Peter Hutchins’ *McGill Law Journal* Book Review of “Provincial Law and Indian Lands” by Micheline Patenaude[115]

Micheline Patenaude introduces her work *Le droit provincial et les terres indiennes* with a question:

> Jusqu’où va le pouvoir fédéral dans chacun de ces domaines (les Indiens et les terres réservees aux Indiens)? Car, pour savoir dans quelle mesure une loi provinciale peut affecter les Indiens et leurs terres, il faut d’abord déterminer l’étendue de la compétence exclusive fédérale.[117,118]

François Chevrette wrote:

> Faut-il redire combien nous n’avons pas à regretter cette époque où nos ouvrages de droit constitutionnel se limitaient à létude du partage des compétences entre Ottawa et les provinces?[120,121]

Despite the many merits of Micheline Patenaude’s *Le droit provincial et les terres indiennes,* the author appears to have succumbed to this Canadian constitutional Lethe. This is particularly unfortunate in an area of law that has suffered more than most from juridical amnesia and self-serving constitutional theory. This state of affairs was recently

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[115] Hutchins, Peter W. , Book Review of “Le droit provincial et les terres indiennes, Micheline Patenaude,” 1987 *McGill Law Journal* v. 33, p.248

[117] Patenaude, Micheline, *Le droit provincial et les terres indiennes.* Montreal: Editions Yvon Blais, 1986, pp. xciii, 198. ISBN 10: 2890735605

[118] How for does federal power reach in these matters (Indians and lands reserved for the Indians)? Because to know to what extent a provincial law can affect Indians and their lands, we must first establish the extent of exclusion federal jurisdiction.

[120] F. Chevrette, book review of *Constitutional Law of Canada,* 2d ed. By P.W. Hogg (1986-87) 32 *McGill L.J.* 244 at 245.

[121] Is it necessary to repeat how much we do not have to regret this time when our works of constitutional law were limited to the study of the division of powers between Ottawa and the provinces?

recognized and deplored by Chief Justice Dickson of the Supreme Court of Canada in a significant decision relating to Indian treaties, *Simon v. R.*[123]

In the course of that judgment, the Chief Justice reacted strongly to judicial pronouncements from the 1920s, specifically those of Mr. Justice Patterson in *R. v. Syliboy.*[124] As Justice Patterson would have it:

> [T]he 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. Accordingly, the 'savages' rights of sovereignty 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.[125]

Having quoted this view on the matter of the status of the Indians of Nova Scotia, Chief Justice Dickson observed:

It should be noted that the language used by Patterson J., illustrated in this passage, reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada. With

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[123] [1985] 2 S.C.R. 387, 81 N.S.R. (2d) 15, 171 A.P.R. 15, 24 D.L.R. (4th) 390, 23 C.C.C. (3d) 238 [hereinafter *Simon* cited to S.C.R.], p. 398-99

[124] (1928), [1929] 1 D.L.R. 307, 50 C.C.C. 389 (N.S. Co. Ct.) [hereinafter *Syliboy* cited to D.L.R.] The full text of the decision is available at <http://library2.usask.ca/native/cnlc/vol04/430.html>

Prof. Slattery also cited *Syliboy* as evidence of one of the tenets of the "Imperial Model" which holds that treaties with First Nations cannot be characterized as international treaties because Aboriginal peoples were never recognized as sovereign entities in international law.

Once such rulings enter the jurisprudence, they then become the basis for further entrenchment of this model: *Syliboy* was used to deny treaty rights in *Regina v. Francis* (1969) 10 D.L.R. (3d) 189 (also reported 1970 3 C.C.C. 165, 2 N.B.R. (2d) 14, 9 C.R.N.S. 249 New Brunswick Supreme Court, Appeal Division.

See also Wicken, William C. "'Heard It From Our Grandfathers': Mi'kmaq Treaty Tradition and the Syliboy Case of 1928." *University of New Brunswick Law Journal* 44 (1995): 145-55.

[125] *Syliboy,* at 313, and quoted by Chief Justice Dickson in *Simon,* 399.

regard to the substance of Patterson J.'s words, leaving aside for the moment the question of whether treaties are international-type documents, his conclusions on capacity are not convincing.

While Madame Patenaude's skillful and detailed analysis of the ownership of and jurisdiction over Indian lands inspires admiration for its thoroughness, it is, nevertheless, flawed in its lack of appreciation and treatment of the constitutional "capacity" of Aboriginal peoples, both with respect to ownership and jurisdiction over lands and resources. One gets the impression that, in this area, a pendulum swings between Ottawa and the provinces "and4 the Indians pass with it".

As a thesis presented for the degree of Master of Laws at l'Université Laval, the work is divided into two chapters, the first dealing with Indian lands and the second dealing with the application of provincial law to those lands. In each case, the problem lies with the underlying premise rather than the analysis itself.

In the first chapter, the author launches immediately into an interesting and detailed discussion on the manner in which lands could be "set aside" for Indians. However, this approach neglects to establish, at the outset, that the proper backdrop against which this analysis must be viewed is aboriginal occupation of, and title to, all lands in Canada.

As to the issue of jurisdiction, the author concentrates upon the issue of conflict of laws between federal and provincial statutes, relegating aboriginal jurisdiction to the bylaw power provided under the *Indian Act*.[126] While our courts have avoided explicit statements on the subject of inherent aboriginal self-government powers, there has been implicit recognition of the fact that Aboriginal peoples were historically self-governing.

As early as 1973 the Supreme Court of Canada had begun to put the lie to two persistent myths of Canadian history and law: that Indian or aboriginal title derived from the European sovereign and that no organized self-governing societies existed in the northern portion of the North American continent prior to the arrival of Cabot and Cartier.

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[126] R.S.C. 1970, c. I-6 (as amended) [hereinafter "the *Indian Act*]

Mr. Justice Judson stated the following in the landmark decision of the Supreme Court of Canada in *Calder v. A.G. British Columbia:*[127]

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right".[128,129]

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[127] [1973] S.C.R. 313, 34 D.L.R. (3d) 145, [1973] 4 W.W.R. I [hereinafter "*Calder*" cited to S.C.R.]

[128] Although Judson J. continues with the affirmation that "There can be no question that this right was dependent on the goodwill of the Sovereign" the courts have repeatedly affirmed that its origin was not the sovereign.

[129] In ***Guerin v. The Queen,*** 1984 CanLII 25 (S.C.C.), [1984] 2 S.C.R. 335, at p. 382, relying in part on Justice Judson's remarks, Mr. Justice Dickson (as he then was) wrote that aboriginal peoples have a "legal right to occupy and possess certain lands, the ultimate title to which is in the Crown".

In ***R. v. Sparrow,*** 1986 CanLII 172 (B.C.C.A), the B.C. Court of Appeal, sustained by the Supreme Court of Canada, noted that in *Calder,* "Six judges of the Supreme Court having joined in rejecting the view that aboriginal title can exist only if conferred by a treaty, statute, or agreement, there can be no justification for continuing to treat that view as binding."

In ***Canadian Pacific Ltd. v. Paul,*** 1988 CanLII 104 (C.S.C.), [1988] 2 S.C.R. 654, the Supreme Court stated, at p. 678: "The inescapable conclusion from the Court's analysis of Indian title up to this point is that the Indian interest in land is truly sui generis. It is more than the right to enjoyment and occupancy although . . . it is difficult to describe what more in traditional property law terminology".

In ***R. v. Van der Peet***, 1996 CanLII 216 (S.C.C.), para. 33, Chief Justice Antonio Lamer wrote for the majority, at para. 30, that the doctrine of aboriginal rights (one aspect of which is "aboriginal title") arises from "one simple fact: when Europeans arrived in North America, aboriginal peoples <u>were already here</u>, living in communities on the land, and participating in distinctive cultures, as they had done for centuries" (emphasis added by Chief Justice Lamer).

He continued in para. 33: "The position of Judson and Hall JJ. on the basis for aboriginal title is applicable to the aboriginal rights recognized and affirmed by s. 35(1). Aboriginal title is the aspect of aboriginal rights related specifically to aboriginal claims to land; it is the way in which the common law recognizes aboriginal land rights. As such, the explanation of the basis of aboriginal title in Calder, supra, can be applied equally to the aboriginal rights recognized and affirmed by s. 35(1). Both aboriginal title and aboriginal rights arise from the existence of distinctive aboriginal communities occupying "the land as their forefathers had done for centuries" (p. 328)."

Chief Justice Lamer continued [para. 35]: "The basis of aboriginal title articulated in *Calder*, supra, was affirmed in *Guerin v. The Queen*, 1984 CanLII 25 (S.C.C.), [1984] 2 S.C.R. 335. The decision in *Guerin* turned on the question of the nature and extent of the Crown's fiduciary obligation to aboriginal peoples; because, however, Dickson J. based that fiduciary relationship, at p. 376, in the "concept of aboriginal, native or Indian title", he had occasion to consider the question of the existence of aboriginal title. In holding that such title existed, he relied, at p. 376, on *Calder*, supra, for the proposition that "aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands". [Emphasis added by the court in *Van der Peet*.]

In ***Delgamuukw v. British Columbia,*** 1997 CanLII 302 (S.C.C.), para. 189, Chief Justice Lamer again turned to the words of Justice Judson : "In my view, the foundation of "aboriginal title" was succinctly described by Judson J. in Calder v. Attorney-General of British Columbia, 1973 CanLII 4 (S.C.C.), [1973] S.C.R. 313, where, at p. 328, he stated: "the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means . . . ."

He continued in paragraph 190: "It follows from these cases that the aboriginal right of possession is derived from the historic occupation and use of ancestral lands by aboriginal peoples. Put another way, "aboriginal title" is based on the continued occupation and use of the land as part of the aboriginal peoples' traditional way of life. This sui generis interest is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts. The best description of "aboriginal title", as set out above, is a broad and general one derived from Judson J.'s pronouncements in *Calder,* supra. Adopting the same approach, Dickson J. wrote in *Guerin,* supra, that the aboriginal right of occupancy is further characterized by two principal features. First, this sui generis interest in the land is personal in that it is generally inalienable except to the Crown. Second, in dealing with this interest, the Crown is subject to a fiduciary obligation to treat aboriginal peoples fairly. Dickson J. went on to conclude, at p. 382, that "[a]ny description of Indian title which goes beyond these two features is both unnecessary and potentially misleading". I share his views and am therefore reluctant to define more precisely the "right [of aboriginal peoples] to continue to live on their lands as their forefathers had lived"; see *Calder*, at p. 328.

In ***R. v. Bernard,*** 2003 NBCA 55 (CanLII), Justice Daigle of the New Brunswick Court of Appeal write in para. 2, "In *Calder v. Attorney-General of British Columbia,* 1973 CanLII 4 (S.C.C.), [1973] S.C.R. 313, Judson J. stated, at p. 328, that "the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means ..." Some 150 years before, Chief Justice Marshall of the United States Supreme Court stated in the landmark decision on aboriginals' right of possession of their lands, *Johnson v. M'Intosh* (1823), 21 U.S. (8 Wheat.) 543, that the original inhabitants "were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion ..."

Madame Patenaude leads off Chapter 1, entitled "Les terres indiennes" with the statement that the jurisprudence has not, to date, supplied a definition for the expression "lands reserved for the Indians" as found in s. 91(24) of the *Constitution Act, 1867*.[131] This is not entirely true, as is evidenced by the author's subsequent treatment of the subject. More important, however, is the fact that constitutional provisions are branches of a "living tree capable of growth and expansion"[132] not fossils, silent and frozen. There exist no definitive definitions in constitutional instruments. The courts, in their interpretation of the expression "lands reserved for the Indians" have reflected this desirable flexibility. In referring to s. 91(24), Lord Watson declared that "the words actually used are, according to their natural meaning, sufficient to include all land reserved, upon any terms or conditions, for Indian occupation".[133] Mr. Justice Dickson (as he was

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"[3] In each of these two landmark cases the forthright recognition as a historical fact of the prior occupation of North America by aboriginal peoples embodies the foundation of aboriginal title. Aboriginal title is thus derived at common law from the historic occupation and possession of ancestral lands by aboriginal people and their relationship to those lands."

In **R. v. Marshall; R. v. Bernard,** 2005 SCC 43 (CanLII), Chief Justice McLachlin said in para. 132: "At the time of the assertion of British sovereignty, North America was not treated by the Crown as *res nullius*. The jurisprudence of this Court has recognized the factual and legal existence of aboriginal occupation prior to that time. In *Calder v. Attorney-General of British Columbia,* 1973 CanLII 4 (S.C.C.), [1973] S.C.R. 313, Judson J. wrote that "when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries" (p. 328). Hall J., dissenting, also found that indigenous legal traditions pre-existed the Crown's assertion of sovereignty, and he recognized the existence of concepts of ownership that were "indigenous to their culture and capable of articulation under the common law" (p. 375).

[131] (U.K.), 30 & 31 Vict., c. 3 [hereinater "*Constitution Act, 1867"]*

[132] *Edwards v. A.G. Canada* (1929), [1930] A.C. 124 at 136, [1929] 3 W.W.R. 479 (P.C.), Lord Sankey L.C.

[133] *St. Catherine's Milling and Lumber Co. v. R.* (1888), 14 A.C. 46 at 59, 58 L.J.P.C. 54, 5 T.L.R. 125, 4 Cartwright 107., Interestingly, this could embrace lands reserved by the Indians for themselves.

then), urged an open approach in the determination of the nature of the Indians' interest in land reserved for Indians.[134]

Madame Patenaude gives a good detailed analysis of pre-Confederation statutes in order to establish the meaning of the s. 91(24) expression "Indians land lands reserved for Indians". She concludes, quite rightly, that the expression includes both traditional aboriginal lands and Indian reserves.

However, the author's contention that the courts should have given more weight to this pre-Confederation material rather than to the common law jurisprudence so often cited in characterizing the Indian interest in lands, must be answered. A reading of the early cases[135] certainly does not leave the impression that the courts have ignored the pre-Confederation legislation. Recent judgments of the Supreme Court of Canada have cited and reviewed these earlier cases in some detail.[136]

The author's impatience with the courts' use of common law jurisprudence serves to illustrate the fundamental flaw referred to at the outset of this review – lack of appreciation of the indigenous character of Indian title and jurisdiction. In its pronouncements on these matters, the Supreme Court of Canada has repeatedly cited, with approval, the position of Chief Justice Marshall of the United States Supreme Court in leading cases such as *Johnson and Graham's Lessee v. McIntosh*[137] and *Worcester v. State of Georgia.*[138] The important Commonwealth cases such as *Amodu Tijani v. Secretary, Southern Nigeria*[139] are also consistently invoked. The fact is that there can be no meaningful inquiry into the nature or extent of aboriginal title and interest without

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[134] *Guerin v. R.* [1984] 2 S.C.R. 335, 13 D.L.R.)4th 321, [1984] 6 W.W.R. 481, 55 N.R. 161.

[135] *Ontario Mining Co. V. Seybold* (1902) A.C. 73, 72 L.J.P.C. 5, 87 L.T. 449, 19 T.L.R. 48, aff'g (1901), 32 S.C.R. 1; *A.G. Canada v. Giroux* (1916), 53 S.C.R. 172; *A.G. Quebec v. A.G. Canada* (1920), [1921] 1 A.C. 401, 90 L.J.P.C. 33, 124 L.T. 513, 37 T.L.R. 125.

[136] See, e.g., *Smith v. R.* [1983] 1 S.C.R. 554, 147 D.L.R. (3d) 237, 47 N.R. 132; *Guerin v. R., supra.*

[137] 21 U.S. 240, 8 Wheaton 543 (1823)

[138] 31 U.S. 350, 6 Peters 515 (1832)

[139] [1921] 2 A.C. 399, 90 L.J.P.C. 236

full consideration of the early American and Commonwealth cases. As Mr. Justice Hall stated in *Calder* (although in dissent):

> The case most frequently quoted with approval dealing with the nature of aboriginal rights is *Johnson and Graham's Lessee v. M'Intosh* . . . It is the *locus classicus* of the principles governing aboriginal title.[140]

It should be noted as well that there is an increasing appreciation of the importance of the principles of conventional and customary international law in this area. The application of international law principles is ignored by the author in her treatment of the Indian interest in lands. When the subject is broached in the context of the application of provincial laws to Indian lands, the author refers to early jurisprudence[141] denying "Indian sovereignty". We have already seen what the Supreme Court of Canada thinks of certain judicial pronouncements made during the 1920s on the subject of the capacity of Indian nations.[142] It is significant that courts are showing an increased sensitivity toward the historical treaty process and its implications for an enhanced special status for Aboriginal peoples.[143] Academic research and writings reveal a history of "nation to nation" dealings between French, English and Aboriginal peoples that courts simply cannot ignore.[144]

The author's treatment of the creation of pre-Confederation Indian reserves is sound. This reviewer does, however, have considerable difficulty with her contention that lands that were not "Indian lands" as of 1867 cannot now be acquired by the federal government and set aside as "lands reserved for the Indians". The author appears to rely rather heavily on a narrow reading of the reasons

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[140] supra, at 380

[141] E.g., *Sero v. Gault* (1921), 50 O.L.R. 27, 64 D.L.R. 327 (S.C.)

[142] Footnote omitted.

[143] See, e.g., *Simon,* supra; *Sioui v. A.G. Quebec* (8 September 1987), Quebec 200-10-000137-856 (C.A.)

[144] J.D. Hurley, *Children or Brethren: Aboriginal Rights in Colonial Iroquoia* (Saskatoon: University of Saskatchewan, Native Law Centre, 1985).

of Mr. Justice Idington in *A.G. Canada v. Giroux (supra)*.[145] Although there clearly exist restrictions on unilateral federal action in the creation of new Indian reserves in lands not contemplated by section 91(24) of the *Constitution Act, 1867*,[146] such reserves may be, and have been established through a variety of techniques.[147]

A section of the first chapter is devoted to examining the characteristics of Indian land. Quite appropriately, emphasis is put on the collective character of the Indian interest. It would also have been appropriate here, however, to mention the growing concern for individual rights, both in Canadian constitutional law generally and, more particularly, in the law applying to Aboriginal peoples. A judgment of the Federal Court of Appeal in *Boyer v. R.*,[149] which dealt with an Indian reserve land tenure issue, illustrates the courts'

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[145] No jurisprudence to date seems to rely upon Justice Idington's reasons in *Giroux*. However, there are have been quotations of Justice Duff's reasons in the same case.

In ***Cardinal v. Attorney General of Alberta,*** 1973 CanLII 8 (S.C.C.), Mr. Justice Martland wrote, "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 **Guerin v. The Queen,** 1984 CanLII 25 (S.C.C.). Mr Justice Dickson (as he was then) noted that Justice Duff had distinguished St. Catherine's Milling on the ground that the statutory provisions in accordance with which the reserve in question in *Giroux* had been created conferred beneficial ownership on the Indian Band which occupied the reserve.

The *Giroux* decision is at <http://library2.usask.ca/native/cnlc/vol04/147.html>

[146] See, for example, *Ontario Mining Co. v. Seybold, supra.*

[147] *Rapport de la Commission d'étude sur l'integrit du territoire du Québec: Le domaine indien,* vol. 4 (Querbec: Éditeur officiel, 1971) (Chair: H. Dorion.)

[149] [1986] 2 F.C. 393 (*sub nom. Re Boyer and R.)* 26 D.L.R. (4th) 284, (*sub nom. Boyer v. Canada)* 65 N.R. 305 (C.A.) (leave to appeal to S.C.C. refused (1986), 72 N.R. 365.

tendency to favour individual rights over collective rights in the absence of specific legislative direction to the contrary.

Other conclusions in respect of the characteristics of Indian land are quite accurate. The author correctly concludes that reserve status does not depend upon who owns the land and seems to reason that the Indian interest in reserve lands goes beyond a pure usufruct, that indeed it may extend to ownership. It would have been interesting here for the author to refer to recent examples of legislative initiatives recognizing substantial Indian interest in Indian reserves or equivalent lands. The *Cree-Naskapi (of Quebec) Act*[150] recognizes that Cree and Naskapi Bands enjoy, in their Category IA and Category IA-N land, rights practically equivalent to those of an owner.[151] The *Sechelt Indian Band Self-Government Act*[152] transfers lands, formerly constituted as Indian reserves, to the Band in fee simple.[153]

On the question of extinguishment of Indian or aboriginal title, Madame Patenaude again seems to give too much attention to an analysis of the respective powers of the federal and provincial governments and not enough attention to the constitutional and common law limitations which apply to these powers. As between the federal and provincial Crowns, the author quite correctly favours exclusive federal authority in this area. The author, however, does not sufficiently distinguish Parliament's recognized authority to limit the *exercise* of the aboriginal right through valid federal legislation and its authority, if any, to extinguish that right. For example, the protection now afforded aboriginal and treaty rights by s. 35 of the *Constitution Act, 1982*[154] is significantly underestimated. While the courts have held that s. 35 does not necessarily affect a limitation on the ability of Parliament to modify the exercise of the right through valid legislation, they have been far more reluctant to hold that this section means absolutely

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[150] S.C. 1984, c. 18 [hereinafter *Cree-Naskapi Act]*.

[151] *Ibid.,* s. 109(2). However, note that s. 109(1) clearly states that the province of Quebec retains the *bare ownership* of Categories IA and IA-N land.

[152] S.C. 1986, c. 27 [hereinafter *Sechelt Indian Band Self-Government Act*].

[153] *Ibid.,*s. 23

[154] Schedule B of the *Canada Act 1982* (U.L., 1982, c. 11

nothing and that the rights therein referred to may be extinguished. The British Columbia Court of Appeal dealt[155] with this "dual issue" in the case of *Sparrow v. R.*,[156] where it stated:

> It is clear from the *Derriksan* line of cases that before 17th April 1982 the aboriginal right to fish was subject to regulation by legislation, and that it was subject to extinguishment. The question whether there is now a power to extinguish does not arise in this case but it is relevant to observe that extinguishment and regulation are essentially different concepts. Even if there cannot now be extinguishment, it would not follow that there cannot be regulation. It may be that a power to extinguish is necessarily inconsistent with the recognition and affirmation of aboriginal right [sic] in s. 35(1). There is no necessary inconsistency with a power to regulate.[157]

The shorter second chapter of Madame Patenaude's work deals with the application of provincial law to lands reserved for Indians. The chapter opens with the contention that claims to "Indian sovereignty" have received no support in the jurisprudence.[158] The examination is consequently narrowed once again to a federal/provincial issue, in this case conflict of laws. The approach is once more chronological. The period prior to the adoption of s.87 (now s. 88) of the *Indian Act* in 1951 receives the thorough treatment we have by this point come to expect of the author. Concise conclusions assist in a comprehension of this section.

With respect to the period following the adoption of s. 87, one is inclined to agree with Madame Patenaude when she writes:

> Si le premier objectif recherché par le léegislateur, en 1951, – soit imposer des limites à l'application du droit provincial aux Indiens – a été atteint, du moins en partie, nous pensons que le deuxiéme visant à clarifier de droit a été rate. Les tribunaux, à notre avis, se sont servis à souhait de l'article 88 de la *Loi sur les Indiens* pour compliquer d'une

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[155] Recently" omitted

[156] (1986), 9. B.C.L.R. (2d) 300, [1987] 1 C.N.L.R. 145 [hereinafter *Sparrow* cited to the B.C.L.R.]

[157] *Ibid., at 323*

[158] Footnote omitted.

façon extraordinaire la question de l'applicabilité des lois provinciales sur les terres réservées aux Indiens.[159]

The principal cases are discussed by the author and this section provides a concise and factual account of the complex jurisprudence on s. 88 of the *Indian Act*. The conclusions drawn by the author, however, must be questioned.

Madame Patenaude takes exception to the line of case and doctrine which supports the view that provincial law relating to the use of land should not apply to lands reserved for Indians on grounds that it affects the pith and substance of a subject-matter of exclusive federal jurisdiction. The author contends that this is yet another manifestation of the "enclave theory", propounded by Chief Justice Laskin, which postulates that Indian reserves are enclaves shielded from the application of all provincial law, unless such provincial law is incorporated into federal legislation.[160]

While it is true that the enclave theory has not fared well in the Supreme Court, it is not accurate to state that challenges to provincial laws affecting the use of lands reserved for Indians are manifestations of the theory. If exclusive federal legislative competence over lands reserved for Indians does not preclude the application of provincial law affecting the Indian interest in those lands, it is difficult to understand the purpose of s. 92(24) of the *Constitution Act, 1967* as it relates to such lands. The prospect that this may exclude the application of certain provincial legislation to extensive tracts of traditional lands may be daunting, but it does not justify ignoring or torturing the true sense of s. 91(24).

The author identifies three tests respecting the rules for the application of provincial laws reserved for Indians: (i) that a provincial law cannot relate directly to lands reserved for Indians; (ii) that a provincial law cannot extinguish the Indian or aboriginal title in lands,

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[159] *Ibid.*, at 111. If the primary goal sought by the legislator in 1951 was to impose limits on the application of the provincial law to the Indians, we think that the second aiming at clarifying of right was missed. The courts, in our opinion, used sec 88 of the *Indian Act* to complicate in an extraordinary way the question of the applicability of the provincial laws regarding lands reserved to the Indians.

[160] See, e.g., *Cardinal v. A.G. Alberta* (1973), [1974] S.C.R. 695, 40 D.L.R. (3d) 553, [1973] 6 W.W.R. 205, 13 C.C.C. (2d) 1.

and (iii) that a provincial law cannot conflict with a federal law which validly regulates the exercise of the Indian interest in those lands or which authorizes such regulation. Although these tests are accurate in and of themselves, they do not go far enough.

Particularly with respect to the third test, it should be noted that recent federal legislative initiatives tend to limit the application of provincial law with the primary purpose of permitting a full exercise of aboriginal jurisdiction. For example, both the *Cree-Naskapi Act* and the *Sechelt Indian Band Self-Government Act* recognize substantially increased jurisdiction for Indian bands over their lands. Section 4 of the *Cree-Naskapi Act* reads:

> Provincial laws of general application do not apply to the extent that they are inconsistent or in conflict with this Act or a regulation or by-law made thereunder or to the extent that they make provision for a matter that is provided for by this Act.

This provision reverses the presumption in favour of the application of provincial laws established in s. 88 of the *Indian Act*.

In 1984, the Penner Committee *Report on Indian Self-Government in Canada*[161] recommended that Indian self-government be encouraged, [pending constitutional change] through legislation adopted under the authority of s. 91 (24) of the *Constitution Act, 1867*. Such laws would be designed, in the words of the Committee:

> [T]o occupy all areas of competence necessary to permit Indian First Nations to govern themselves effectively and to ensure that provincial laws would not apply on Indian lands except by agreement of the Indian First Nation government.[163]

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[161] Canada, House of Commons, *Report of the Special Committee on Indian Self-Government* (Ottawa: Queen's Printer, 12 October 1983) (Chair: Keith Penner)

[163] *Ibid.*, at 59.

The conclusion to this work is useful in many specific areas of the subject matter. The footnotes, list of jurisprudence consulted and bibliography attest to prodigious research. On specific issues, one may quibble with part of the analysis, but in many instances, the research and the conclusions are sound.

It is in the broader historical and constitutional context that *Le droit provincial et les terres indiennes* must be considered wanting. Madame Patenaude should have been examining a constitutional tripod rather than the tired old Canadian constitutional bipod of federal/provincial ownership and jurisdiction. Gone is the era when lawyers ~~could~~ treat Aboriginal peoples and their lands as mere objects of jurisdiction and, it is hoped, much outdated jurisprudence and doctrine will "pass with it".

Aboriginal peoples are actors on the constitutional stage, a stage whose increasingly illuminated backdrop shows Aboriginal peoples "organized in societies and occupying land as their forefathers had done for centuries."[165]

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[165] *Calder, supra,* at 328