the judge in fact did was to withdraw from the jury the issue whether the defendant had any lawful excuse for making to William Reed the threat alleged. Throughout the summing up one finds that the judge is directing the jury that lawful excuse does not come into the matter at all. Indeed, after the jury had been out for close on two hours, they sent a note to the judge: 'Please clarify lawful excuse and unlawful excuse.' In answer to this request, the final words of the judge to the jury were:

> 'Well, let us forget, shall we, the unlawful excuse, because that is no excuse at all. We will deal with the lawful excuse. I am not going to attempt a comprehensive definition because you will be considering purely this case, and my reply to your question is to be taken within the context of this case. First of all, if you are not satisfied that the threat, as alleged, has been proved, that is an end to the matter: the accused is entitled to be acquitted. If, on the other hand, the threat to kill has been proved and that it was intended that Mr Reed senior should take that threat seriously, in the actual words alleged, then the threat to kill is something which the law does not allow in those circumstances. There would therefore be no lawful excuse for it, because at the time that the threat was issued the life of the defendant was not in immediate jeopardy. Now, does that help you?'

For the foregoing reason, this appeal against conviction must be allowed and the conviction on count 1 is quashed.

This court can find no ground whatever for interfering with the concurrent sentences of four months on counts 3 and 4.

Appeal allowed.

Solicitors: *C S Hoad*, Kidlington (for the Crown).

April Weiss Barrister.

R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta and others

COURT OF APPEAL, CIVIL DIVISION
LORD DENNING MR, KERR AND MAY LJJ
14, 15, 18, 19, 20, 28 JANUARY 1982

Crown – Divisibility – Proceedings against the Crown – Proceedings against the Crown in right of Canada – Whether proceedings against the Crown in right of Canada can be brought against the Crown in right of the United Kingdom – British North America Act 1867 – Statute of Westminster 1931, s 7.

Commonwealth – Colony or dominion – Governmental obligation – Whether United Kingdom government owing obligations to Canadian Indians.

Canada – Constitutional law – Treaty rights granted to Canadian Indians – Whether treaty rights enforceable against United Kingdom government.

By a royal proclamation on 7 October 1763 George III declared that there would be reserved for the Indian peoples of Canada such territory described therein which was not ceded to or purchased by the Crown, the territory concerned being substantial parts of the North American territories ceded to England by France under the Treaty of Paris 1763, but excluding Quebec and territory granted to the Hudson's Bay Company. By a series of treaties made between 1693 and 1906, a number of Indian tribes ceded territory to the Crown in return for the reservation of land for their use and for hunting, trapping and fishing rights. By the British North America Act 1867 the United Kingdom Parliament created the Dominion of Canada by setting up a federal government and a Dominion parliament with its own legislative powers. By s 9 of that Act the executive government of, and authority over, Canada was 'to continue and be vested in the Queen' and by s 91(24) the Dominion parliament was to have exclusive power to legislate 'for Indians, and lands reserved for the Indians'. The 1867 Act continued to be the constitution of Canada, alterable only by the United Kingdom Parliament, and subject to amendments subsequently made by that Parliament. The Dominion of Canada acquired, largely by agreement and convention, increasing independence from the United Kingdom over and above that given to it by the 1867 Act, until, by virtue of the Statute of Westminster 1931, it attained complete independence subject to the provisions of s 7 of the 1931 statute, which entrenched the constitution of Canada in Westminster by providing that the United Kingdom Parliament had sole power to repeal, amend or alter, inter alia, the British North America Act 1867. In 1981 the government of Canada sought the 'repatriation' of the Canadian constitution in the terms proposed by Sch B to the Canada Bill, which was introduced into the United Kingdom Parliament. The Bill proposed, inter alia, the amendment of the British North America Act 1867 and the repeal of s 7(1) of the Statute of Westminster to provide for future constitutional changes to be within the sole authority of the legislature of Canada. Various Indian associations in Canada opposed the Canada Bill, fearing that the special rights granted to Indians under the royal proclamation of 1763 and the treaties made between 1693 and 1906 would be in danger of being reduced or extinguished if the Bill were passed. Following representations by the associations to the United Kingdom government, the Foreign and Commonwealth Office stated in a memorandum to the Foreign Affair Committee of the House of Commons on 11 November 1980 that 'All relevant treaty obligations insofar as they still subsisted became the responsibility of the Government of Canada with the attainment of independence, at the latest with the Statute of Westminster 1931'. The Indian Association of Alberta together with other Indian associations in New Brunswick and Nova Scotia applied to the Divisional Court of the Queen's Bench Division for declarations that the statement was wrong in law and that obligations entered into by the Crown under various treaty and statutory provisions were owed to the Indian peoples by Her Majesty in right of the United Kingdom government. The application was dismissed. The applicants appealed, contending, inter alia, (1) that under the royal proclamation of 1763 and the treaties, whether made before or after the 1867 Act, the Crown assumed obligations to the Indian peoples in return for formal concessions of territory by the Indian peoples and those obligations still subsisted against the Crown in right of the United Kingdom because they had never been transferred to the federal or provincial governments of Canada, and (2) that having in law retained, by virtue of ss 55 to 57 the 1867 Act and s 7 of the Statute of Westminster, ultimate power to deny royal assent to Canadian legislation the Crown, in right of the United Kingdom, had retained a degree of sovereignty over the Canadian constitution which carried with it some obligation in the Crown in right of the United Kingdom to the Indian peoples of Canada under the royal proclamation of 1763 and the treaties which would continue until Canada's total independence was achieved by the Canada Bill.

Held – Such obligations under the royal proclamation of 1763 and under the Indian treaties as had the force of law were owed by the Crown in right of Canada and not in right of the United Kingdom, and accordingly the matters raised by the applicants were justiciable in the courts of Canada and not those of the United Kingdom and the appeal would therefore be dismissed because—

(1) (Per Lord Denning MR) The Crown, although at one time single and indivisible throughout the British Empire, had by constitutional usage and practice become separate and divisible for each particular territory in which it was sovereign. Accordingly, those

obligations which were previously binding on the Crown simpliciter were now to be treated as divided and were to be applied and confined to the territory to which they related (see p 127 *j*, p 128 *c e f*, p 129 *a b j* and p 130 *a*, post); *R v Secretary of State for the Home Dept, ex p Bhurosah* [1967] 3 All ER 831 and *Mellenger v New Brunswick Development Corp* [1971] 2 All ER 593 followed.

(2) (Per Kerr LJ) It was settled law, that although the Queen was the personal sovereign of the peoples inhabiting different territories within the British Commonwealth, all rights and obligations of the Crown, other than those concerning the Queen in her personal capacity, could only arise in relation to a particular government within those territories, since the situs of obligations owed by the Crown was to be found only in that territory within the realm of the Crown where such obligations could be enforced against a local administration. Independence or the degree to which a territory was independent was wholly irrelevant to the issue of situs because the rights and obligations of the Crown arose exclusively in right or respect of any government outside the bounds of the United Kingdom as soon as it could be seen that there was an established government of the Crown in the overseas territory in question. A fortiori, on the grant of a representative legislature to a dominion, the government thereof was to be regarded as distinct from the United Kingdom government and rights and obligations of the Crown within that dominion could only be enforced against the Crown in right of the dominion. It followed that the effect of the 1867 Act and its successors was to transfer every aspect of legislative and executive power in relation to Canada's internal affairs to Canada and that the situs of rights and obligations of the Crown in relation to the Indian peoples of Canada was the Crown in right of Canada (see p 131 *a b e g*, p 132 *b f*, p 133 *e*, p 134 *a b f g* and p 135 *a b g* to *j*, post); *Re Holmes* (1861) John & H 527, dicta of Earl Loreburn LC in *A-G for Ontario v A-G for Canada* [1912] AC at 581, 584, of Viscount Haldane in *Bonanza Creek Gold Mining Co Ltd v R* [1916–17] All ER Rep at 1005, *A-G v Great Southern and Western Rly Co of Ireland* [1925] AC 754, *Federal Comr of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278 and *R v Secretary of State for the Home Dept, ex p Bhurosah* [1967] 3 All ER 831 applied.

(3) (Per May LJ) Any rights or obligations of the Crown in right of the United Kingdom devolved on the Crown in right of a particular territory as soon as that territory attained self-government to a greater or lesser degree. Accordingly, all treaty or other obligations entered into with the Indian peoples of Canada by the Crown in right of the United Kingdom had become the responsibility of the government of Canada with the attainment of independence, or at the latest with the Statute of Westminster. Although as a matter of construction of s 7 of the Statute of Westminster the Crown in right of the United Kingdom retained limited sovereignty over the Dominion of Canada, that did not mean that treaty or other obligations into which the Crown may have entered with the Indian peoples of Canada still enured against the Crown in right of the United Kingdom. To the extent that those obligations still continued, they were owed by the Crown in right of the Dominion of Canada or in right of a particular province of Canada (see p 136 *d* to *g*, p 137 *d* to *f*, p 140 *d e*, p 141 *c j* to p 142 *d* and p 143 *a* to *d*, post); *Re Holmes* (1861) 2 John & H 527, dicta of Lord Watson in *Liquidators of the Maritime Bank of Canada v Receiver-General of New Brunswick* [1892] AC at 441–442, of Earl Loreburn LC in *A-G for Ontario v A-G for Canada* [1912] AC at 581 and *A-G v Great Southern and Western Rly Co of Ireland* [1925] AC 754 applied.

Notes

For the unity and the divisibility of the Crown, see 6 Halsbury's Laws (4th edn) para 820.

For the Queen as Sovereign of her dominions, see ibid para 817.

For the constitution of Canada and the amendment thereof, see ibid paras 836, 926–930.

For the British North America Act 1867, ss 9, 55, 56, 57, 91, see 4 Halsbury's Statutes (3rd edn) 188, 196, 197, 203.

For the Statute of Westminister 1931, s 7, see ibid 22.

Cases referred to in judgments

A-G v Great Southern and Western Rly Co of Ireland [1925] AC 754, CA, 8(2) Digest (Reissue) 862, *1054*.
A-G for Ontario v A-G for Canada [1912] AC 571, PC, 8(2) Digest (Reissue) 685, *141*.
Bonanza Creek Gold Mining Co Ltd v R [1916] 1 AC 566, [1916–17] All ER Rep 999, PC, 8(2) Digest (Reissue) 713, *277*.
Calder v A-G of British Columbia (1973) DLR (3d) 145, 8(2) Digest (Reissue) 784, **1419*.
Campbell v Hall (1774) 1 Cowp 204, [1558–1774] All ER Rep 252, 8(2) Digest (Reissue) 655, *9*.
Faithorn v Territory of Papua (1938) 60 CLR 772.
Federal Comr of Taxation v Official Liquidator of E O Farley Ltd (1940) 63 CLR 278, 11 Digest (Reissue) 664, **10*.
Hodge v R (1883) 9 App Cas 117, PC, 8(2) Digest (Reissue) 684, *132*.
Holmes, Re (1861) 2 John & H 527, 70 ER 1167, 11 Digest (Reissue) 396, *372*.
Maritime Bank of Canada (liquidators) v Receiver-General of New Brunswick [1892] AC 437, PC, 8(2) Digest (Reissue) 659, *23*.
Mellenger v New Brunswick Development Corp [1971] 2 All ER 593, [1971] 1 WLR 604, CA, 8(2) Digest (Reissue) 665, *38*.
New Windsor Corp v Mellor [1975] 3 All ER 44, [1975] Ch 380, [1975] 3 WLR 25, CA, Digest (Cont Vol D) 101, *1106*.
R v Isaac (1975) 9 APR 175.
R v Polchies (2 December 1981, unreported).
R v Secretary of State for the Home Dept, ex p Bhurosah [1967] 3 All ER 831, [1968] 1 QB 266, [1967] 3 WLR 1259, CA, 2 Digest (Reissue) 197, *1147*.
St Catherine's Milling and Lumber Co v R (1889) 14 App Cas 46, PC, 8(2) Digest (Reissue) 780, *477*.
Theodore v Duncan [1919] AC 696, PC.
Williams v Howarth [1905] AC 551, PC, 8(2) Digest (Reissue) 684, *131*.

Cases also cited

A-G for Australia v Colonial Sugar Refining Co Ltd [1914] AC 237, PC.
A-G for Canada v A-G for Ontario, A-G for Quebec v A-G for Ontario [1897] AC 199, PC.
A-G for Canada v A-G for Ontario, Re Employment and Social Insurance Act [1937] AC 355, PC.
A-G for Quebec v A-G for Canada [1921] 1 AC 401, PC.
Adams v Adams (A-G intervening) [1970] 3 All ER 572, [1971] P 188.
Baker Lake (Hamlet) v A-G for Canada (1979) 107 DLR (3d) 513.
Buck v A-G [1965] 1 All ER 882, [1965] Ch 745, CA.
Buttes Gas and Oil Co v Hammer (Nos 2 & 3), Occidental Petroleum Corp v Buttes Gas and Oil Co (Nos 1 & 2) [1981] 3 All ER 616, [1981] 3 WLR 797, HL.
Canada (Dominion) v Province of Ontario [1910] AC 637, PC.
Madzimbamuto v Lardner-Burke [1968] 3 All ER 561, [1969] 1 AC 645, PC.
Mutasa v A-G [1979] 3 All ER 257, [1980] QB 114.
Ontario Mining Co Ltd v Seybold [1903] AC 73, PC.
R v George [1966] SCR 267.
R v Sikyea (1964) 42 DLR (2d) 135.

Appeal

The applicants, the Indian Association of Alberta, the Union of New Brunswick Indians and the Union of Nova Scotia Indians, appealed with the leave of the Court of Appeal granted on 21 December 1981 against the decision of Woolf J, hearing the Crown Office List, on 9 December 1981 whereby he refused the applicants leave to apply for judicial review by way of declarations (i) that the decision of the respondent, the Secretary of State for Foreign and Commonwealth Affairs, that all relevant treaty obligations entered into by the Crown with the Indian peoples of Canada in so far as they still subsisted became

the responsibility of the government of Canada with the attainment of independence, at the latest with the Statute of Westminster 1931, was wrong in law and (ii) that treaty and other obligations entered into by the Crown to the Indian peoples of Canada were still owed by Her Majesty in right of her government in the United Kingdom. The government of Canada appeared as intervener. The facts are set out in the judgment of Lord Denning MR.

Louis Blom-Cooper QC and *Richard Drabble* for the applicants.
Robert Alexander QC and *Simon D Brown* for the Secretary of State.
Andrew Morritt QC and *Peter Irvin* for the Canadian government.

Cur adv vult

28 January. The following judgments were read.

LORD DENNING MR.

1. *The Indian peoples come here*

Over 200 years ago, in the year 1763, the King of England made a royal proclamation under the Great Seal. In it he gave solemn assurances to the Indian peoples of Canada. These assurances have been honoured for the most part ever since. But now the Indian peoples feel that the assurances are in danger of being dishonoured. They are anxious about the Canada Bill which is now before the Parliament of the United Kingdom. Under it there is to be a new constitution for Canada. The Indian peoples distrust the promoters of the Bill. They feel that, if it is passed, their own special rights and freedoms will be in peril of being reduced or extinguished. They have not gone to the courts of Canada for redress. They have come to this court. They say that the assurances which were given 200 years ago, and repeated in treaties 100 years later, were binding on the Crown of the United Kingdom. So they come to the courts of this country to plead their case. They come in particular from Alberta, Nova Scotia and New Brunswick. But the other Indian peoples from the other provinces are watching closely too. They want to see what happens. Seeing that their claim is against the Crown in respect of the United Kingdom, they are entitled, I think, to come here to put their case. They ask this court to make a declaration 'that treaty or other obligations entered into by the Crown to the Indian peoples of Canada are still owed by Her Majesty in right of Her Government in the United Kingdom'.

This is disputed by the Department of State in the United Kingdom. When the matter was under consideration by the Foreign Affairs Committee of the House of Commons, the question was put to the Foreign and Commonwealth Office (Foreign Affairs Committee minutes of evidence (HC Papers (1979–80) no 362–xxi) p 63): 'Has the UK any treaty or other responsibilities to Indians in Canada?' The answer given by that office on 11 November 1980 was: 'No. All relevant treaty obligations insofar as they still subsisted became the responsibility of the Government of Canada with the attainment of independence, at the latest with the Statute of Westminster 1931.'

The Indian peoples dispute that answer. In order to challenge it, they have brought these proceedings for judicial review. They seek declarations (i) that the answer is wrong in law, (ii) 'that treaties or other obligations entered into by the Crown to the Indian peoples of Canada are still owed by Her Majesty in right of Her Government in the United Kingdom'.

In order to decide the case we have had to look into the constitutional law affecting the colonies of the United Kingdom, just as Lord Mansfield CJ did years ago. He had to consider this very royal proclamation of 1763. He did it in 1774 in the great case of *Campbell v Hall* (1774) 1 Cowp 204, [1558–1774] All ER Rep 252, which has been ever since a landmark in the law. So I will try to trace the history of the rights and freedoms of the aboriginal peoples of Canada.

2. *Aboriginal rights and freedoms*

The Indian peoples of Canada have been there from the beginning of time. So they are called the 'aboriginal peoples'. In the distant past there were many different tribes scattered across the vast territories of Canada. Each tribe had its own tract of land, mountain, river or lake. They got their food by hunting and fishing and their clothing by trapping for fur. So far as we know they did not till the land. They had their chiefs and headmen to regulate their simple society and to enforce their customs. I say 'to enforce their customs', because in early societies custom is the basis of law. Once a custom is established it gives rise to rights and obligations which the chiefs and headmen will enforce. These customary laws are not written down. They are handed down by tradition from one generation to another. Yet beyond doubt they are well established and have the force of law within the community.

In England we still have laws which are derived from customs from time immemorial. Such as rights of villagers to play on the green; or to graze their cattle on the common: see *New Windsor Corp v Mellor* [1975] 3 All ER 44, [1975] 1 Ch 380. These rights belong to members of the community and take priority over the ownership of the soil.

3. *The coming of the English*

To return to primitive societies, their solitude was disturbed by the coming of the English from across the seas. They came as explorers, like Captain Cook in 1774, or Captain Vancouver in 1792; or as traders, like the East India Company, or the Hudson's Bay Company; or as colonists, like those who sailed across the ocean to found Virginia and Massachusetts. Wherever the English came, they came as representatives of the Crown of England. They carried with them the rights of Englishmen. They were loyal to the Crown and acted with the direct authority of the Crown under royal charter. Thus in 1600 there was the charter of the East India Company. In 1606 the first charter of Virginia drawn by Sir Edward Coke. In 1629 the charter of Massachusetts Bay. In 1670 the charter of the Hudson's Bay Company. In 1681 Pennsylvania. And so on.

Our long experience of these matters taught us how to treat the indigenous peoples. As matter of public policy, it was of the first importance to pay great respect to their laws and customs, and never to interfere with them except when necessary in the interests of peace and good order. It was the responsibility of the Crown of England, and those representing the Crown, to see that the rights of the indigenous people were secured to them, and that they were not imposed on by the selfish or the thoughtless or the ruthless. Witness the impeachment of Warren Hastings in Westminster Hall for his conduct of affairs as Governor General of Bengal.

4. *The unity of the Crown*

In all these matters in the eighteenth and nineteenth centuries it was a settled doctrine of constitutional law that the Crown was one and indivisible. The colonies formed one realm with the United Kingdom, the whole being under the sovereignty of the Crown. The Crown had full powers to establish such executive, legislative and judicial arrangements as it thought fit. In exercising these powers, it was the obligation of the Crown (through its representatives on the spot) to take steps to ensure that the original inhabitants of the country were accorded their rights and privileges according to the customs coming down the centuries, except in so far as these conflicted with the peace and good order of the country or the proper settlement of it. This obligation is evidenced most strikingly in the case of Canada by the royal proclamation of 1763.

5. *The royal proclamation of 1763*

You will all recall the events which preceded this proclamation. In the year 1759 James Wolffe with his redcoats crept stealthily and silently by night up the St Lawrence River and scaled the Heights of Abraham. It was the turning-point in the Seven Years War between England and France. It was followed in 1763 by the Treaty of Paris, under

which the French surrendered all the rights which they had previously held or acquired in Canada. England gained dominion over Quebec. Later in that very same year, on 7 October 1763, the Crown made this solemn proclamation:

> 'And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.—We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure . . .'

Then followed detailed assurances by which the Crown bound itself to reserve 'under our Sovereignty, Protection and Dominion, for the use of the said Indians, all the lands and territories' thereafter described.

The royal proclamation superseded earlier agreements for other territories. Thus in 1752 in Nova Scotia a treaty had been made with the Indians by which it was agreed:

> 'That all Transactions during the late War shall on both sides be buried in Oblivion with the Hatchet, And that the said Indians shall have all favour, Friendship & Protection shewn them from this His Majesty's Government.'

I cannot forbear from mentioning also that in 1794 in New Brunswick there was this delightful little treaty with the Micmacs:

> 'And the English King said to the Indian King "Henceforth you will teach your children to maintain peace and I give you this paper upon which are written many promises which will never be effaced." Then the Indian King, John Julian with his brother Francis Julian begged His Majesty to grant them a portion of land for their own use and for the future generations. His Majesty granted their request. A distance of six miles was granted from Little South West on both sides and six miles at North West on both sides of the rivers. Then His Majesty promised King John Julian and his brother Francis Julian "Henceforth I will provide for you and for the future generation so long as the sun rises and river flows."'

The effect of the royal proclamation

The royal proclamation of 1763 had great impact throughout Canada. It was regarded as of high constitutional importance. It was ranked by the Indian peoples as their Bill of Rights, equivalent to our own Bill of Rights in England 80 years before. It came under the close consideration of Lord Mansfield CJ himself in the great case of *Campbell v Hall* (1774) 1 Cowp 204, [1558–1774] All ER Rep 252. That case came from the island of Grenada in the West Indies which we conquered from the French during the war. It was one of the places to which the 1763 proclamation expressly applied. Lord Mansfield CJ emphasised that by it the King made an immediate and irrevocable grant to all who were or should become habitants. Lord Mansfield CJ took the opportunity to lay down five fundamental propositions, of which I would quote two 1 Cowp 204 at 208, 209, [1558–1774] All ER Rep 252 at 254:

> 'A country conquered by the British arms becomes a dominion of *the King in the right of his Crown*; and, therefore, necessarily subject to the Legislature, the Parliament of *Great Britain* . . . that the laws of a conquered country continue in force, until they are altered by the conqueror . . .'

To my mind the royal proclamation of 1763 was equivalent to an entrenched provision in the constitution of the colonies in North America. It was binding on the Crown 'so long as the sun rises and the river flows'. I find myself in agreement with what was said a few years ago in the Supreme Court of Canada in *Calder v A-G of British Columbia* (1973) 34 DLR (3d) 145 at 203, in a judgment in which Laskin J concurred with Hall J and said:

> 'This Proclamation was an Executive Order having the force and effect of an Act of Parliament and was described by Gwynne, J., . . . as the "Indian Bill of Rights" . . . Its force as a statute is analogous to the status of Magna Carta which has always been considered to be the law throughout the Empire. It was a law which followed the flag as England assumed jurisdiction over newly-discovered or acquired lands or territories . . . In respect of this Proclamation, it can be said that when other exploring nations were showing a ruthless disregard of native rights England adopted a remarkably enlightened attitude towards the Indians of North America. The Proclamation must be regarded as a fundamental document upon which any just determination of original rights rests.'

The 1763 proclamation governed the position of the Indian peoples for the next hundred years at least. It still governs their position throughout Canada, except in those cases when it has been supplemented or superseded by a treaty with the Indians. It still is the basis of the rights of the aboriginals in those provinces of Nova Scotia and New Brunswick. That is shown by the decision of the Supreme Court of Nova Scotia in *R v Isaac* (1975) 9 APR 175, and of the Provincial Court of New Brunswick in *R v Polchies* (2 December 1981, unreported).

But I must say that the proclamation is most difficult to apply so as to enable anyone to say what lands are reserved to the Indians and what are not. It contains general statements which are wanting in particularity. In this respect it is like other Bills of Rights. The details have to be worked out by the courts or in some other way. To this I will return.

6. The British North America Act 1867

This brings me to the British North America Act 1867. It proclaimed the union of the provinces of Ontario, Quebec, Nova Scotia and New Brunswick into one dominion under the name of Canada. It contained powers to admit other colonies later into the union. It was the result of consultation over many years before. It set up a federal government. It contained a written constitution which was to last for over 100 years and more. It declared in s 9 that the executive government and authority of and over Canada was 'to continue and be vested in the Queen'. That is, in the Crown of England. The Governor General was her representative. It set up a Dominion parliament with its own legislative powers. It refashioned the provincial governments with their own Lieutenant Governors and their own parliaments. It set out detailed provisions, in ss 91 and 92, distributing legislative powers between the Dominion parliament and the provincial legislatures. It delegated, by ss 12 and 65, executive authority in similar respects to the Governor General and Lieutenant Governors respectively. It provided for a judicature and it contained detailed provisions about revenue, debts, assets and taxation.

The effect on the Indians

How did this Act affect the Indians? Section 91(24) gave the Dominion parliament the exclusive power to legislate for 'Indians, and lands reserved for the Indians'. The 1867 Act contained nothing specific about the executive power, but I think it mirrored the legislative division so that the executive power in regard to the 'Indians, and lands reserved for the Indians' was vested in the Governor General of the Dominion, acting through his representative; and he in turn represented the Queen of England, that is the Crown, which, as I have said, was in our constitutional law at that time regarded as one and indivisible.

Save for that reference in s 91(24), the 1867 Act was silent on Indian affairs. Nothing was said about the title to property in the 'lands reserved for the Indians', nor to the revenues therefrom, nor to the rights and obligations of the Crown or the Indians thenceforward in regard thereto. But I have no doubt that all concerned regarded the royal proclamation of 1763 as still of binding force. It was an unwritten provision which went without saying. It was binding on the legislatures of the Dominion and the provinces just as if there had been included in the statute a sentence: 'The aboriginal peoples of Canada shall continue to have all their rights and freedoms as recognised by the royal proclamation of 1763.'

No power to alter the 1867 Act

There is this other important point. The 1867 Act could not be altered either by the Dominion parliament or by the provincial legislatures. There was no provision in the statute for any means of altering it. This was, no doubt, at the wish of the provinces. They did not want the Dominion parliament to alter it to their prejudice. If it was to be altered at all, it could only be done by the Parliament of the United Kingdom. This shows to my mind, quite conclusively, that the Crown of the United Kingdom was regarded at that time as still the Crown of the Dominion and of the provinces of Canada. It was all one Crown, single and indivisible. As Lord Haldane said in *Theodore v Duncan* [1919] AC 696 at 706: 'The Crown is one and indivisible throughout the Empire, and it acts in self-governing States on the initiative and advice of its own Ministers in those States.'

7. *The making of the treaties*

After the 1867 Act was passed, there were a series of important treaties made with the Indian peoples across the greater part of Canada affecting all the provinces. They follow the same pattern but suffice it to state as an example a treaty made in 1873 between 'The Queen of Great Britain and Ireland, by Her Commissioners' and 'The Saulteaux Tribe of the Ojibbeway Indians by their Chiefs'.

After describing a tract of land, the treaty goes on to provide that the tribe and all other Indians—

> 'do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges whatsoever, to the lands ... To have and to hold the same to Her Majesty the Queen, and Her successors forever.'

In return Her Majesty the Queen entered into several obligations to the Indians, of which I select some as illustrations:

> '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, in such a manner as shall seem best, other reserves of land in the said territory hereby ceded ... And further, Her Majesty agrees to maintain schools for instruction in such reserves hereby made as to Her Government of Her Dominion of Canada may seem advisable whenever the Indians of the reserve shall desire it ... Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.'

Then follow the signatures from which you can get the charming scene:

> 'IN WITNESS WHEREOF, Her Majesty's said Commissioners and the said Indian Chiefs have hereunto subscribed and set their hands at the North-West Angle of the Lake of the Woods this day and year herein first above named.'

The effect of the treaties

That treaty gave rise to a most important case. It is *St Catherine's Milling and Lumber Co v R* (1889) 14 App Cas 46. The Dominion asserted that it had the right to the produce of the Indian lands. It granted a licence to a milling company to cut and carry away one million feet of timber. The Province of Ontario disputed it. The Privy Council decided in favour of the province. It was the province, and not the Dominion government, which was entitled to the revenues from the sale of timber. The Privy Council considered the rights of the various persons in the Indian lands. The judgment was given by Lord Watson, who, being bred in Scots law, expressed himself in the concepts of Roman law. He said that the Indian tribes had a 'personal and usufructuary right' in the lands reserved to the Indians, by which he meant that they had a right to use and take the fruits and products of these lands and to hunt and fish thereon. Underneath the Indian title, there had been—

> 'all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.'

(See 14 App Cas 46 at 55.)

By the treaty the Indians ceded and surrendered much of their lands to the Crown and in return the Crown undertook the obligations to the Indians specified in the treaty.

So the Crown by the treaty obtained a 'plenum dominium' in the lands. That 'plenum dominium' was distributed between the Dominion and the province. By reason of s 109 of the 1867 Act the revenues from timber, mines and so forth belonged to the Province of Ontario. But the administration of the lands was left to the Dominion. The obligations under the treaty remained the obligations of the Crown.

That judgment was given at a time when, in constitutional law, the Crown was single and indivisible. In view of it, and later cases, I think that the Indian title (by which I mean 'the personal and usufructuary right' of the Indians in respect of 'lands reserved to the Indians') was a title superior to all others save in so far as the Indians themselves surrendered or ceded it to the Crown. That title was guaranteed to them by the Crown. Then by treaties which covered much of Canada the Indians did cede and surrender their right in some lands to the Crown and in return the Crown undertook to fulfil the obligations set out in the treaties. Those treaty obligations were obligations of the Crown, the single and indivisible Crown, which was at that time the Crown of the United Kingdom.

Apart from the ceded lands, ceded under the treaties, there were Indian reserves, not ceded to the Crown, in which the Indian peoples still retained their 'personal and usufructuary right' to the fruits and produce of the lands and to hunt and fish thereon.

8. *The British North America Act 1930*

Similar treaties were made in 1876, 1877 and 1899 with the Indian tribes who were living in what is now Alberta, with which we are here particularly concerned. The Province of Alberta was formed in 1905 and joined the union. In 1929 an agreement was made between the Dominion government and the provincial government of Alberta. Similar agreements were made with the provinces of Manitoba, British Columbia and Saskatchewan. The agreements were in every case 'subject to approval by the Parliament of Canada and by the Legislature of the Province and also to confirmation by the Parliament of the United Kingdom'.

In 1930, by the British North America Act 1930, the United Kingdom Parliament gave the force of law to those agreements. It recognised that Canada was bound 'to fulfil its obligations under the treaties with the Indians of the Province' and that—

> 'the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.'

This 1930 Act seems to me to recognise that the Crown had subsisting obligations to the Indians under the treaties. That is why it was necessary to have the agreements confirmed by the Parliament of the United Kingdom with the assent of the Queen.

The division of the Crown

Hitherto I have said that in constitutional law the Crown was single and indivisible. But that law was changed in the first half of this century, not by statute, but by

constitutional usage and practice. The Crown became separate and divisible, according to the particular territory in which it was sovereign. This was recognised by the Imperial Conference of 1926 (Cmd 2768). It framed the historic definition of the status of Great Britain and the dominions as—

> 'autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.'

It was also agreed that—

> 'the Governor-General in a Dominion is the representative of the Crown holding in all essential respects the same position in relation to the administration of public affairs in a Dominion as is held by His Majesty the King in Great Britain and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government.'

(See Cmd 2768, pp 14, 16.)

Thenceforward the Crown was no longer single and indivisible. It was separate and divisible for each self-governing dominion or province or territory. Thus in 1968 it was held in this court that the Queen was the Queen of Mauritius, and the Crown in right of Mauritius could issue passports to its citizens: see *R v Secretary of State for the Home Dept, ex p Bhurosah* [1967] 3 All ER 831, [1968] 1 QB 266: and in 1971 it was held, again in this court, that the Queen was the Queen of the Province of New Brunswick, and that province was entitled to state immunity: see *Mellenger v New Brunswick Development Corp* [1971] 2 All ER 593, [1971] 1 WLR 604.

As a result of this important constitutional change, I am of opinion that those obligations which were previously binding on the Crown simpliciter are now to be treated as divided. They are to be applied to the dominion or province or territory to which they relate: and confined to it. Thus the obligations to which the Crown bound itself in the royal proclamation of 1763 are now to be confined to the territories to which they related and binding only on the Crown in respect of those territories; and the treaties by which the Crown bound itself in 1875 are to be confined to those territories and binding on the Crown only in respect of those territories. None of them is any longer binding on the Crown in respect of the United Kingdom.

9. *The Statute of Westminster 1931*

The Statute of Westminster 1931 gave considerable independence to the dominions. By s 4 it was enacted that no Act of Parliament of the United Kingdom was to extend to a dominion as part of the law of the dominion unless 'it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof'.

But, at the same time, there was an express limitation in s 7(1): 'Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930 . . .'

That provision shows that the Parliament of the United Kingdom has still the power to repeal, amend or alter the British North America Acts 1867 to 1930 and that the Dominion parliament has no such power. No doubt the Parliament of the United Kingdom would not exercise this power except at the request of the Dominion itself and the consent of the majority of the provinces. But still in point of law the power still rests in the Parliament of the United Kingdom to repeal, amend or alter the British North America Acts 1867 to 1930. To my mind this shows that, in strict constitutional law, the Dominion of Canada is not completely independent. It is still tied hand and foot by the British North America Acts 1867 to 1930. The Dominion itself cannot alter one jot or tittle of those Acts.

But the Crown, as I have said already, was separate and divisible.

10. *The Crown Proceedings Act 1947*

In order that proceedings should be brought against the Crown in this country, it is necessary that the liability of the Crown should be a liability 'in respect of Her Majesty's Government in the United Kingdom': see s 40(2)(*c*) of the Crown Proceedings Act 1947.

Now, at the time when the Crown entered into the obligations under the 1763 proclamation or the treaties of the 1870s, the Crown was in constitutional law one and indivisible. Its obligations were obligations in respect of the government of the United Kingdom as well as in respect of Canada: see *Williams v Howarth* [1905] AC 551. But, now that the Crown is separate and divisible, I think that the obligations under the proclamation and the treaties are obligations of the Crown in respect of Canada. They are not obligations of the Crown in respect of the United Kingdom. It is, therefore, not permissible for the Indian peoples to bring an action in this country to enforce these obligations. Their only recourse is in the courts of Canada.

11. *The Canada Bill 1982*

This brings me to the Canada Bill. It is designed to give complete independence to Canada. It is to be done by 'patriating' the constitution, to use a coined word. It is to be done by the Constitution Act 1982. No longer will the United Kingdom Parliament have any power to pass any law extending to Canada. No longer will it have power to repeal, amend or alter the British North America Acts 1867 to 1930. But the Dominion parliament will have power to do so. This is to be done by setting out a new constitution for Canada to be enacted by the United Kingdom Parliament. This new constitution contains a charter of rights and freedoms. It specifically guarantees to the aboriginal peoples the rights and freedoms which I have discussed earlier. These are the relevant sections:

> '**25.** The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada, including (*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (*b*) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.'

> '**35.**—(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.'

It also provides for a constitutional conference to be called within one year. That conference is to consider—

> 'an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples . . .'

(See s 37(2).)

Conclusion

It seems to me that the Canada Bill itself does all that can be done to protect the rights and freedoms of the aboriginal peoples of Canada. It entrenches them as part of the constitution, so that they cannot be diminished or reduced except by the prescribed procedure and by the prescribed majorities. In addition, it provides for a conference at the highest level to be held so as to settle exactly what their rights are. That is most important, for they are very ill-defined at the moment.

There is nothing, so far as I can see, to warrant any distrust by the Indians of the government of Canada. But, in case there should be, the discussion in this case will strengthen their hand so as to enable them to withstand any onslaught. They will be able to say that their rights and freedoms have been guaranteed to them by the Crown, originally by the Crown in respect of the United Kingdom, now by the Crown in respect of Canada, but, in any case, by the Crown. No parliament should do anything to lessen the worth of these guarantees. They should be honoured by the Crown in respect of

Canada 'so long as the sun rises and river flows'. That promise must never be broken.

There is no case whatever for any declaration. I would dismiss the appeal accordingly.

KERR LJ. In connection with the 'repatriation' of the Canadian constitution, a number of statements have been made on behalf of Her Majesty's government in Parliament to the effect that all treaty obligations entered into by the Crown with the Indian peoples of Canada became the responsibility of the government of Canada with the attainment of independence, at latest with the Statute of Westminster 1931. The repatriation of the Canadian constitution is now proposed by means of the Canada Bill which is awaiting its second reading in the House of Commons. By ss 25 and 35 of the annexed Constitution Act 1982 the rights of the aboriginal peoples of Canada, including in particular of the Indian peoples, are expressly preserved. However, various Canadian Indian organisations, and perhaps all of them, are dissatisfied with the present situation. They contend that the government's conclusion as to the legal position is wrong. The applicants accordingly seek a declaration by way of judicial review to the effect that this conclusion is wrong in law and that all 'treaty and other obligations entered into by the Crown to the Indian peoples of Canada are still owed by Her Majesty in right of Her Government in the United Kingdom'.

We are here only directly concerned with the Indian organisations in the provinces of Alberta, New Brunswick and Nova Scotia. But on the voluminous material placed before us it is clear that the same considerations apply throughout Canada. Thus, the applicants rely on the royal proclamation of 1763 which purported to extend to the Indian peoples beyond those parts of eastern Canada, the Maritime Provinces and parts of Quebec, which had by then been opened up for settlement. They also rely on the pattern of the so-called 'treaties' concluded between the Crown and many Indian 'bands', which ultimately covered most of the territory of Canada, and to which most or all of the remaining Indians subsequently adhered. They contend that under all of these, whether made before or after the British North America Act 1867 which set up the Dominion of Canada, as well as under the royal proclamation, the Crown assumed obligations to the Indians in return for formal concessions of territory by the Indians, and that these obligations still subsist and have never been transferred to Canada.

As to the subsistence of these rights, we have been referred to many legislative enactments and decisions of the courts in Canada in which the continuing binding effect of the proclamation and treaties has been recognised. Their binding effect has also been accepted before us by counsel on behalf of the Secretary of State and of the government of Canada as interveners in the proceedings, as well as in the Canada Bill mentioned above. However, the Indian peoples wish to achieve certain political objectives, viz a greater degree of recognition, and the right of consultation on those aspects of the constitution of Canada resulting from its 'repatriation' which may affect them. This is the object of these proceedings and of the declarations which they seek.

However great may be one's sympathy with the grievances and aspirations of the Indian peoples of Canada, this court can only concern itself with the decision of justiciable issues on the basis of law. The issue raised in the declarations which are sought, quite apart from any question whether this should be dealt with by any formal declaration, is in my view only justiciable as a matter of concession by the court, faced with the wish of the applicants to have it decided and of the respondents' non-objection to its decision. The reason is that the applicants are not asserting any breach of any of the obligations on the part of the Crown, and are a fortiori not asking for any relief or remedy in respect of such obligations. Indeed, it has been virtually conceded by counsel on behalf of the applicants, rightly in my view, that no such relief or remedy could be obtained in our courts; and for the reasons explained hereafter this factor is in itself a crucial pointer to the decision. In effect, however, the parties are agreed that this court should determine the abstract and bare issue as to the situs of obligations which are ultimately owed by the Crown, whether in right or respect of the United Kingdom on the one hand or of the Dominion or provinces of Canada on the other. Since we have heard full argument on this issue over several days, whereas the position in this respect was different before

Woolf J who dismissed the application for other reasons, I think that we should express our views on this issue.

It is settled law that, although Her Majesty is the personal Sovereign of the peoples inhabiting many of the territories within the Commonwealth, all rights and obligations of the Crown, other than those concerning the Queen in her personal capacity, can only arise in relation to a particular government within those territories. The reason is that such rights and obligations can only be exercised and enforced, if at all, through some governmental emanation or representation of the Crown. Thus, the Crown Proceedings Act 1947 distinguishes between liabilities in respect of, and proceedings in right of, Her Majesty in the United Kingdom on the one hand and outside the United Kingdom on the other. In relation to the latter class, it is open to the Secretary of State under s 40(3) to issue a certificate which is conclusive for the purposes of that Act. This has not been done in the present case, though without prejudice to the Secretary of State's contention that the legal position of the Indian peoples of Canada has no connection with the Crown in right of the United Kingdom. It is accordingly necessary to examine the constitutional principles which determine the situs of the Crown's rights and obligations in this regard, but bearing in mind that, although the relevant agreements with the Indian peoples are known as 'treaties', they are not treaties in the sense of public international law. They were not treaties between sovereign states, so that no question of state succession arises.

The principles which govern the situs of rights and obligations of the Crown are conveniently summarised in 6 Halsbury's Laws (4th edn) para 820, under the heading 'Unity and Divisibility of the Crown'. For present purposes it is sufficient to refer to two passages and to a number of authorities cited in support of these.

First, as there stated, it is clear that—

> 'on the grant of a representative legislature, and perhaps even as from the setting up of courts, legislative council and other such structures of government, Her Majesty's government in a colony is to be regarded as distinct from Her Majesty's government in the United Kingdom.'

Thus, in *R v Secretary of State for the Home Dept, ex p Bhurosah* [1967] 3 All ER 831, [1968] 1 QB 266 an issue arose as to passports issued in Mauritius, which was then a dependent British colony, on behalf of the Governor. The passports were issued 'in the name of Her Majesty' to persons who were British subjects and citizens of the United Kingdom and Colonies under s 1 of the British Nationality Act 1948. The issue was whether they were 'United Kingdom passports' within the Commonwealth Immigrants Act 1962. It was held that they were not, because, in effect, they had been issued in the name of Her Majesty in right of the government of Mauritius and not of the United Kingdom.

This being the position in relation to a dependent colony, the government of a dominion is clearly in an a fortiori position, and neither of these forms of established government within the Commonwealth presents any constitutional problem for present purposes. In times long past there was such a problem, when many of the territories which are now within the Commonwealth had not yet been opened up for settlement, or even fully discovered, and there was no established government on behalf of the Crown. Thus, the royal charter of 1670, granting Rupert's Land to the Hudson's Bay Company, described the territory as 'one of our Plantacions or Colonyes in America' and conveyed it 'as of our Mannor of East Greenwich in our County of Kent in free and common Soccage'. This was clearly a Crown grant in right of the government here. Subsequently, as the overseas territories gradually came to be settled and colonised, there may have been an indeterminate and intermediate stage of constitutional development in many cases, when it was uncertain whether rights and obligations concerning the overseas territory arose in right or respect of the Crown here or of the emerging forms of local administration overseas. This may still have been the position at the time of the eighteenth century 'Maritime Treaties' and of the royal proclamation of 1763, although all these contain references to the then emerging colonial governments of what later became the eastern provinces of Canada and the eastern states of America. However, for the reasons explained hereafter, it is unnecessary to determine what was the resulting

This Act was subsequently extended by amendment and by other Acts until 1930 to the whole of the present territory of the Dominion and provinces of Canada.

The effect of the 1867 Act and its successors, up to the Statute of Westminster 1931, was accordingly to create an all-embracing federal governmental structure for Canada, which, subject to one point discussed hereafter, was wholly independent and autonomous in relation to all internal affairs. For present purposes only a few of its provisions require to be mentioned specifically. First, ss 91 and 92 conferred exclusive legislative powers on the Dominion and the provinces respectively in relation to the matters therein mentioned. By s 91(24), the Dominion government was invested with exclusive powers in relation to 'Indians, and lands reserved for the Indians'. Second, however, by s 109 all lands, mines, minerals and royalties belonging to the provinces were expressly declared to continue to belong to them.

Since the passing of this Act there have been numerous cases, many of which reached the Privy Council, concerning the respective rights and obligations as between the Dominion and the provinces. In the present context the most important ones arose out of the dichotomy between ss 91(24) and 109: whereas the Dominion government was vested with exclusive legislative power concerning the Indian peoples and the lands reserved for them, the lands themselves, and the usufructuary rights arising out of them, were vested in the provinces. The problem was that large parts of those lands were subsequently ceded by the Indians under the treaties nos 1 to 11 and accordingly accrued to the provinces. This dichotomy gave rise to a number of disputes, of which *St Catherine's Milling and Lumber Co v R* (1888) 14 App Cas 46 is the leading authority. The issue concerned the right to timber growing on land covered by the royal proclamation of 1763 and ceded on behalf of the Salteaux Tribe of Ojibbeway Indians under treaty no 3 of 1873, subject to certain privileges of hunting and fishing. It was held by the Privy Council that the Indian usufructuary rights were preserved and did not fall within s 109, but that this section, and the cession under the treaty, vested the whole of the beneficial interest in the land (including its timber etc) in the Province to the exclusion of the Dominion, notwithstanding the legislative power of the Dominion under s 91(24).

This decision was followed in many subsequent cases to which we were referred. It is unnecessary to discuss these further, other than to mention that I cannot accept that it follows from one sentence in the judgment of Lord Watson in the *St Catherine's* case 14 App Cas 46 at 60 that any right or obligation in relation to the Indian peoples remained vested in the Crown in respect of what was then Great Britain. On the contrary, subsequent decisions of the Privy Council have authoritatively established that the effect of the 1867 Act and of its successors was to transfer to Canada, as between the governments of the Dominion and of the provinces, every aspect of legislative and executive power in relation to Canada's internal affairs. Thus in *A-G for Ontario v A-G for Canada* [1912] AC 571 at 581, 584, Earl Loreburn LC said:

> 'It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada . . . For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act.'

(I return to the reference to the limits under the Act hereafter.)

Similarly, in *Bonanza Creek Gold Mining Co Ltd v R* [1916] 1 AC 566 at 579, [1916–17] All ER Rep 999 at 1005 Viscount Haldane stated:

> 'It is to be observed that the British North America Act has made a distribution between the Dominion and the provinces which extends not only to legislative but to executive authority.'

We are here not concerned with the many difficult and complex problems concerning the distribution of power and responsibility as between the Dominion and the provinces, which have given rise to so much litigation. We are only concerned with the question

whether any of these still remain vested in the Crown in right or respect of the United Kingdom. On the basis of the principles discussed earlier in this judgment, and of the British North America Act 1867 and its successors, there can in my view be no doubt that the answer to this is in the negative. So far as rights and obligations in relation to the Indian peoples of Canada are concerned, the entire devolution of these from the Crown in right of what is now the United Kingdom to the Crown in right of the Dominion or provinces of Canada, is further confirmed by numerous Canadian enactments, both federal and provincial, culminating in the consolidated Indian Act 1970. This derives its ultimate constitutional authority under the Crown from s 91(24) of the 1867 Act, as mentioned above, and deals comprehensively with all matters concerning the Indian peoples. The devolution to Canada of all legislative and executive powers in this regard is therefore complete.

It then only remains to deal with one further argument put forward by counsel on behalf of the applicants. This is that, by virtue of ss 55 to 57 of the British North America Act 1867, the Crown, in right of what is now the United Kingdom, retained the ultimate power over all legislation enacted by the Dominion of Canada. On this basis it is said that the Crown in right of the United Kingdom also indirectly maintained ultimate power over the enactments of the provincial legislatures, but it is unnecessary further to consider the constitutional complexities in relation to this latter aspect apart from mentioning that the independence of the provinces under the Crown, in the same way as that of the Dominion, was recognised by the Privy Council in *Liquidators of Maritime Bank of Canada v Receiver-General of New Brunswick* [1892] AC 437. The argument, however, is that Canada has never been, and still is not, wholly independent, since there is an ultimate power to deny royal assent to Canadian legislation. The fact that it has become an established constitutional convention not to invoke this ultimate power is said to be irrelevant, since this derives from convention and not from law. Further, the fact that the entire independence and self-government of the Dominion of Canada in all matters, both internal and external, was recognised or affirmed by the Statute of Westminster 1931 is also said to be irrelevant, since s 7 of the 1931 Act expressly provides that nothing in that Act—

> 'shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.'

What is contended, in other words, is that Canada is still not wholly independent from the Crown in right of the United Kingdom, and that its total independence will only be achieved by the enactment of the Canada Bill, which has not yet taken place.

With respect, in my judgment, this argument is wholly fallacious. As shown by the basic constitutional principles discussed at the beginning of this judgment, it is perfectly clear that the question whether the situs of rights and obligations of the Crown is to be found in right or respect of the United Kingdom, or of other governments within those parts of the Commonwealth of which Her Majesty is the ultimate sovereign, has nothing whatever to do with the question whether those governments are wholly independent or not. The situs of such rights and obligations rests with the overseas governments within the realm of the Crown, and not with the Crown in right or respect of the United Kingdom, even though the powers of such governments fall a very long way below the level of independence. Indeed, independence, or the degree of independence, is wholly irrelevant to the issue, because it is clear that rights and obligations of the Crown will arise exclusively in right or respect of any government outside the bounds of the United Kingdom as soon as it can be seen that there is an established government of the Crown in the overseas territory in question. In relation to Canada this had clearly happened by 1867.

It follows in my judgment that the declarations sought by the applicants have no foundation in law, and that this appeal must be dismissed.

MAY LJ. The application in this case is for two declarations: first, that the decision of the Secretary of State for Foreign and Commonwealth Affairs that all treaty obligations entered into by the Crown with the Indian peoples of Canada became the responsibility of the government of Canada with the attainment of independence, at the latest with the Statute of Westminster 1931, is wrong in law; and, second, that treaty and other obligations entered into by the Crown to the Indian peoples of Canada are still owed by Her Majesty in right of her government in the United Kingdom.

There is no question that the decision is one that has been come to by the Secretary of State for Foreign and Commonwealth Affairs and which has been communicated in the various ways to which Lord Denning MR and Kerr LJ have referred. Indeed it is quite clear that the decision is one on which the governments of both the United Kingdom and Canada are agreed.

These applications therefore raise three specific questions. First, with what treaty or other obligations are we concerned? Second, were these or any of them ever owed to the persons with whom they were made by Her Majesty or the Crown in the right of the United Kingdom? Third, are they or any of them still so owed?

Before seeking to answer these three questions, however, I think that it is first necessary to consider and reach a clear understanding of the constitutional questions and law involved. Whilst, like Lord Denning MR and Kerr LJ, I have every sympathy for the interests of the Indian peoples of Canada and understand why they come to the courts of England at this time when the Canada Bill is before the Parliament of the United Kingdom, I also feel that there is at the root of their application and the arguments in support of it a fundamental misunderstanding of the constitutional position.

Although at one time it was correct to describe the Crown as one and indivisible, with the development of the Commonwealth this is no longer so. Although there is only one person who is the Sovereign within the British Commonwealth, it is now a truism that in matters of law and government the Queen of the United Kingdom, for example, is entirely independent and distinct from the Queen of Canada. Further, the Crown is a constitutional monarchy and thus when one speaks today, and as was frequently done in the course of the argument on this application, of the Crown 'in right of Canada', or of some other territory within the Commonwealth, this is only a short way of referring to the Crown acting through and on the advice of her ministers in Canada or in that other territory within the Commonwealth.

Another consequence of this process of evolution from a single undivided imperial Crown, to which counsel for the applicants frequently but as I think erroneously referred in the course of his submissions, to the multi-limbed Crown of the British Commonwealth is that as different territories within the Commonwealth attained self-government to a greater or less extent, acquired the right to legislate on some and ultimately all matters within and affecting that territory, and thus to raise the finance to enable them to manage their own affairs, so pro tanto did any rights or obligations of what had been the Imperial Crown, that is to say the Crown in right of the United Kingdom, devolve on the Crown in right of the particular territory concerned.

This divisibility of the Crown was recognised by the courts in this country at a relatively early stage in the evolution from Empire to Commonwealth. In *Re Holmes* (1861) 2 John & H 527, 70 ER 1167 the Court of Chancery was asked to entertain a petition of right presented under the then recent Petitions of Right Act 1860 claiming the restoration of certain lands taken for a canal by an Act of the provincial legislature of Canada and vested in the Queen. This was before the British North America Act 1867 at a time when the then Province of Canada comprised the two provinces of what had been Upper Canada and Lower Canada respectively. In fact three provincial Acts were concerned: two of the provincial parliament of Upper Canada, before the merger, and the third of the provincial parliament of the merged Province of Canada itself. In essence the argument on behalf of the suppliants was that, although the land concerned was land in Canada and the relevant statutes had been passed by the Canadian legislatures, nevertheless the Queen in her person was within the United Kingdom and that accordingly a petition of right under the new Act would lie. In rejecting that claim Page Wood V-C said (2 John & H 527 at 543–544, 70 ER 1167 at 1174):

> 'Now it is said that the Queen is present here, and therefore amenable (by virtue of the recent Act) to the jurisdiction of this Court. But it would be at least as correct to say that, as the holder of Canadian land for the public purposes of Canada, the Queen should be considered as present in Canada, and out of the jurisdiction of this Court. This alone supplies a sufficient answer to the argument of the suppliants; and, without entering into a number of other questions which the case involves, it is enough to say that, when land in Canada is vested in the Queen, not by prerogative, but under an Act of the Provincial Legislature, for the purposes of the province, and subject to any future directions which may be given by the Provincial Legislature, I hold that, for the purpose of any claims to such land made under the provincial statutes, the Queen is not to be regarded as within the jurisdiction of this Court. I wish to rest my decision on the broadest ground, that it was not the object of the Petitions of Right Act, 1860, to transfer jurisdiction to this country from any colony in which an Act might be passed vesting lands in the Crown for the benefit of the colony; and upon that ground I allow the demurrer . . . I prefer to rest upon the higher ground that this land cannot be withdrawn from the control of the Canadian Legislature, and brought within the jurisdiction of this Court, merely on the technical argument that the Queen, in whom it is vested for Canadian purposes, is present in this country.'

That the duties and liabilities of the Crown in right of the United Kingdom in respect of another territory or its peoples within the Commonwealth should devolve in this way on the Crown in right of that territory as the latter attained its own legislature, and with that its own revenue and Consolidated Fund, was itself merely a natural consequence of that progress of self-government and ultimately independence. It necessarily followed from the political concept, convention or, in some cases, specific legislation which realised, accepted or enacted that Parliament in the United Kingdom would not thereafter interfere with or derogate from laws passed by the legislature in the self-governing territory on any subject which had in truth been left to its jurisdiction. To contemplate any other result would be to contemplate legislative and inter-governmental chaos.

On this point, however, I do not have to rest solely on political theory. There is in my judgment good support for it in the speeches of their Lordships' House in *A-G v Great Southern and Western Rly Co of Ireland* [1925] AC 754. By agreements made in 1917 and 1918 the President of the Board of Trade in the United Kingdom agreed that, if the Irish railway company took up the rails and sleepers on parts of their line and transferred them to the British government to enable them to construct certain other lines to help their transport of coal for local use during the 1914–18 war, then after the war the latter government would pay the railway company the cost of new rails and sleepers and of reconstructing their previous railway line. The company duly transferred the rails and sleepers to the government. Subsequently by legislation and an Order in Council the liabilities so incurred by the Board of Trade were transferred to the British Minister of Transport. There followed in 1922 two further Acts of the Parliament at Westminster creating the Irish Free State and an Order in Council transferring relevant functions from certain British ministers to Irish ones. The railway company claimed a declaration on a petition of right that notwithstanding those statutes and orders the liability of the British government under the 1917 and 1918 agreements still subsisted. The decision in the House of Lords that the liability had been transferred to and vested in the government of the Irish Free State rested principally on the proper construction and effect of the statutes and orders involved, but having so held that that was their result Viscount Cave LC continued (at 765–766):

> 'That this conclusion is in accordance, not only with the terms of the several Acts and Orders, but with the reason of the case, is (I think) plain. The Free State Government now holds the branch lines to which the rails and sleepers were transferred. That Government alone can sanction the replacement of the lines removed from the respondents' railway and can regulate the method of replacement and control the expense incurred. The lines when replaced will be for the benefit

of the surrounding population, and the betterment of the respondents' line (for which under the terms of the Castlecomer Agreement the respondents are to make an allowance) will proceed from that population. At the time when the Acts and Orders were passed, it was plain that the administration of all the railways in Southern Ireland would pass out of the jurisdiction and control of the British Ministry of Transport and would become a function of the Free State; and it was natural that the assets and future liabilities connected with that function should at the same time be transferred to the Government of that State. I think that on the true construction of the Acts and Orders this was their effect, and accordingly that this appeal should succeed.'

Viscount Haldane, with whose speech Lord Carson concurred, having considered the point of construction and then referred to three other cases concerning Newfoundland, New Zealand and England respectively, said (at 773–774):

'My Lords, I am of opinion that the judgments in these three cases illustrate a principle which is definitely recorded in our textbooks of constitutional law. However clear it may be that before the Revolution Settlement the Crown could be taken to contract personally, it is equally clear that since that Settlement its ordinary contracts only mean that it will pay out of funds which Parliament may or may not supply. In the present case Parliament transferred the duty of producing the fund out of which the liability in question, when it accrued, should be met to the Irish Parliament. It thereby declared its intention not itself to provide the money required out of its own Consolidated Fund. It does not matter whether the liability was in terms transferred to the Irish Government. By its very character it would cease when it became operative to be a liability of the British Consolidated Fund and become one of the Irish Legislature Central Fund, if they chose to so provide.'

Finally Lord Phillimore in his speech said (at 779–780):

'So far then it is merely a departmental question whether a particular property is stated to be vested in one Minister or another. But when it becomes a question of a transfer from the Home Government to the Irish Free State or to any other Dominion, it is necessary to look into it somewhat more closely. The property of the Crown in the Dominion is held for the purposes of that Dominion. Its benefits accrue to the Dominion Exchequer, and liabilities in connection with it must be discharged out of the same Exchequer. His Majesty has separate Attorney-Generals to sue and be sued in respect of each Dominion . . . In these circumstances I am of opinion that no petition of right can be brought in the High Court of Justice of England which has for its object a judgment against the Crown which is to be satisfied out of the Exchequer of a Dominion, and that no judgment can be obtained on a petition of right so brought in respect of liabilities incident to the Ministry of a Dominion, because such liabilities are not to be satisfied out of the Exchequer of the United Kingdom.'

It was in these circumstances, and as a part of the evolutionary and devolutionary process to which I have referred, that the British North America Act 1867 was passed. I will myself refer to a few specific sections in a moment, but its general effect has been described in two judgments of the Privy Council. In *Liquidators of the Maritime Bank of Canada v Receiver-General of New Brunswick* [1892] AC 437 at 441–442, Lord Watson said:

'The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion Government should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government. But, in so far as regards those matters which, by sect. 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act. In *Hodge* v. *The Queen* ((1883) 9 App Cas 117 at 132), Lord Fitzgerald[1], delivering the opinion of this Board, said: "When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion." The Act places the constitutions of all provinces within the Dominion on the same level; and what is true with respect to the legislature of Ontario has equal application to the legislature of New Brunswick.'

Secondly, in *A-G for Ontario v A-G for Canada* [1912] AC 571 at 581 Earl Loreburn LC said:

'In 1867 the desire of Canada for a definite Constitution embracing the entire Dominion was embodied in the British North America Act. Now, there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada. Numerous points have arisen, and may hereafter arise, upon those provisions of the Act which draw the dividing line between what belongs to the Dominion or to the province respectively. An exhaustive enumeration being unattainable (so infinite are the subjects of possible legislation), general terms are necessarily used in describing what either is to have, and with the use of general terms comes the risk of some confusion, whenever a case arises in which it can be said that the power claimed falls within the description of what the Dominion is to have, and also within the description of what the province is to have. Such apparent overlapping is unavoidable, and the duty of a Court of law is to decide in each particular case on which side of the line it falls in view of the whole statute.'

For our present purposes it is sufficient to recall that s 3 of the 1867 Act enacted that the Queen by proclamation might constitute the three then provinces of Canada, Nova Scotia and New Brunswick into the Dominion of Canada. The Province of Canada, which had earlier been formed by the joinder of Upper and Lower Canada, became the two new provinces of Ontario and Quebec. The Act then created separate self-governing constitutions for the Dominion and each of the four provinces. Sections 91 and 92 laid down the classes of subject which were to be within the exclusive legislative powers of the Dominion parliament and provincial legislatures respectively. Among these, by s 91(24), the power to legislate in respect of 'Indians, and lands reserved for the Indians' was given to the Dominion parliament. By s 109 all lands, mines, minerals and royalties belonging to the three existing provinces were to continue to belong to the four provinces thereafter to form the Dominion, subject to any trusts existing in respect thereof and to

1 Sic. According to the report of *Hodge v R*, although Lord FitzGerald presided, the judgment of their Lordships was delivered by Sir Barnes Peacock (see 9 App Cas 117 at 121)

any interest other than that of the provinces in the same. The effect of this section was considered in *St Catherine's Milling and Lumber Co v R* (1888) 14 App Cas 46, in which the Privy Council held that lands ceded by Indians under treaties made with the Crown after federation became vested in the relevant province. Section 132 provided that the parliament and government of the Dominion should have all the necessary powers to enable it to perform the obligations of Canada or any province, as part of the British Empire, towards foreign countries arising under treaties between the Empire and such foreign countries. Finally, s 146 gave power to admit to the Dominion, inter alia, what was then Rupert's Land and the North Western Territory, which were each then vested in the Hudson's Bay Company under the latter's charter.

By the 1867 Act, therefore, the Dominion and the provinces acquired a substantial degree of self-government and their own treasuries. Between then and the Imperial Conferences of 1926 and 1930 the Dominion acquired, largely by agreement and convention, increasing independence over and above that given it by the 1867 Act from the United Kingdom and its Parliament until, by the Statute of Westminster 1931, it and the other Dominions referred to in that statute attained complete independence subject, in the case of Canada, to s 7, which, as it was put in argument, entrenched the constitution of Canada and its provinces in Westminster, subject to this, that such constitution can only be amended at the request and with the consent of the Dominion.

As a result of this process and on the authorities to which I have referred, I have no doubt that any treaty or other obligations which the Crown had entered into with the Indian peoples of Canada in right of the United Kingdom had become the responsibility of the government of Canada with the attainment of independence, at the latest with the Statute of Westminster 1931. I therefore think that this application must fail.

However, as counsel have dealt with the general facts and merits of this case, I shall do so shortly myself. As will finally appear, however, I do not think that it is the function of this court in all the circumstances to do so.

It is a matter of history, in so far as is material in this case, that the royal charter granting Rupert's Land to the Hudson's Bay Company was made in 1670. Thereafter, as a result of the Treaty of Utrecht 1713, Hudson Bay, Nova Scotia and Newfoundland passed to England and ultimately the rest of the territory claimed by France in North America was ceded to England in 1763 by the Treaty of Paris.

In that same year George III issued a proclamation with which I shall have to deal in a moment. However, prior to this and to the formal hostilities between Great Britain and France called the Seven Years War, a number of treaties were entered into between the local Indian communities and the English Crown or representatives of it. These are what have been described as the Maritime Treaties in this case and are the first class of documents under which it is alleged that the Indian peoples of Canada obtained rights against the English Crown. I do not agree. I think that if one looks at these treaties as they have been shown to us, they were merely articles of submission. The Indians concerned had been engaging in hostilities against the English Crown. By these treaties they agreed to cease to do so and in the main to trade and treat with the British rather than with the French. Only two of these treaties, namely those of 1752 and 1794, both with the Micmac Indians, could in any way be said to have granted anything to the Indians, but even then this was in such general terms that it is impossible to say to what, if anything, they relate in a context 200 years after they were made.

There was then the royal proclamation of 1763. It is agreed on both sides that this had and continues to have the effect at least of secondary legislation, if not of a statute. After setting up the four self-governing colonies of Quebec, East Florida, West Florida and Grenada, it reserved under the Crown's sovereignty, protection and dominion, for the use of the Indian inhabitants of such land, substantial parts of the territories recently ceded to England by France, but not including the four colonies I have mentioned, or lands within the limits of the territory earlier granted to the Hudson's Bay Company under its charter.

From some of the Canadian decisions which have been shown to us it seems that the Canadian courts have held that the provisions of the royal proclamation did and do

extend to the provinces of Nova Scotia and New Brunswick, subject to the terms of any cessions of land to the Crown by Indians in those provinces which have been made since 1763. From the arguments addressed to us I would respectfully agree with this view of the Canadian courts. As I shall indicate, however, I do not think that it is competent for this or any English court to pronounce definitively on the point and had I disagreed with the Canadian judges I would not have thought it correct for me to say so.

Of the many Canadian cases we have seen, I think that it is sufficient for present purposes to refer to *R v Isaac* (1975) 9 APR 175, a decision of the Nova Scotia Supreme Court, as an authority for the existence of an aboriginal or Canadian common law right possessed by Indians to hunt and fish over their lands. Were it within my jurisdiction now to do so, I would hold that this right was confirmed to the Indians by the proclamation and, save to the extent where it has been extinguished by the cession of Indian lands or a Dominion statute pursuant to s 91(24) of the British North America Act 1867, is still an Indian right over relevant land. This was the decision not only in *R v Isaac* but also in a number of the other Canadian cases to which our attention was directed.

It is a right which the Indians possess against the Crown, but for the reasons I have given against the Crown in right of Canada and not in right of the United Kingdom.

I turn finally to the post-federation treaties, those which have been described in this case as the Prairie Treaties, and in particular to treaty no 6 of 1876, which is the one relating to the Alberta Indians, whose association was the first of the applicants in these proceedings.

I shall refer to the terms of the treaty shortly, but, in addition to the general reasons which I have already given for my conclusion that any rights owed today by the Crown to the Indian population of Canada are owed by the Crown in right of Canada, the history of Alberta, and for that matter Manitoba and Saskatchewan, is also relevant. The territory of what is now the Province of Alberta was part of Rupert's Land, which was granted to the Hudson's Bay Company by its charter of 1670. As such the Indians occupying it were expressly excluded from the reservation of sovereignty in the proclamation of 1763 to which I have referred. The Hudson's Bay Company surrendered Rupert's Land to the Crown in November 1769 and by an Order in Council pursuant to s 146 of the British North America Act 1867 the Crown admitted Rupert's Land into the Dominion the same year. At that stage Rupert's Land and the power to legislate for it was given to the Dominion government. However, by the Alberta Act 1905, the relevant part of Rupert's Land was established as the Province of Alberta and a system of local self-government set up as in the other provinces. The land itself, however, still remained vested in the Dominion. Nevertheless by the schedule to the British North America Act 1930 the land constituting Alberta was transferred from the Dominion to the province, except for the lands included in the Indian Reserves, which, because of the responsibility of the Dominion government for Indians and their lands, under s 91(24) of the 1867 Act, remained vested in the Dominion.

Thus, at least in so far as Alberta itself was concerned, at the date of the treaty which we have been asked to consider its land was vested in the Dominion. Then, understandably, when the lands constituting Alberta were vested in the province, so as to put it in the same position as other provinces, that land which by the treaties had been reserved to the Indians was still kept vested in the Dominion government, which had the responsibility for these people.

Further, although treaty no 6 was expressed to have been made by Her Majesty the Queen of Great Britain and Ireland with the Indians, it was nevertheless made by her through commissioners, including the Lieutenant Governor of the relevant lands. In addition the cession of lands by the Indians, in exchange for which the Crown granted them certain rights and privileges, was to the government of the Dominion of Canada for Her Majesty the Queen. Next, when the Crown in the treaty agreed to lay aside reserves for the Indians, they were to be administered and dealt with for them by Her Majesty's government of the Dominion of Canada.

On both the general and also these particular grounds, therefore, I think that the rights

granted to the Alberta Indians by the relevant treaty were granted to them by the Crown in right of Canada and not by the Crown in right of the United Kingdom.

In essence, the argument of counsel for the applicants was that, because at least some element of sovereignty over the Canadian constitution remained in Westminster, this necessarily carried with it at least some obligation in the Crown in the right of the United Kingdom to the Indian peoples of Canada under the royal proclamation of 1763 and the Prairie Treaties to which I have referred. As a matter of construction, clearly s 7 of the Statute of Westminster 1931 did retain a limited sovereignty of the Crown in right of the United Kingdom over the Dominion. But, in my opinion, on both the general and particular considerations to which I have referred, I do not think that this in any way means that any treaty or other obligations into which the Crown may have entered with its Indian peoples of Canada still enure against the Crown in right of the United Kingdom. Quite clearly, to the extent that these still continue, and I think that it is clear that the Canadian courts have held that they do, they are owed by the Crown in right of the Dominion or in right of the particular province.

As I have said earlier, the Crown is a constitutional monarchy, acting only on the advice of its relevant ministers. Two hundred years ago, in so far as North America was concerned, these were clearly the ministers of the United Kingdom government. Equally clearly, in 1982 and in the events which have occurred, notwithstanding s 7 of the 1931 statute, the relevant ministers on whose advice the Crown acts in relation to Canada and its provinces are those of her government in the Dominion and those provinces.

In the course of his argument counsel for the applicants referred to s 7(1)(*b*) of the India Independence Act 1947, relating to India in Asia, and the corresponding provision in s 1(3) of the Burma Independence Act 1947. By these legislative provisions the Crown's suzerainty of the Indian states and the Karenni states respectively was to lapse on the appointed day and with it, inter alia, all obligations of the Crown to these various states and their rulers at the same time. Counsel for the applicants argued that the absence of any similar provision in the British North America Act 1867, the Statute of Westminster 1931 or the present Canada Bill relating to the Crown's suzerainty of and obligations to the Indian peoples of Canada clearly meant that these were to continue and remain the responsibilities of the Crown in right of the United Kingdom. It is always dangerous to argue from default in this way: circumstances vary so much from case to case and Parliamentary draftsmen in the nineteenth century may have adopted a very different approach from their successors in the twentieth century. In any event, if, for instance, one looks at s 6 and analagous sections (as to India) and s 320 (as to Burma) of the Government of India Act 1935, one can see that there were substantial formal relationships between the Crown in right of the United Kingdom and local rulers in India and Burma which had to be set aside when those two countries obtained their independence. Further, this was obtained by these two countries once and for all by their respective Acts of 1947. Similar independence for Canada, and within her for the provinces, was not the result of one simple legislative act of the United Kingdom Parliament at Westminster, either in 1867 or 1931. It was a gradual process which, save for the entrenched constitution, had been effected by 1931.

For these reasons, the comparative argument of counsel for the applicants relating to India and Burma is, in my opinion, of little, if any, force.

Finally, counsel on behalf of the Crown in right of the United Kingdom, in particular the Foreign and Commonwealth Office, and counsel on behalf of the Crown in right of Canada, each argue that the issues raised by these applications are outside the jurisdiction of the English courts, that they ought not to be considered by them, and that in any event it is inappropriate to grant any declaration in this or any other similar application. With all respect to these arguments, I think that the last is dependent on our decision on the first two. If the issues raised in this case are within this court's jurisdiction, then I see no reason why we should not make an appropriate declaration on the application of one side or the other. On the other hand, if the issues raised are not within this court's jurisdiction, then not only should we in truth not hear them but certainly we should make no declaration, in favour of either side.

On the authority of the decisions of this court in such cases as *Mellenger v New Brunswick Development Corp* [1971] 2 All ER 593, [1971] 1 WLR 604, I do not think that this court has any jurisdiction to consider the issues raised by this application, and not merely no jurisdiction, but that it would be contrary to the comity existing between independent nations were we to do so. The rights and obligations on which we have been asked to adjudicate are said to be enjoyed by and owed to citizens of Canada in respect of land which is itself within the Dominion. Further, any enforcement of these rights and obligations could ex hypothesi only be carried out within Canada and would have to be subject to the relevant provisions of Canadian law. We have only heard the arguments on the merits de bene esse and out of consideration of those who have travelled 4,000 miles and further to hear their cause pleaded before us. We appreciate their anxieties; we have done all that we can relevant to this application to learn about their history and understand the arguments put before us on their behalf.

In the end, however, I am quite satisfied both, on general constitutional grounds as well as on the construction of the relevant instruments and the history of the relevant provinces themselves, that any treaty or other obligations still owed by the Crown to the Indian peoples of Canada are owed by the Crown in right of the Dominion of Canada and not in the right of the United Kingdom. If such obligations still exist, and, if they do, their extent, is, in my opinion, not a matter for this court: it is a matter for the courts of Canada.

I, too, would therefore refuse this application.

Application for judicial review refused; application for leave to appeal to the House of Lords refused.

11 March. The Appeal Committee of the House of Lords (Lord Diplock, Lord Fraser of Tullybelton, Lord Russell of Killowen, Lord Scarman and Lord Bridge of Harwich) heard a petition by the applicants for leave to appeal.

Louis Blom-Cooper QC for the applicants.
Robert Alexander QC for the Secretary of State.
Andrew Morritt QC for the Canadian government.

LORD DIPLOCK. Their Lordships do not grant leave to appeal in this case. They wish to make it clear that their refusal of leave is not based on any technical or procedural grounds, although it is not to be taken as their view that there is jurisdiction to entertain an application for judicial review in such a case as this. Their refusal of leave is because in their opinion, for the accumulated reasons given in the judgments of the Court of Appeal, it simply is not arguable that any obligations of the Crown in respect of the Indian peoples of Canada are still the responsibility of Her Majesty's government in the United Kingdom. They are the responsibility of Her Majesty's government in Canada, and it is the Canadian courts and not the English courts that alone have jurisdiction to determine what those obligations are.

Petition dismissed.

Solicitors: *Radcliffes & Co* (for the applicants); *Treasury Solicitor; Linklaters & Paines* (for the Canadian government).

Diana Procter Barrister.