Do provincial smoking bans apply on Aboriginal reserves?

The Federal and Manitoba governments do not agree on who controls smoking on Aboriginal reserves. Manitoba has a Non-Smokers Health Protection Act that bans smoking inside public places but excuses Aboriginal reserves and other locations that fall under exclusive federal jurisdiction.[1] The exception allows patrons of on-reserve casinos and bars to smoke. Many argue that this gives on-reserve businesses a competitive advantage over other businesses who must abide by the provincial smoking ban.

1. R. v. Jenkinson and R. v. Creekside Hideaway Motel Ltd, a hotel owner in Manitoba successfully challenged the provincial law. Justice Albert Clearwater of Manitoba's Court of Queen's Bench issued a judgment on August 14, 2006 stating that the exemption was discriminatory and violated the hotel owner's right to equality as guaranteed under section 15 of the Canadian Charter of Rights and Freedoms. Justice Clearwater also felt that Aboriginal people should not be denied the health benefits provided by the anti-smoking law.

The province of Manitoba plans to appeal the decision. Aboriginal groups are also appealing the decision, arguing that they have the right to set their own rules concerning smoking on reserves. Manitoba Premier Gary Doer believes that regulating smoking on-reserves is a federal concern. Federal Indian Affairs Minister Jim Prentice disagrees. In his opinion, a province may enact an anti-smoking law that applies everywhere in a province, including Aboriginal reserves. Mr. Prentice feels that court decisions, such as Justice Clearwater's, support this theory.

The dispute involves the question of jurisdiction (division of powers) between the federal and provincial governments as well as Aboriginal self government. Under the Constitution Act, 1867, the federal government has exclusive jurisdiction to legislate matters concerning "Indians and lands reserved for Indians." But the federal Aboriginal power does not stop a provincial legislature from passing laws affecting "property and civil rights in the province" so long as the law does not specifically target Aboriginals or impact on Aboriginal rights. While the Federal and Manitoba governments may disagree about jurisdiction, it was the Charter's equality guarantee that led Justice Clearwater to rule that the Non-Smokers Health Protection Act should apply to public places located on Aboriginal reserves as well.

Justice Clearwater pointed out that anti-smoking legislation has been enacted in other provinces, such as British Columbia, Saskatchewan, and Ontario. According to Clearwater, "[i]n no instance have these Legislatures purported to exempt the business activities of aboriginal persons on reserve lands from legislation validly enacted for health purposes and

clearly within provincial jurisdiction."[2]

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  Alexander Panetta, "Aboriginal group slams Tory gov't after spending cuts" CNEWS (26 September 2006)

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[1] Section 94 includes federal prisons, federally regulated airports, Canadian Forces bases or to any other place or premises occupied by a federal work, undertaking or business.

[2] R. v. Jenkinson and R. v. Creekside Hideaway Motel Ltd., 2006 MBQB 185 (CanLII) at para. 23 online: CanLII < http://www.canlii.org/mb/cas/mbqb/2006/2006mbqb185.html >