brunswick do not accept this view and for many years have claimed to derive the right to off-reserve hunting and fishing from a series of Submissions and Agreements, often described as Treaties of Peace and Friendship. These treaties have long been virtually ignored and their legal status rendered doubtful by a number of judicial decisions. Undaunted, the native people continued to bring the issue of these treaties before the courts in an effort to attain what they believe are

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[37]*Supra*, footnote 34, at 559.

[38]D. E. Saunders, "Indian Hunting and Fishing Rights", (1973-74) 38 *Sask. L. Rev.* 45.

their special rights. In the *Sacobie* case, three such treaties, those of 1725, 1752 and 1762,[39] were relied on by Judge Tippet in his decision.

The chief characteristics of Maritime Treaties of Peace and Friendship are as follows:

(1) Unlike the numbered Indian treaties signed in Ontario and Western Canada, no land entitlement appears to have been considered. Indeed, geographic areas were mentioned in only the most obscure terms. The Maritime Treaties were solely of the peace and friendship variety with no provision for continuing benefits to the Indian signators. The instruments were intended to quiet Indian hostility to the British and to gain their allegiance. In return for these pledges, the British offered trade goods. The arrangement was strictly one-sided, with the British gaining all the benefits and holding the initiative at all times.

(2) For the most part, the terms of these treaties were similar. Before 1749, treaty provisions stressed Indian recognition of the British Crown's title to Acadia, sought pledges of their loyalty and obtained their assistance in apprehending deserters. After 1749, when the influence of the British Board of Trade began to increase, articles encouraging trade with the Indians were inserted into the treaties. The Indians were also assured that they would not be interfered with in "their hunting and fishing". This particular clause was written into many treaties to allay Indian fears that their way of life would be destroyed and also to encourage Indian hunting and fishing so as to provide a source of pelts, fish and feathers for colonial merchants.

(3) Indians adhering to these treaties represented local groups, not large tribes covering immense areas of land. In many of these treaties, a clause was inserted whereby the Indians pledged to encourage other tribes to sign. In the case of the 1725 treaty, it was signed at Boston, then taken to Nova Scotia where Indian groups from various areas of the colony would gather to sign. The 1752 treaty, for instance, was signed by Chief Cope who represented only eighty Indians.[40]

THE LEGAL IMPLICATIONS OF THE PEACE AND FRIENDSHIP TREATIES

The fundamental question underlying the Maritime treaties is whether these documents can be called "treaties" in the legal sense. Perhaps the most notable statement with regard to the treaties and their

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[39]*Supra*, footnote 8, Appendix III.

[40]*Maritime Indian Treaties in Historical Perspective* (Ottawa: Dept. Ind. Aff. Nth. Dev., Treaties Section, 1971).

significance was made by Patterson, (Acting) Co. Ct. J. in *R.* v. *Syliboy*, a case which has frequently been cited as the leading authority on the meaning of the Maritime Treaties.[41]

> 'Treaties are unconstrained Acts of independent persons.' But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.
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> Indeed the very fact that certain Indians sought from the Governor the privilege or right to hunt in Nova Scotia as usual shows that they did not claim to be an independent nation owning or possessing their lands.[42]

Mr. Justice Patterson concluded that the 1752 treaty (the treaty considered in this particular case) was at best a mere agreement made by the Governor in Council with a handful of Indians giving them food, presents and the right to hunt and fish as usual in return for good behaviour.

Although the judge in this particular case considered the 1752 "treaty" simply as an agreement, MacKenzie in his article on "Indians and Treaties in Law"[43] argued that this might not be the decision of another court as the term "treaty" in international law has various connotations.

However that may be, the situation has changed. Thirty years after the *Syliboy* case s. 87 (now s. 88) of the *Indian Act*, was enacted. That section, as we have seen, provides that when there are treaty protected rights, provincial laws of general application cannot affect them. In essence, this means that these treaties must be shown to be treaties within the meaning of s. 88. Otherwise provincial hunting and fishing laws will prevail.

Even if it could ever be definitively declared that the early Maritime treaties were in fact treaties in a legal sense it is unlikely that the Maritime native people would gain any material benefits. Unless it is accepted that the present native people in New Brunswick are the beneficiaries of these treaty rights, the treaties cannot be enforced. As noted earlier, the treaties were for the most part made not with the Maritime Indian tribes as a whole, but with small local groups. As such, it would probably be impossible for the present day Indian people to

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[41][1929] 1 D.L.R. 307 (N.S. Co. Ct.).

[42]*Ibid.*, at 313.

[43]N. A. M. MacKenzie, "Indians and Treaties in Law", (1929) 7 *Can. Bar Rev.* 561.

show any connection by descent or otherwise with the original Indian signators. Thus, in the New Brunswick case of *Simon* v. *The Queen,*[44] Chief Justice McNair held that an Indian claiming protection under a 1752 treaty had no right to immunity as he had failed to establish any connection with the group of Indians who made that treaty.

THE ISSUE OF ABORIGINAL RIGHTS IN NEW BRUNSWICK

In addition to the treaties, there have been claims by the native people of New Brunswick and in the other Maritime Provinces that an aboriginal right exists apart from treaty, statute, or grant. Aboriginal rights have been defined most simply as those rights that descend to native peoples because of their use and occupation of certain lands from time immemorial. It would appear that if such rights exist they would, as a minimum, contain a special right to hunt and fish. Moreover, if the right to hunt and fish on traditional hunting grounds is an incident of the aboriginal title, such rights would be protected to some extent from provincial legislation.

The most vital component of the Aboriginal Rights argument to date has been the Royal Proclamation of 1763. It has been argued that this document operated to confirm legally the aboriginal right. Under the Proclamation, a large tract of land was reserved "for the present" for the King's Indian allies, to be used "as their hunting grounds". The provisions of the Proclamation regarding the land it reserves for the Indians may thus be summarized: the Indians were to be left undisturbed in the possession of such land. Further, the colonial governors were restricted from granting these lands and private persons were forbidden from settling on or purchasing them. Finally, the lands would only be transferred to the Crown "at some public meeting or assembly of the said Indians" to be held for that purpose by the governor where the land was located.[45] The native people of the Maritime Provinces claim that the Proclamation applied there and that the land was never surrendered. Consequently, they argue, their rights are still in existence.

Contrary to the Indian argument, it does not appear, historically at least, that lands in what became the three Maritime Provinces were covered by the Proclamation.[46] But the language of the Proclamation is imprecise and has therefore led to some differing judicial opinions. Thus, in the 1970 *Calder* case dealing with the aboriginal claim of the

[44](1958), 43 M.P.R. 101 (N.B.C.A.).

[45]*Supra*, footnote 12, at 114.

[46]Note, however, the differing views on this matter expressed by Allen C. J. in *Doe d. Burk* v. *Cormier* (1891), 30 N.B.R. 142 (N.B.S.C.), and Anglin J. in *Warman* v. *Francis* (1960), 20 D.L.R. (2d) 627 (N.B.S.C.).

Nishga Indians, Mr. Justice Hall of the Supreme Court of Canada argued that "the proclamation followed the flag";[47] *i.e.*, it applied wherever British settlers moved.

Although the Indian claim was rejected by the Supreme Court of Canada, the bench was evenly divided on the substantive issue, so that the Hall argument is still entitled to great weight.[48] If, in a subsequent decision, the Hall judgment is accepted, a number of implications will follow. In the Maritime Provinces the native people could argue that aboriginal title existed or that the 1763 Proclamation applied and the land was never surrendered. Consequently the Indians would claim special rights, particularly in terms of hunting and fishing.

This might, however, be countered with the argument that Indian occupation was not of the sedentary type prevailing in British Columbia, that the Indians no longer occupy the land, and that they cannot establish that they are descendents of the original occupants, and, possibly, that the claim was removed under the French regime. Moreover in New Brunswick, the Indians face an especially formidable obstacle in their attempt to establish an aboriginal right to hunt and fish off reserve lands. In 1844, the New Brunswick Legislature passed a statute which appears to have extinguished all Indian titles except on the reservations specifically set aside under the act.[49]

SUMMARY

Federal jurisdiction over "Indians and lands reserved for the Indians" includes authority over Indian hunting and fishing rights. Federal legislative competence with respect to Indians is unfettered by treaties — either Indian treaties or international treaties — or by the Proclamation of 1763.[50] Thus, where Indian treaties and federal legislation conflict, the federal law will prevail.

Provincial legislation, of course, may not relate to Indian lands unless it is of general application. Thus, for the most part, Indians in New Brunswick and elsewhere who hunt and fish on reserve lands are virtually unaffected by provincial fishing and game laws.

On the other hand, off-reserve hunting and fishing is not protected in the Maritime Provinces as in other areas of Canada. New Brunswick,

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[47]*Supra*, footnote 7.

[48]The Supreme Court split 3 to 3 on the substantive issue.

[49]*An Act to Regulate the Management and Disposal of the Indian Reserves in this Province*, 7 Vict., c. 47.

[50]K. Lysyk, "The Unique Constitutional Position of the Canadian Indian", (1967) 45 *Can. Bar Rev.* 513, at 551.

as one of the Maritime Provinces, is considered to be a non-treaty area. As such, provincial laws will apply to an Indian hunting or fishing outside the reserve. Moreover, the aboriginal rights argument does not appear to offer any assistance to the New Brunswick Indians.

At best, such treatment appears inconsistent with that given to Indians in other parts of the country. Perhaps this is an issue that might better be settled at the political level, rather than before the courts. A fair and consistent government policy would be to recognize the treaties, to simplify the law concerning native hunting and fishing rights, and to treat Indians in all parts of the country equally.[51]

[51]*Supra*, footnote 38, at 62.