Constitutional "Property" and Reserve Creation: *Seybold* Revisited

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I. INTRODUCTION

As land claims settlements are completed and aboriginal policy evolves, it is inevitable that new lands arrangements will be made with aboriginal people. Land claims settlements are being negotiated now, and this process will not end for many years. The creation of effective land claims settlements will likely involve the creation of new s. 91(24) lands[1], some of which will be Indian reserves.

The present advantage of reserves is that they allow bands to use *Indian Act*[2] jurisdiction without negotiating a complex self-government agreement to govern settlement and other new lands. This is an advantage particularly when the amount of land involved is minor and the claim settlement would be delayed if it required drafting what would amount to elaborate new jurisdictional legislation. The jurisdictional issues which arise when dealing with reserve creation are the same ones that arise when any lands are newly brought under s. 91(24) jurisdiction, whether under the *Indian Act* or another scheme. While not all land claims will be settled using s. 91(24) lands, many will.

One obstacle to using reserve lands or other s. 91(24) lands in land claims settlements is that provinces often do not concur with the setting apart of reserve lands within their boundaries. Indeed, many land claims negotiations underway now derive from disputes with provinces over reserve "confirmation". The need for and failure to achieve provincial concurrence with respect to lands represents a major failure of historical treaty settlements in many parts of Canada. Many provincial governments continue to exercise control over the selection of lands for settlement agreements. The context of reserve creation in land claims settlements is one where many different stakeholders attempt to control the process. Provincial interference with land selection has been a significant obstacle to building a new relationship.

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1 That is, lands pursuant to s. 91(24) of the *Constitution Act, 1867*(U.K.), 30 & 31 Vict., c. 3 reprinted in R.S.C. 1985, App. II, No. 5.

2 R.S.C. 1985, c. I-5.

This paper attempts to answer the question of whether the federal government has the authority to settle agreements and meet treaty and other constitutional obligations unilaterally with respect to the creation of "lands reserved for the Indians" under s. 91(24) of the *Constitution Act 1867*.

In this paper I argue for a purposive reading of s. 109 in light of the indivisibility of the Crown. Second, I argue against a proprietary approach to resolving conflict between federal powers over Indian lands and provincial s. 109 rights.[3] I conclude that federal actions which regulate the use of public lands "belonging" to the province under s. 109 are valid unless they are a colourable attempt to dispose of or derive revenue from public lands, and so long as they manifest the "essence of" federal jurisdiction under s. 91(24). This should mean that the federal government can reserve public lands for use by Indians, regardless of whether or not they are s. 109 lands of a province. It should also render provincial "confirmation" of reserves unnecessary.

II. INDIVISIBILITY OF THE CROWN

Within Canada public lands are vested in Her Majesty the Queen. The Crown is vested with public lands and is indivisible for the purposes of land ownership.[4] One might complain that Canada is a sovereign nation and moreover, a federal one, and that therefore the Crown must be divisible. This is to miss the point of Crown indivisibility, for it serves to unite the "sovereignties" of the respective provinces and the federal government into one state, under one "sovereign."[5] The very idea that there are multiple sovereignties, that the provinces are not subordinate to or delegates of the federal government, is based on the idea that both have a direct relationship to the single, indivisible Crown.[6] While the Crown in the United Kingdom is divisible from the Crown in the Dominions, this is merely a description of the political independence of the former colonies.[7]

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3 Kerry Wilkins, "Negative Capability: Of Provinces and Lands Reserved for the Indians" (2002) 1 Indigenous L. J. 57 at 75.

4 See Maurice Sunkin & Sebastian Payne, *The Nature of the crown, a legal and political analysis* (Oxford: Oxford University press, 1999) at 59-61.

5 See the *Royal Styles and Titles Act*, R.S. 1985, c. R-12, s. 2.

6 *Maritime Bank of Canada (Liquidators of) v. Reciever-General of New Brunswick*, [1892] A.C. 437 at 441-442, [1892] J.C.J. no.1 (P.C.), [*Martime Bank*].

7 *Regina v. Secretary of State for Foreign and Commonwealth Affairs Ex. Parte Indian Association of Alberta and Others*, [1982] 1 Q.B. 892 (C.A.) at 916-917 (Denning M.R.). In a separate judgment Kerr L.J. at 919-926, felt that it is merely a territorial constraint on Crown liability. The discussion in this case and others regarding liability of the Crown is a separate issue - relating to which revenue fund the liability applies and as such is not really about the Crown but the legislature.

Within Canada, the Crown is unitary, such that Canada can be said to be one nation.

Indivisibility is the law in Canada,[8] it was also the prevailing constitutional theory in Canada when the Canadian constitution was formulated. Since the *Union Act*, 1840[9] the colonial legislatures have had some measure of control over the "benefit" from Crown lands. This is often described as a "beneficial interest" or as land being "vested in the legislature." Both of these are misnomers. The best description of how the land system in Canada operates is found in the seminal case of *St. Catherines Milling* where Lord Watson writes:

> In construing these enactments, it must always be kept in view that, wherever public land with its incidents is described as "the property of" or as "belonging to" the Dominion or a Province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.[10]

This refrain is not a passive nod to British Constitutional doctrine; it plays a key role in the analysis of the meaning of s. 109 in *St. Catherines Milling*.

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8 See especially, *Attorney-General of Canada v. Higbie*, [1945] S.C.R. 385, [1945] 3 D.L.R. 1 [*Higbie*] where the Court held that the right of disposing of the land in question can only be exercised by the Crown under the advice of the Ministers of the Dominion or province. Per *Reference re Saskatchewan Natural Resources*, [1931] S.C.R. 263 at 275, [1931] 1 D.L.R. 865, aff'd Privy Council [1931] J.C.J. No. 2, there is only one Crown, and the lands belonging to the Crown are and remain vested in it notwithstanding that legislatures may administer the beneficial use of it where competent to do so. A summary of the most important cases can be found in Peter Noonan, *The Crown and Constitutional Law in Canada*, (Calgary: Sripnoon Publications, 1998) at 27-29. In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1, the Court held that the Crown is indivisible for the purposes of whether it is bound by a statute. Also see, *Reference re s.109 (St. Catherines Milling)* [1888] J.C.J. No. 1, 14 App. Cas. 46, 10 C.R.A.C. 13, *St. Catherines Milling*; *Attorney-General Quebec v. Attorney-General Canada (Star Chrome)*, [1920] J.C.J. No. 3, [1921] 1 A.C. 401, [*Star Chrome*]; *Attorney-General Canada v. Attorney-General Ontario et. Al. (Fisheries Case)*, [1898] A.C. 700 (P.C.) *Fisheries Case*] per Lord Herschell, Crown property is all vested in the Crown; *Theodore v. Duncan*, [1919] A.C. 696 at 706; *Burrard Power Co. v. The King*, [1911] A.C. 87 at 95. Also see *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746 [*Osoyoos*] at para. 181 the Court states "the special nature of public ownership must steadily be kept in mind. It is a power of the provincial (or Dominion) authorities to administer and control for the provincial (or Dominion) benefit property vested in the Queen"; and countless other cases.

9 3 & 4 Vic., c. 35, s. 54. Also see *St. Catherines Milling*, *supra* note 6 per Lord Watson at para. 7, where he comments on the effect of the *Union Act*: "There was no transfer to the Province of any legal estate in the Crown lands, which continued to be vested in the Sovereign; but all moneys realized by sales or in any other manner became the property of the Province." [emphasis added]. Also see *Haida Nation*, *infra* note 71.

10 *St. Catherines*, *supra* note 8 at para. 8.

It is impossible to read s. 109 purposively, that is in light of its constitutional and historical context, without recognizing that the Crown is indivisible for the purpose of land ownership. Lord Watson confines the provincial interest to the revenues from Crown lands and the disposal of Crown lands. This is a limited interest granted to the legislature in Canada after the rebellions of the 1830s and the controversies over land that surrounded them. It entitled the then colonial legislatures of British North America to administer and derive revenues from Crown lands without authorization from the Crown that had been required since the fall of Quebec.[11] It was this same power which was incorporated into the *British North America Act* in 1867. Section 109 of that Act reads:

> All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.[12]

The first part of s. 109 deals with provincial capacity to dispose of land (the land shall "belong" to the provinces), while the second part deals with the ability to derive revenue (all sums due or payable) and gain Royalties. Read purposively s. 109 grants provinces the power to derive revenues and make grants, while the "royalty" power provides for tenures like escheat.[13] This interest of the province differs fundamentally from a "radical" or "underlying" or legal title in the land. The term "belonging to" the provinces must be read in light of the purpose of the *Constitution Act, 1867*. For example, the words "between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues *which had previously belonged to the provinces*"[14] refer to the provincial capacities under the *Union Act*. The Privy Council confirmed that s. 109 must be read in light of the indivisibility of the Crown when it first discussed the independence of provinces in *Maritime Bank*:

> The first of these clauses deals with "all lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union," which it declares "shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise." If the Act had operated such a severance between the Crown and the provinces, as the appellants suggest, the

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[11] See the excellent discussion in Chester Martin, *Natural Resources Question*, (Winnipeg: Kings printer for the province of Manitoba, 1920) at 17-22.

[12] *Constitution Act, 1867*, *supra* note 1, s. 109.

[13] *Attorney General of Ontario v. Mercer* (1883), 8 App. Cas. 767 (P.C.) [Mercer]. Also referenced as the *Reference re: The Escheat Act, R.S.O. c. 94*.

[14] *Maritime Bank*, *supra* note 4 at para. 4.

> declaration that these territorial revenues should "belong" to the provinces would hardly have been consistent with their remaining vested in the Crown. Yet... their Lordships expressly held that all the subjects described in sect. 109, and all revenues derived from these subjects, continued to be vested in Her Majesty as the sovereign head of each Province.[15]

That s. 109 must be read in light of the indivisibility of the Crown is a point that remains well settled. Surprisingly, the issue has not been raised very frequently in the last fifty years in the context of aboriginal law.[16]

What s. 109 gives the provinces is certain powers over the revenue and disposal of lands vested in the indivisible Crown. This is not the same as ownership. The legislature of a province does not *own* any Crown property or lands, it simply has certain rights and powers over that property and land belonging to it or in other words, within its boundaries. Neither does the province have a legal title to s. 109 land. All Crown land is vested in the Crown *simpliciter* and the provincial legislature has those rights over that land which is set out for it in s. 109. Other rights over that *same* land may still be powers held by other levels of government.

III. ADMINISTRATION OF PUBLIC LANDS-GENERALLY

In the *Fisheries Case*[17] Lord Herschell held that s. 91(12) of the *Constitution Act, 1867* which granted the federal government powers over the "sea coast and inland fisheries" did not permit the federal government to dispose of Crown fisheries by lease. He also remarked that, "the fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion." Lord Herschell found that s. 91(12) conferred jurisdiction over fisheries only on the Dominion, not ownership over fisheries, which was provincial. What flowed from provincial ownership was that the ability to "lease" or dispose of, the fish was outside Dominion jurisdiction. This makes sense, because the power of disposal is a clear s. 109 power. Thus the Dominion government lacked the power to dispose of Crown fish via a leasehold interest.

On the other hand, so long as the Dominion refrained from disposing of any interest in fish of the Crown, it appears that its jurisdictional authority over fisheries was wide in scope. For example, Dominion jurisdiction did include inter-

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15 *Ibid.* at para. 8.

16 For recent aboriginal law jurisprudence affirming this point see *Ossoyos*, *supra* note 6 and generally see *Higbie*, *supra* note 6.

17 *Fisheries Case*, *supra* note 6 at para. 11.

19 *Ward*, *infra* note 21.

ference with "the times of year during which fishing is to be allowed, or the instruments which may be employed." When dealing with the bounds of jurisdiction and property of the Crown, there may be jurisdiction in the one that interferes with the beneficial use of the other. This approach was affirmed by the Supreme Court more recently in a fisheries case entitled *Ward*.[19]

A good rule of thumb is that if the legislature with jurisdiction is able to impact the private property of a subject with that power, then it can likewise impact the "beneficial interest" of the other legislature.[20] Section 109 "ownership" in the province does not immunize the province from valid legislation in the Dominion which relates to use of that property.[21] Although the *Fisheries Case* on its face appears to conclude that s. 91 does not allow the federal government to do anything that *transfers to itself* s. 109 rights, it is hardly the final word on the subject. Pronouncements in that case relating to other powers under s. 91 are *obiter*.

The *Fisheries Case* indicates that the federal government may be able to use its jurisdiction to regulate the use of s. 109 or other provincially administered Crown property, but that this will not normally extend to the taking of or disposal of provincial "property". This approach taken alone might seem logical enough, but read in light of the indivisibility of the Crown the approach must clearly have limits. Section 109 must be read purposively in light of its limitations, because it does not in fact vest land ownership in the provinces. In the *Fisheries Case*, s. 91 is described as non-proprietary. However, it does not logically follow from the *Constitution Act, 1867* that one should draw a hard line between classes of provisions relating to jurisdiction, e.g. ss..91 and 92 which should be read according to their soft edged pith and substance boundaries - and ss. 109 and 117, which should describe watertight plenary proprietary powers. After all, if the *Fisheries Case* were followed on this point, s. 91(1A) which deals with fed-

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20 This proposition works both ways. Federal ownership of harbours for example does not preclude the application of provincial zoning laws. See *Hamilton Harbour Commissioners v. City of Hamilton* (1978), 91 D.L.R. (3d) 353, 6 M.P.L.R. 183, 21 O.R. (2d) 459 (Ont. C.A.) [*Hamilton Harbour*]. However this proposition is not applied consistently, often, federal lands are exempt from zoning bylaws, see Wilkins, *supra* note 1. In my view, holding that zoning bylaws are inapplicable because they relate to the use of land is inconsistent with the approach in the *Fisheries Case*, *supra* note 8. Also see *Ward*, *infra* note 21.

21 *Fisheries Case*, *supra* note 8. Also see *Reference Re Water and Water Powers*, [1929] S.C.R. 200 at 212 [*Water Powers*]. Duff J held that the Dominion cannot take ownership of the fish belonging to the province: "This, of course, is not to say that the Dominion in exercising its legislative authority under s. 91, may not legislate in such a way as to affect the proprietary rights of a Province.". In *Ward v. Canada (Attorney General)*, [2002] 1 S.C.R. 569, [2002] S.C.J. No. 21 [*Ward*] at para. 36 the Court accepted case law that found that the fisheries power extends to "suppression of an owner's right of utilization." The court further held at para. 48 that, "the issue is rather whether the matter regulated is essentially connected – related in pith and substance – to the Federal fisheries power, or to the provincial power over property and civil rights."

eral public property would have to be read as a "non-property" provision!

Kerry Wilkins has also advocated using a "proprietary" approach (by which he means plenary rather than pith and substance) for certain provisions in the *Constitution Act, 1867* in particular, ss. 91(1A) and 91(24).[22] He argues, simply, that property provisions are not amenable to a pith and substance analysis.

It is extremely difficult to reconcile this attitude with the well established doctrine of the indivisibility of the Crown. If one accepts that the Crown is indivisible, treating such provisions as an altogether separate class of subject without pith and substance dimensions is of no assistance. This is because if all Crown property is vested in the indivisible Crown, the question of ownership does not answer any questions as between the provinces and the federal government. *Maritime Bank* very clearly rejected this "proprietary" approach to reading s. 109, referring specifically to the indivisibility of the Crown.[23] Instead, one must examine which of the ownership rights of the Crown is granted to which legislature; this must be drawn from the provisions of the *Constitution Act, 1867*.

There is no currently utilized constitutional doctrine, beyond the very qualified refrains in the 1898 *Fisheries Case* that can support a watertight proprietary approach in the case of s. 109.[24] Read purposively, the appropriate approach to s. 109 is the dominant constitutional doctrine, that of pith and substance. Given that the ownership is vested in the Crown *simpliciter* we must ask whether a particular action of one of the legislatures is in pith and substance taken pursuant to one of the provisions of the *Constitution Act, 1867*. We should not ask "who owns" the property to resolve the constitutionality of the action.

IV. PAST APPLICATIONS OF A PITH AND SUBSTANCE APPROACH TO S. 109

The federal government has the competence to expropriate private land in pursuance of a valid federal object.[25] Under the *Constitution Act 1867*,[26] the federal government clearly has some powers to take land from the provinces for certain

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22 Wilkins, *supra* note 3 at 75.

23 See *Maritime Bank supra* note 6 at para. 8.

24 See especially *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641; *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783.

25 See *Munro v. Canada (National Capital Commission)*, [1966] S.C.R. 663 where the court held it was valid to expropriate greenbelt in National Capital relying on POGG power.

26 *Supra* note 1.

federal purposes, such as national defence.[27] Since there is no hard line between proprietary and jurisdictional provisions in the *Constitution Act, 1867* the courts have developed an approach that attempts to deal with whether a federal power, read liberally, encompasses a power over property.

For example, in *Reference Re: Railway Act, 1919*[28] the federal government purported to be able to expropriate provincial lands for the construction of railways.[29] To defend its s. 109 rights, Quebec adduced the classic *Fisheries Case* argument that federal jurisdiction over railways did not allow it to "expropriate" s. 109 land. Viscount Cave summarized the Privy Council case law on federal use of Crown property, and held that public land which is vested in the Crown *simpliciter* was open to both Crowns to use within their jurisdiction and concluded that Parliament had "full power, if it thought fit, to authorize *the use* of provincial Crown lands by the company for the purposes of this railway."

Viscount Cave gave the *Fisheries Case* a broad reading, saying that, "while the proprietary right of each province in its own Crown lands is beyond dispute" the fact that a head of power fell under s. 91 or was not phrased like s. 117 did not mean that the federal government's hands were tied if the exercise of that power required the use of s. 109 lands. The test for determining whether a head of power under s. 91 or other jurisdictional provisions in the *Constitution Act, 1867* permitted the federal government to use provincial public lands was set out:

> [T]he power to legislate in respect of any matter must necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights; and it may be added that where (as in this case) the legislative power cannot be effectually exercised without affecting the proprietary rights both of individuals in a Province and of the Provincial Government, the power so to affect those rights is necessarily involved in the legislative power. [30]

In *Reference Re Waters and Water Powers* the Supreme Court of Canada cautioned that:

> There is no general formula for deciding whether or not, in respect of any such given purpose, the nature of the Dominion authority imports the existence of [a right to affect the proprietary rights of a Province]. That can only be determined after an examination

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27 Section 117 of the *Constitution Act, 1867*, provides: "The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the Country."

28 *Infra.* note 29.

29 [1926] J.C.J. No. 3, [1926] A.C. 715 (P.C.) [*Railway Act Reference*] which commented on with approval in *Re Water Powers, supra* note 21.

30 *Ibid.* at para. 11.

> of the nature of the purpose, the character of the power invoked and the character of the means proposed to be employed in order to effectuate the purpose.[31]

Together, these cases define a contextual test for whether s. 91 powers might interfere in extreme ways with s. 109 rights of a province. The result is that the federal government is not totally handicapped by the application of s. 109 provincial "ownership" of public lands. The federal government may regulate uses of provincial property generally according to the *Fisheries Case*. The *Railway Act Reference*, however, frames the test such that if the use of public lands is the "essence" of the exercise of federal power, there is the possibility of using public lands administered by the province to the extent of excluding the province or erecting permanent works.[32] A federal action that is in pith and substance about public lands is still in pith and substance within the federal power, if that power, read liberally, includes powers over public property.

Where the exercise of federal legislative jurisdiction requires or encompasses the use of Crown lands, the federal government may use them, notwithstanding that the disposal and revenue from those lands belongs to the province under s. 109. The power to interfere with provincial land must therefore be limited to certain compelling cases and depends very much on the nature of the federal power in question. The question cannot simply be distilled down to observing that the land in question is s. 109 land "owned" by the province. Such an observation does not tell us the scope of the federal power relied upon or whether the federal action in question falls within *its* scope. The latter is the relevant question for resolving the constitutionality of the action.

The approach endorsed in *Re Water Powers* is clearly a purposive one. The question is not a simple matter of who has ownership rights under the *Constitution Act, 1867* and who does not. Instead, the powers in s. 109 are quasi-jurisdictional, due to the indivisibility of the Crown; ss. 91 and 92 powers may also be quasi-proprietary. This must follow from the examination of the Act as a whole. Section 91(1A) includes a federal power over "public property" and s. 92A includes provincial powers over timber and other natural resources. Read purposively, the provisions of the *Constitution Act, 1867* do not seek to determine which legislature *owns* public property, but rather "[b]y 'property' of the province or the Dominion is meant only that the right to its beneficial use or its revenues has been appropriated to the province or the Dominion as the case may be; the land in all cases remains vested in the Crown."[33]

The question in a case like the *Railway Act Reference* is what to do when two "cores" of jurisdiction overlap – that of building railways, and that of disposing

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[31] *Water Powers, supra* note 21 at 224.

[32] *Railway Act Reference, supra*, note 28.

[33] *Higbie, supra* note 8 per Rand J.

of public lands. But no such question truly arises under the doctrine of inter-jurisdictional immunity. Put more accurately, the issue is whether the federal government is exercising a power that includes a power in relation to Crown ownership of property. The provision of the Constitution must itself be read purposively, and I will not endeavour to do so any further in the abstract.

V. THE S. 91(24) POWER TO "RESERVE"

The power to reserve Crown lands is said to be part of the Royal prerogative. In fairness, the question of whether this really is part of the prerogative is an unsettled one.[34] If it does form part of the prerogative as supposed, it is likely a prerogative relating to land.[35] That it is a prerogative relating to land does not, as might be supposed, mean that it is within provincial competence under s. 109. This flows logically from the proposition that land is not "owned" by the province under that provision, but is vested in the Crown *simpliciter*. On the contrary, since s. 109 lands are "administered by" the provinces, but owned by the Crown *simpliciter* the question of whether Crown lands can be reserved pursuant to prerogative is primarily a question of legislative jurisdiction.[36]

Given that the federal government has express constitutional jurisdiction over "lands reserved for the Indians" under its s. 91(24) power, it would seem to be the obvious competent authority for creating Indian reserves. That the power to reserve lands for Indians is a Royal prerogative relating to Crown ownership of land means that s. 91(24) is also on its face about Crown ownership of property.

The more complicated matter is what effect the exercise of that power may have on provincial s. 109 powers. The reservation of land for Indians under the *Indian Act* cannot be normally construed as "disposing" of Crown land or an at-

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34 For example in *Ross River Dena Council Band v. Canada*, [2002] 2 S.C.R. 816 at para. 3, [2002] S.C.J. No. 54, Bastarache J. [*Ross River* cited to S.C.R.]. All the parties agreed that the source of the power to reserve lands for Indians was the Royal Prerogative. Both the trial court and a dissenting judge in the appeal court in Ross River found that either it was not based on the prerogative in the first place: [1998] Y.J. No. 63 (S.C.) at paras. 25-26 (QL), or that it had been altered by statute [1999] Y.J. No. 121 at para. 56, 1999 BCCA 750 (Y.C.A.), Finch J.A., dissenting. The Supreme Court in *Ross River*, per Lebel J., found that none of the existing legislation restricted the prerogative power - but it had not yet been established that it existed in the first place as that point been conceded by the parties.

35 *Ibid.* I note that in Ross River (S.C.C.) Lebel J. sources the prerogative to the treaty-making power because many reserves are created pursuant to treaties with Indians, whereas Bastarache J. at para. 3 sources it to the power of Crown lands generally.

36 In *Higbie, supra* note 8, a Crown prerogative is exercised in accordance with jurisdiction under the *Constitution Act* and Canada has all the prerogatives of the Crown. Also see *Reference re: Criminal Code of Canada s. 1036*, [1932] A.C. 98 (P.C.), in which "royalties" in s. 109 did not include prerogatives relating to subject matter that was federal under s. 91.

tempt to derive revenue from that land infringing s. 109 rights directly. *Indian Act* reserves are by definition, land vested in Her Majesty.[37] A parcel of land that is reserved under the *Indian Act*, remains vested in the Crown and is not "disposed of".[38] The issue of conflict with s. 109 arises only because under the *Indian Act*, Indians have exclusive use of the reserved Crown land.

Recalling the *Fisheries Case* and the *Railway Act Reference*, the federal Crown can use its legislative jurisdiction to regulate land use on provincial Crown land whether the provision of s. 91 federal jurisdiction it relies on is a power in relation to public property or not. In principle, even if s. 91(24) is not a power over public lands (not a prerogative over land for example) this probably goes far enough to allow it to permit and facilitate *use* of s. 109 lands by Indians.

The *Water Powers* case flags down federal actions that actually exclude the province from those lands, and forces us to ask if the federal power relied on is enough to do this. If, as argued above, s. 91(24) is a provision relating necessarily to public property as a Crown prerogative relating to land, it ought to be able to go further, and allow the federal government to exclude the province - as it did in the *Railway Act Reference.*

All of this must be examined in the context of a particular reserve creation Order in Council or legislation.[39] The attempt to use the "lands reserved for Indians" power must be in pith and substance about lands reserved for Indians and not something broad in scope that might really be about revenue from and disposal of public lands, or about property and civil rights generally.

To determine whether s. 91(24) is about public lands, one must ask whether the reservation of land for Indians is "the essence of" s. 91(24) powers. Federal powers should be assessed on a case-by-case basis. I would argue that, in spite of the position taken in *Ontario Mining v. Seybold*[40] described below, a federal power in relation to "lands reserved for Indians" must be one about public lands and property, since it is impossible to exercise federal jurisdiction over Indians without using public lands for that purpose if the power to reserve is a prerogative relating to Crown land.

The case law on the *Indian Act* has held that, put very loosely, the regulation

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37 *Indian Act*, R.S.C. 1985, c. I-5, s. 2(1), but see s. 36.

38 Note that in *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, [1990] S.C.J. No. 63 there is some discussion about whether s. 91(1)(b) of the *Indian Act* which refers to "personal property that was given to Indians ... under a treaty or agreement between a band and Her Majesty" refers to the federal or provincial Crown.

39 See *Ward* supra note 21 at para. 43.

40 (1902), [1903] A.C. 73, 3 C.N.L.C. 203 (P.C.) (Q.L) [*Seybold*].

of *land use* on reserves is the very core of s. 91(24) jurisdiction.[41] Whether this extends to areas more analogous to s. 109 (disposal of and deriving revenue from land) is more controversial.[42] There is a fundamental difference between these two things; it is totally irrational that "ownership" by a legislature should bring with it land use powers equivalent to immunity from zoning. Generally, regulation of land use does not touch the land unless it is excludes the owner.[43] For the legislatures, ownership brings an ability to dispose of land or to derive revenue from it, not to regulate land use generally. Therefore, zoning (land use generally) is not really something in relation to the land itself and should have little or nothing to do with the prerogative over reservation.

To create a reserve, one needs neither the power to regulate zoning, dispose of land, nor to derive revenue from it. It is therefore not truly analogous to land use regulation, or s. 109 powers. The power to dispose of a reserve for the benefit of Indians is a complex matter that is simply beyond the scope of this paper due to its overlap with s. 109. To *create* a reserve, the federal power over lands reserved for Indians must simply relate to the use of public lands and give it the capacity to give *exclusive* rights to Indians. Clearly a power over "lands reserved" relates to rights to exclude non-Indians from public lands on its face.

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41 This really has more to do with powers of local government (zoning) than land ownership or related rights of disposal and revenue. For some reason, both the case law on Indian reserves and also on federal lands has not grasped this distinction at all. The Court in *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285 at para. 41, [1986] S.C.J. No. 16 [*Derrickson*] cite to S.C.R.], held that the right to possession of lands on an Indian reserve is the "very essence of" s. 91(24) powers. This would seem to relate at least to provincial s. 92(13) jurisdiction over property and civil rights, if not also public land ownership. See also *Surrey (District) v. Peace Arch Enterprises Ltd.* (1970), 74 W.W.R. 380 (B.C.C.A.) [*Peace Arch*], regulation of land use on reserve is the core of s. 91(24) which is at least the provincial equivalent of local and private or municipalities; and *R. v. Isaac* (1976), 13 N.S.R. (2d) 460 (N.S. C.A.) where hunting was held to be a use of land and so provincial laws ceased to apply.

42 See *Stoney Tribal Council v. PanCanadian Petroleum Ltd.*, [2000] A.J. No. 870, 2000 ABCA 209 (Alta. C.A.) where federal royalty regimes relating to Indian Oil and Gas were paramount; the federal government could derive revenue for Indians even if it was through a lease. But see *Smith v. R.*, [1983] 1 S.C.R. 554, 147 D.L.R. (3d) 237 where surrenders to Canada in trust to sell for Indians made those lands unencumbered s. 109 lands in the hands of the province [*Smith*].

43 See *British Columbia v. Tener*, [1985] 1 S.C.R. 533, [1985] S.C.J. No. 25 and *Hamilton Harbour, supra* note 20; but see "Negative Capability" *supra* note 3.

VI. THE LAW RELATING TO RESERVE CREATION ON PROVINCIAL LANDS: *SEYBOLD*

Perhaps the only appeal case to truly have the s. 91(24) power to "reserve" and its interaction with s. 109 before it was the case of *Ontario Mining v. Seybold.*[44] In that case the Privy Council had occasion to analyze a case of reserve creation on s. 109 land. The case concerned the creation of a reserve in the same Treaty No. 3 context as *St. Catherines Milling.* Recall that St. *Catherines Milling* held that after the surrender, the lands became s. 109 lands that were totally free of any Indian or other interest.[45] The provinces therefore had the full right to dispose of and derive revenue from all the Crown lands in the Treaty area. To fulfill its obligations under the same Treaty, the federal government attempted to create a reserve, IR 38B in Rat Portage. The Treaty expressly provided for the setting aside of reserves in the surrendered territory:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and also to lay aside and reserve for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada ....[46]

Of note is that the setting aside of the reserves after the surrender is a treaty obligation, but that the actual reserves to be set-aside are to be agreed to. It is an actual part of the treaty that the reserves shall be "administered by" the Dominion government. The Treaty also stipulates a formula for the amount of land to be set aside. This Treaty offers a wonderful illustration because it is this same type of treaty that currently forms the basis of a vast number of "Additions to Reserve" proposals and claims.

The Court in *St. Catherines Milling* found that the obligations in the Treaty did not constitute interests that the provinces s. 109 rights were "subject to" within the terms of that provision, so it is on that basis that *Seybold* considers the federal powers. Lord Davey determined in *Seybold* that the creation of I.R. 38B was *ultra vires* the federal government using the classic *Fisheries Case* dicta he held that that s. 91(24) is not about property:

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[44] *Supra* note 40.

[45] This claim is of course, based on an approach to interpretation of Treaty 3 that has been fully overturned since *Nowegijick v. The Queen,* [1983] 1 S.C.R. 29 [*Nowegijick*]. In reality, there are probably remaining interests that the s. 109 interest is "subject to"; the consequences of this will be discussed below.

[46] Canada. *Treaty No.3* (Ottawa: Queen's Printer and Controller of Stationary, 1966) Cat. No. Ci 72-0366.

> By s. 91 of the British North America Act, 1867, the Parliament of Canada has exclusive legislative authority over "Indians and lands reserved for the Indians." But this did not vest in the Government of the Dominion any proprietary rights in such lands, or any power by legislation to appropriate lands which by the surrender of the Indian title had become the free public lands of the province as an Indian reserve, in infringement of the proprietary rights of the province.[47]

With respect to Lord Davey, the *Seybold* reasons are not an apex of pith and substance jurisprudence. Unlike in the *Fisheries Case* this case has no clear reasoning for why s. 91(24) is not about property. As explained above, the matter is not as simple as saying that s. 109 is about property and s. 91 is not. The actual character of s. 91(24) ought to have been interrogated as was s. 91(12) in the *Fisheries Case*.

Lord Davey in *Seybold* cites with approval the indivisible Crown doctrine as stated in *St. Catherines Milling*, yet no consequence appears to flow from this.[48] The analysis assumes rather than decides that the interest the Indians have in their *Indian Act* reserves is so great as to be in pith and substance relating to s. 109. It omits any discussion of whether the creation of IR 38B merely regulates uses of lands, something which is permissible under the *Fisheries Case* even if s. 91(24) is not "proprietary" in any way. Even if the conclusion that it goes to the heart of s. 109 is to be implied, there is no mention of whether the creation of reserves for Indians on public lands is the very "essence of" s. 91(24). The reasoning in *Seybold* is so sparse that it is impossible to reconcile with the other cases on s. 109. The issue has been treated as a settled one ever since. The federal government must ask permission to create reserves on full s. 109 lands.

The approach used in *Seybold* is highly problematic. At the most basic level, the problem is that the case ignores the consequences of Crown indivisibility. Lord Davey appears to treat the use of public lands by Canada as an infringement of the "proprietary rights" of the provincial legislature. In fact, the rights of the provincial legislature are not accurately thought of as "proprietary" because the land is vested in the Crown *simpliciter*.

The question asked by Lord Davey is the wrong question. Lord Davey asks the question "who owns the land in question" and assumes that jurisdiction to exercise the prerogative of reservation flows exclusively from that ownership in a watertight manner. In the lower courts the same approach was used, with the Supreme Court of Canada fussing over whether the federal legislature was granting "proprietary" rights that it did not have. The Supreme Court of Canada complained that the "proprietary right of the province attaching upon these lands cannot be at the same time lodged in the Dominion so as to enable Can-

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[47] *Seybold*, *supra* note 40 at para.12 (Davey L.J.).

[48] *Ibid.* at para. 3.

ada to convey the proprietary ownership of this land to the plaintiffs."[49] This is untrue; if the Crown is indivisible as both the cited cases of *St. Catherine's Milling* and the *Fisheries Case* hold, the proprietary rights of the Crown *simpliciter* can be carved up as between the two legislatures. No argument is made in *Seybold* that s. 91(24) itself could be read such that no rights in property passed to it. How a power to "reserve" could not include the power to exclude is a difficult question that is simply not answered.

There is no simple question of ownership under an indivisible Crown. Instead, the correct approach is really to ask whether the attempt to create a reserve is in pith and substance relating to s. 91(24) or s. 109.

In *Seybold* the question that was left unasked and unanswered is whether reserve *creation* on public lands *simpliciter* was an action in pith and substance in relation to s. 91(24). That approach to ss. 109 and 91(24) is a very different and arguably superior and more modern approach than that used in *Seybold.* First, following *Re Water Powers*, the question is whether s. 91(24) goes to the reservation of public lands - clearly it does. Second, following the *Railway Act Reference*, is the reservation of public lands for Indians so essential to the exercise s. 91(24) jurisdiction that the federal creation of IR 38B should include the power to exclude the province from s. 109 land? This question is really a straightforward pith and substance analysis. If something is pith and substance federal, by definition it is not *ultra vires* simply because it does something that is also provincial, for example the use of public lands.

The issue is not whether the creation of Indian reserves is something the federal government can ground in land ownership. As Lord Davey himself recites in *Seybold*, the land is vested in the Crown *simpliciter*, and so "ownership" as between the federal and provincial legislatures is a non-issue. Instead the question is *which* ownership rights of the indivisible Crown have been granted to *which* legislature?

While provinces have a s. 109 power to dispose of and derive revenue from Crown lands, this power must be read in relation to the Act as a whole, including ss. 91(1A) and 91(24). Since s. 91(24) clearly confers the reservation power over Crown land on the Crown in right of Canada, that same power cannot be read into s. 109. A reserve creation is only invalid if the federal attempt to create a reserve (which is usually by Order in Council) is in pith and substance about s. 109 rights to disposal and revenue from land not if it is really an attempt to reserve land for Indians.[50]

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[49] *Ontario Mining Corp. Co. v. Seybold* (1899), 31 O.R. 386 at 397, [1899] O.J. No. 112 (H.C.J. Ch. Div.), aff'd (1902), [1903] A.C. 73, 3 C.N.L.C. 203 (P.C.).

[50] Orders-in-Council relating to reserve creation are to be construed purposively: see *Canada v. Anishnabe of Wauzhushk Onigum Band*, [2002] O.J. No. 3741 (Sup. Ct.), aff'd [2003] O.J. No. 4655 (Ont. C.A.).

Creation of an *Indian Act* reserve goes to the core of federal jurisdiction, at least where that entails exclusive use by Indians in the normal manner contemplated by that Act. In the case of Treaty No. 3, the promise to create reserves, of fulfilling treaty obligations, and "administering" "lands reserved for Indians" is clearly on its face within the federal government's jurisdiction and so, in addition to being *intra vires*, should normally be immune from s. 109's influence under the doctrine of inter-jurisdictional immunity.

I would conclude that it is not entirely out of the question that the federal government has the unilateral power to create a reserve on Treaty No. 3 Crown land. Whether a particular reserve creation is *intra vires* will depend on the facts of the case at hand.

VII. PITH AND SUBSTANCE OF IR 38B: HOW UNIVERSAL IS IT?

Looking at the facts in *Seybold*, we might actually suspect the federal government of having a colourable purpose to the proposed creation of IR 38B. They signed the Treaty in 1873, created IR 38B shortly afterwards, and then proceeded to accept a surrender for sale of that reserve in 1886. Parliament then claimed to have the right to the proceeds of sale to administer for the Indians. This is mentioned only to highlight the importance of context to the analysis of pith and substance.

The case of IR 38B in *Seybold* may not be a very sympathetic case if a pith and substance analysis is used, as the reserve creation appears almost as a vehicle for putting funds at the disposal of Parliament that are, but for the Indians' brief involvement, properly at the disposal of the provincial legislature.[51] Indeed an analysis of the lower court decisions in *Seybold* reveals that the lower courts were concerned not with the creation of the reserve so much as the subsequent disposal and its validity.[52] Since the validity of the disposal was what was at issue in the *Seybold* case this makes sense. This may go some length to explain the short and simplistic reasons given by the Privy Council in *Seybold*. Thus caution ought to be used when applying this case in other contexts, in particular now that the analysis of treaty rights applied by the courts is very different than that used in *Seybold* and *St. Catherines Milling*.

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[51] This must be viewed of course, against the backdrop practice of not creating reserves on lands containing minerals or other valuable resources.

[52] *Supra* note 49.

1. The practice of provinces confirming reserves

It has long been the practice of the federal government to get agreements from provinces regarding the administration of purported Indian reservations, particularly in Ontario and British Columbia. In 1902 Canada and Ontario for example, attempted explicitly rectify the decision in *Seybold* by signing the following agreement:

> As to all treaty Indian reserves in Ontario (including those in the territory covered by the Northwest Angle Treaty, which are or shall be duly established pursuant to the statutory agreement of one thousand eight hundred and ninety-four), and which have been or shall be duly surrendered by the Indians to sell or lease for their benefit, Ontario agrees to confirm the titles heretofore made by the Dominion, and that the Dominion shall have full power and authority to sell or lease and convey title in fee simple or for any less estate.[53]

The 1894 Agreement referenced above was codified by both jurisdictions in 1891.[54] Article 6 of that agreement held that Ontario had to concur in the making of future treaties regarding un-surrendered land.[55] Ontario was a signatory to Treaty 9 in 1905, shortly after the making of the 1902 Agreement. The practice of provinces "confirming" reserves had been born.

There are federal-provincial Indian lands agreements in many provinces in response to the *St. Catherines* and *Seybold* lethal combination.[56] Many of these agreements also deal with surrender and disposal of Indian reserves; a topic beyond the scope of this paper. In the prairie provinces and British Columbia, these issues relate more to the *Terms of Union, 1871* and the *Constitution Act, 1930* which create a duty for those provinces to "transfer" lands to the federal government to create Indian reserves under certain circumstances. There are also bilateral agreements and legislation relating to these provinces attempting to implement agreements under those acts.[57]

These agreements go to show, if nothing else, the degree to which expansive s. 109 rights have impinged very badly on s. 91(24) jurisdiction. If provinces must "confirm" all reservations of s. 109 lands, all meaning is sucked from the reserva-

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53 *Agreement between counsel on behalf of the Dominion and Ontario, intervening parties upon the appeal to the Judicial Committee of the Privy Council in Ontario Mining Company v. Seybold et. al* (July 7, 1902).

54 54-55 Vic. Cap. 5 (Canada); 54-55 Vic. Cap 3 (Ontario).

55 See generally Department of Indian and Northern Affairs Canada, *Treaty Research Report: Treaty No. 9 (1905-1906)* by James Morrison (Ottawa: Indian and Northern Affairs, 1986).

56 See *New Brunswick Indian Reserves Agreement Act*, S.C. 1959, c. 47; *Nova Scotia Indian Reserves Agreement*, S.C. 1959, c. 50; *Indian Lands Settlement of Differences* (B.C.), S.C. 1920, c. 51, (Ont.), S.C. 1924, c. 48; and also *Indian Lands Agreement (1986) Act*, S.C. 1988, c. 39.

57 *Ibid.*

tion power in s. 91(24). There would appear to be no limit to the provincial veto. This is an important issue because provinces have demonstrated an unwillingness to offer up resource-rich Crown land in settlements for Indians.[58] Sometimes this is an unwillingness to uphold or implement past confirmation agreements, and sometimes this is an unwillingness to expand those agreements as circumstances change. As Michael Ignatieff once said, "we should cease believing that constitutional settlements will end historical arguments. In reality, they can only produce a new basis for ongoing and unending dialogue."[59] While it is constitutionally possible to transfer the administration of land to the federal government voluntarily, this is really anachronistic and contrary to the purpose of s. 109 and its intent.

2. Wewaykum and confirming provincial reserves

In *Wewaykum v. Canada*,[60] Binnie J., for the majority of the Supreme Court of Canada, discussed the issue of reserve confirmation in British Columbia. In the British Columbia *Terms of Union*,[61] British Columbia agreed to convey tracts of land to the federal government from time to time for Indian reserves.[62] As Binnie J. described in *Wewaykum*, henceforth the two governments were largely unable to agree to what lands could be conveyed. Binnie J. examined an inaccurate provincial Order in Council purporting to convey a reserve to the wrong band. He wrote:

> We really do not know what intent, if any, the provincial government had. The permissible constitutional scope of the provincial "intent" in relation to "Lands reserved for Indians" was limited to the size, number and location of reserves to be transferred by it to the administration and control of the Crown in right of Canada.[63]

In so putting the answer, Justice Binnie chose to use what is an astonishingly expansive approach to provincial competence over s. 109 lands. It is highly questionable that s. 109 entitles the province to *any* powers in relation to Indianre-

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58 It is constitutionally possible to "transfer" lands from one jurisdiction to the other. See *Higbie, supra* note 8, per Rinfret C.J.C.: "After all, there is no real conveyance of property, since His Majesty the King remains the owner in either case and, therefore, it is only the administration of the property which passes...".

59 Michael Ignatieff, *The Rights Revolution* (Toronto: House of Anasasi Press, 2000) at 136.

60 [2002] 4 S.C.R. 245, 2002 SCC 79 (QL) [*Wewaykum* cited to S.C.R.].

61 British Columbia was admitted into the Union pursuant to section 146 of the *Constitution Act, 1867*, 30-31 Vict., c. 3 (U.K.) by the *British Columbia Terms of Union*, being Order in Council of May 16, 1871, effective July 20, 1871.

62 Similar provisions are included in the *Constitution Act*, 1930, 20-21 Geo. V, c. 26 (U.K.).

63 *Wewaykum, supra* note 60 at para.70 (Binnie J.).

serves.

Justice Binnie apparently used a "pith and substance" approach regarding a provincial Order in Council regarding reserve creation. The province's decision about the "size, number and location" of Indian reserves was seen as incidental to s. 109, but not apparently going to the core of s. 91(24)! With respect. this is an untenable position in a Constitution where the power to reserve is explicitly granted to the federal legislature. First, an Order in Council in relation to Indian reserves is straightforwardly in pith and substance a federal purpose and *ultra vires* the province. No attempt is made to establish that this Order in Council is in pith and substance about the disposal or derivation of revenue from public lands. Second, the implication is that this same Order in Council is not going to the core of s. 91(24) but no analysis is given of what the core of lands reserved for Indians actually might be. To offer an alternative to this analysis, it is necessary to look at the modern approach to treaties and reserves.

3. The Modern Approach to Treaties and Reserves

It is argued here that the modern approach to reserve creation and treaty interpretation should play a key role in the pith and substance analysis used for federal attempts to create reserves. In particular, recent cases on the honour of the Crown lend credence to a view that sees federal reserve creation as valid in the face of provincial s. 109 rights.

In *Ross River*[64] the Supreme Court of Canada was asked to decide whether lands in the federally administered Yukon Territory which had been transferred to the Department of Indian Affairs and "set aside" under the *Territorial Lands Act*[65] was a reserve under the *Indian Act*. In that case there was no treaty just a mutual understanding that a reserve should be created. The Supreme Court found, among other things, that to create a reserve under the *Indian Act*, "the band concerned must have accepted the setting apart and must have started to make use of the lands so set apart."[66]

Although there was no treaty in the *Ross River* case, LeBel J. found that:

> In both cases, an agent of the Crown, duly authorized, acts in the exercise of a delegated authority to establish or further elaborate upon the relationship that exists between a First Nation and the Crown. The Crown agent makes representations to the First Nation with respect to the Crown's intentions. And, in both cases, the honour of the Crown rests on the Governor in Council's willingness to live up to those representations

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[64] *Ross River* (S.C.C.), *supra* note 34.

[65] 1985 R.S.C., c. T-6.

[66] *Ross River*, *supra* note 34 at para. 67.

> made to the First Nation in an effort to induce it to enter into some obligation or to accept settlement on a particular parcel of land.[67]

This analogy between all reserve creation enterprises and treaty making is important. Although LeBel J. sources the reserve creation power to the Royal prerogative there is an issue of representations and inducements made to First Nations regarding reserve entitlements. Embedded in this analysis is an idea that when a First Nation moves onto a reserve it is almost like a treaty. Moreover, although there may be no s. 35 right to the reserve initially, the honour of the Crown is triggered when a band occupies a réserve. LeBel J. notes that even a "setting aside" short of the *Indian Act* triggers the fiduciary obligation of the Crown: "the actions of the Crown with respect to the lands occupied by the Band will be governed by the fiduciary relationship which exists between the Crown and the Band."[68]

Justice LeBel's emphasis on the aboriginal perspective, the honour of the Crown and the fiduciary relationship means that a good decision maker will be mindful of this in their analysis of the pith and substance of a federal Order in Council relating to reserve creation. Where reserve creation may be characterized as the fulfillment of treaty obligations, the settlement of land claims or more generally triggering the honour of the Crown it is clearly in pith and substance about the federal s. 91(24) powers. This is to say that the purpose of a federal Order in Council setting aside Crown land for the use of an Indian band can only truly be discovered in light of the relationship between the Crown and aboriginal peoples. Indeed Justice LeBel J. in *Ross River* saw it as an elaboration of that relationship.

4. Impact of the Modern approach to Reserve creation on Treaty No. 3 IRs

In the case of Treaty No. 3 we clearly have a relationship building exercise. Recall that it was found in *R. v. White and Bob* that Treaty obligations go to the "core" of s. 91(24).[69] We also have the aboriginal perspective of the Treaty signatories who expected reserves to be created for their use and benefit. In some cases, treaties even stipulated that reserves should be "administered by" the Government of Canada. The courts should be liberal in their approach to treaty interpretation.[70]

The purpose behind the creation of IR 38B is clearly grounded in unambi-

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[67] *Ibid.* at para. 65.

[68] *Ibid.* at para. 77.

[69] (1964), 50 D.L.R. (2d) 613 at 618, 52 W.W.R. 193 (B.C.C.A.), aff'd (1965), 52 D.L.R. (2d) 481 (S.C.C.).

[70] *Nowegijick, supra* note 45.

guous s. 91(24) jurisdiction. The reserve *creation* is in pith and substance about the exercise of valid s. 91(24) powers and is not colourable, even if the subsequent disposition of IR 38B might be. Reserve *creation* clearly goes to the very essence of s. 91(24) jurisdiction; the honour of the Crown is at stake.

Recognizing that the creation of an *Indian Act* reserve will probably also go to the basic provincial jurisdiction of s. 109 - the provincial component of the honour of the Crown must also be a consideration. In *Haida Nation v. British Columbia (Minister of Forests)* McLachlin C.J. dismissed British Columbia's argument that to read the honour of the Crown into s. 109 would "upset the balance of federalism":

> The answer to this argument is that the Provinces took their interest in land subject to "any Interest other than that of the Province in the same" (s. 109). The duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty. It cannot therefore claim that s. 35 deprives it of powers it would otherwise have enjoyed. [71]

According to Chief Justice McLachlin, s. 109 powers are "subject to" the honour of the Crown in its dealings with aboriginal peoples. Note that this is not the same exactly as saying that the province's s. 109 rights are "subject to" aboriginal title. In *Haida Nation*, aboriginal title was not yet proven; the honour of the Crown was triggered in provincial dealings on lands where aboriginal title was claimed. In *Misikew Cree*,[72] the Supreme Court recently confirmed that the honour of the Crown is also triggered in treaty relations. Moreover, the *Misikew Cree* case is a case that acknowledges that many of the numbered treaties are not "a finished land use blueprint."[73] The *Misikew Cree* case relates directly to the use by the Crown, of public lands surrendered in a treaty.

All of this leads inexorably to the conclusion that the provinces' s. 109 rights are subject to treaty obligations of the Crown *simpliciter* towards aboriginal peoples.[74] We also know from *Ross River* that the honour of the Crown is triggered in non-treaty reserve creation, where aboriginal peoples are promised lands or occupy lands. The consequence of these modern approaches to relations with aboriginal peoples in Canada is that the province cannot use s. 109 as a shield to prevent the setting aside of public lands for Indians.

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[71] [2004] 3 S.C.R. 511 at para. 59, 2004 SCC 73 (McLachlin C.J.) [*Haida Nation* cited to S.C.R.].

[72] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] S.C.J. No. 71 (QL) [*Mikisew Cree* cited to S.C.J.].

[73] *Ibid.* at para. 27.

[74] This necessarily rejects the approach taken to this issue in *St. Catherines Milling*, *supra* note 6, where Lord Watson argued that because treaty obligations in Treaty 3 didn't touch the land, they were not part of those subjects which s. 109 was "subject to."

The result is that the creation of a reserve is definitively and squarely in pith and substance federal, either because it is part of a treaty relationship or because it is analogous to one. It is impossible to read this power into the limited s. 109 powers conferred on the provinces. Even if it were, this power is subject to any honour of the Crown which arises by dealings inducing aboriginal people to live on a particular tract of land or by treaty promises to allow them to select reserves to be administered by Canada.

In contrast, Binnie J.'s judgment in *Wewaykum* implies that when lands are held by the province pursuant to s. 109, without any other interest 'burdening' the land, they are immune from federal treaty and fiduciary obligations to the extent of being able to determine what the size and location of those reserves ought to be. Moreover Binnie J. explains that there are no fiduciary obligations arising from the creation of "new" Indian interests in land.[75]

This implies that a province has a veto over the reservation of land in pursuance of treaty or other constitutional obligations. Consider for example s. 11 of the Constitution Act, 1930

> 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 Minister of Mines and Natural Resources 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.[76]

With respect, the conclusion that the province has a veto over reserve creation under this provision is rather extraordinary. It amounts to giving the province and the federal government jurisdictional smokescreens behind which to hide from honour of the Crown obligations to aboriginal people![77]

In light of the fact that the provinces' s. 109 rights are subject to the honour of the Crown, any stipulations in the *Terms of Union* that the province of British Columbia must "agree" to allow Canada to set aside lands for Indians must be

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[75] *Supra* note 60 at para. 81.

[76] *Constitution Act, 1930*, 20-21 Geo. V, c. 26 (U.K.), s. 11.

[77] In *R v. Jack* (1979), [1980] 1 S.C.R. 294, it was held that because Article 13 of the British Columbia *Terms of Union, 1871* requiring the province to "transfer" lands to Canada for reserves was constitutionalised and therefore third parties could rely on it. See Nigel Bankes, "Constitutionalized Intergovernmental Agreements and Third Parties: Canada and Australia" (1992) 30 Alta. L. Rev. 524.

read narrowly. Moreover, in light of the *Terms of Union* provision above, it is Canada not the province who does the actual "selection" of the land. Justice Binnie's approach in *Wewaykum* is difficult to reconcile with the *Terms of Union*, s. 109, s. 91(24), the indivisibility of the Crown, the near contemporaneous decision in *Ross River*, and the honour of the Crown doctrine generally. It should also be noted that *Wewaykum* ignores the consequences of any possible aboriginal title claim to the same reserve land and that, having determined that the province could not allocate selected lands to a particular band, the question of whether the province must concur in setting aside generally was not really at issue and so the discussion is *obiter*.

It is time to move on from the era of *Seybold*, and the casual remarks in *Wewaykum* ought to be disregarded as adding nothing to the doctrines relating to the relationship between s. 109 and s. 91(24).

VIII. CONCLUSION

It might be argued that over 100 years, and numerous intergovernmental agreements later it is hard to be convinced that overturning *Seybold* and allowing the federal government to reserve s. 109 land in the province for Indians is desirable or possible.

First, I have argued here that *Seybold* and *Wewaykum* did not actually have reserve creation *itself* at issue before them and so the question has not been truly yet decided. Thus it is the distinguishing rather than the overturning of those cases that is necessary to apply the approach suggested above. There is nothing radical about forcing s. 109 jurisprudence in relation to aboriginal lands, to conform to the general approach taken in other s. 109 cases.

Second, while the passage of time and the presence of agreements which resolve some of the issues raised by *Seybold* are significant, the approach offered in this paper relates to the interpretation of s. 109 generally. What exactly s. 109 purports to give the provinces will become increasingly important the instant there is any kind of successful aboriginal title claim to any land that was acquired by the province or granted post-confederation.[78] Thus establishing the appropriate purposive approach to s. 109 in relation to aboriginal lands is crucial. Moreover, the agreements themselves are attempts to reach the same conclusion that this paper did - that is to recognize that reserving lands for Indians is properly a federal power.

Third, the federal government is in the middle of a complex process of attempting to engage in the settlement of land claims - at the prompting of the courts - that was stalled for the first 75 years of the last century and the ability for

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[78] See Kent McNeil, "Aboriginal Rights, Resource Development, and the Source of the Provincial Duty to Consult in *Haida Nation* and *Taku River*" 29(2) Sup. Ct. Law. Rev. 447 at 452.

it to do this will be litigated. When this happens the issues left unresolved in *Seybold* and related bilateral agreements will have to be examined.

Lastly, if there is no convincing the reader that this approach is viable without a substantial change to accepted political and legal norms of reserve creation there is always resort to an argument for change. A province would no doubt argue that to allow the federal government to reserve public lands for Indians without asking permission from a province would upset the balance of federalism. In *Reference Re Secession of Quebec* the Supreme Court of Canada noted that federalism was an underlying Canadian constitutional principle:

> [T]here can be little doubt that the principle of federalism remains a central organizational theme of our Constitution. Less obviously, perhaps, but certainly of equal importance, federalism is a political and legal response to underlying social and political realities.[79]

It must not be forgotten that the protection of minorities was also one of the "underlying" constitutional principles pronounced by the Supreme Court in that reference, with specific reference to s. 35 of the *Constitution Act, 1982* and aboriginal peoples. While the idea that s. 91(24) was a right to manage very limited aboriginal interests may have been in the minds of the fathers of Confederation in 1867, or indeed, in those of the Privy Council in the 1880s and 90s, it does not mean that it must have that connotation today. In *Reference Re Same Sex Marriage* the court for the umpteenth time reaffirmed the "living tree" doctrine:

> A large and liberal, or progressive, interpretation ensures the continued relevance and, indeed, legitimacy of Canada's constituting document. By way of progressive interpretation our Constitution succeeds in its ambitious enterprise, that of structuring the exercise of power by the organs of the state in times vastly different from those in which it was crafted.[80]

The vain refrain that s. 91 does not confer property on the federal government from *Seybold*, is not the dominant tide in Canadian constitutional law. It stands against the driving force of overlapping pith and substance oriented jurisdiction and the established doctrine of Crown indivisibility. It renders s. 91(1A) utterly repugnant. It attempts a base classification of types of sections in the *Constitution Act, 1867* without giving a large and liberal interpretation to them.

Most importantly however, it is wrong in light of s. 35(1) of the *Constitution Act, 1982* to construe s. 109 so expansively that it ties the hands of the federal government in engaging in relationship building and reconciliation. In *Delgamuukw v. British Columbia*,[81] Lamer C.J. held that "[a]boriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political

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79 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 57.

80 [2004] 3 S.C.R. 698, 2004 SCC 79 at para. 23.

81 [1997] 3 S.C.R. 1010, [1997] S.C.J. No. 108 at para. 161.

community of which they are part." In *R. v. Sparrow* Dickson C.J. found that s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place".[82]

This paper has argued that a solid rationale for construing the s. 91(24) power to include the power to reserve public lands can be found in the existing, and long established pith and substance and indivisibility doctrines within the 1867 federalist framework, and substantially without resorting to aboriginal rights doctrines. However, that these doctrines are now constitutionalised and well developed is highly relevant for a reader who might find this proposal to be a substantial change.

In the recent *Reference Re Employment Insurance Act*[83] case, the Supreme Court of Canada noted:

> To derive the evolution of constitutional powers from the structure of Canada is delicate, as what that structure is will often depend on a given court's view of what federalism is. What are regarded as the characteristic features of federalism may vary from one judge to another, and will be based on political rather than legal notions. ... If an issue comes before a court, the court must refer to the framers' description of the power in order to identify its essential components, and must be guided by the way in which courts have interpreted the power in the past. In this area, the meaning of the words used may be adapted to modern-day realities, in a manner consistent with the separation of powers of the executive, legislative and judicial branches.[84]

And so, we are brought to where we started. Constitutional interpretation is not about what the law is so much as it is about what the law should be. The provincial power to dispose of and derive revenue from public lands vested in the Crown is not so extensive that the province can control the land selection process on public lands in light of established constitutional doctrines of Canadian Federalism. This is both a statement of what the law is, and what it should be according to a proper reconciling of Canada's underlying constitutional principles.

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[82] [1990] 1 S.C.R. 1075, (1990), [1990] S.C.J. No. 49 at para. 53.

[83] *Reference re Employment Insurance Act (Can.), ss. 22 and 23* (2005), 258 D.L.R. (4th) 243, 2005 SCC 56.

[84] *Ibid.* at para. 10.