ABORIGINAL TITLE AND THE DIVISION OF POWERS: RETHINKING FEDERAL AND PROVINCIAL JURISDICTION

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The recent decision of the Supreme Court of Canada in *Delgamuukw v. British Columbia*[1] calls for re-examination of a number of significant Aboriginal rights issues. The crucial role of oral histories in Aboriginal rights litigation was emphasized by the Court, and guidelines were laid down for trial judges to admit and give proper weight to that evidence. For the first time the Court addressed the vital issue of the content of Aboriginal title, and provided direction on how that title can be proved.[2]

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1 [1997] S.C.J. No. 103 (Quicklaw) (hereinafter *Delgamuukw* (S.C.C.)). In this case, the Gitxsan (spelled "Gitksan" in the judgments) and the Wet'suwet'en Nations made broad claims to ownership and jurisdiction over their traditional territories in British Columbia. During the course of the litigation, those claims were modified to Aboriginal title and self-government. Due to problems with the pleadings and errors made by the trial judge, the Supreme Court did not determine the outcome of either claim; instead, a new trial was ordered. However, the Court did lay down some very important principles of law in relation to Aboriginal title.

2 For discussion see Kent McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty", forthcoming in *Tulsa Journal of Comparative and International Law* (hereinafter "Aboriginal Rights in Canada"). For background, see Kent McNeil,

The Court also dealt with the constitutional protection accorded to Aboriginal title by s.35(l) of the *Constitution Act, 1982*,[3] and explained how infringements of that title can be justified. Finally, the Court discussed the issue of the division of powers between the Parliament of Canada and the provincial legislatures in relation to Aboriginal rights.[4] This last issue will be the focus of this article. I will attempt to show that the Court's pronouncements on this issue result in a fundamental realignment of constitutional jurisdiction within the provinces where Aboriginal title can be established.

THE DELGAMUUXW DECISION

IN THE BRITISH COLUMBIA COURT OF APPEAL [5]

"Aboriginal Title and Aboriginal Rights: What's the Connection?" (1997) 36 Alta. L. Rev. 117 (hereinafter "What's the Connection?").

3 Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. Section 35(l) provides: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

4 A further issue, namely whether the Gitxsan and Wet'suwet'en have a constitutional right of self-government, though dealt with in the lower courts, was not addressed by the Supreme Court. According to Lamer C.J.C.,

> [t]he errors of fact made by the trial judge, and the resultant need for a new trial, make it impossible for this Court to determine whether the claim to self-government has been made out. Moreover, this is not the right case for the Court to lay down the legal principles to guide future litigation. [[1997] S.C.J. No. 108 (Quicklaw), para. 170]

5 *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470 (hereinafter *Delgamuukw* (C.A.)).

It is worth looking at the treatment of the division of powers issue by the British Columbia Court of Appeal because Macfarlane J.A. , in his majority judgment,[6] dealt with the issue in more detail than the Supreme Court of Canada. Moreover, Lamer C.J.C., delivering the leading judgment in the Supreme Court,[7] explicitly adopted some of Macfarlane J.A.'s reasons and reached the same conclusions. Both judges discussed the issue of federal and provincial jurisdiction in the context of extinguishment of Aboriginal title.[8]

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6 Taggart J.A. concurred with Macfarlane J.A. Wallace J.A. wrote a concurring judgment, in which he said he was "in complete agreement with the reasons and conclusions expressed by Mr. Justice Macfarlane in his reasons on this issue" (i.e., the issue of extinguishment, which includes within it the issue of federal and provincial jurisdiction relating thereto): *ibid.,* at 595. Lambert J.A., dissenting in part, came to the same conclusions as Macfarlane J.A. on the issue of post-Confederation jurisdiction to extinguish Aboriginal title: see *ibid.,* at 679-81. Hutcheon J.A., also dissenting in part, did not deal with this issue directly, but did agree with at least some of Macfarlane J.A.'s treatment of the subject: see *ibid*., at 753.

7 Cory and Major JJ. concurred with Lamer C.J.C. La Forest J., L'Heureux-Dube J. concurring, delivered a judgment arriving at the same result as the Chief Justice, but differing somewhat on the issues of content and proof of Aboriginal title. On the issue discussed in this article, he said:

> I agree with the Chief Justice's conclusion. The respondent province had no authority to extinguish aboriginal rights either under the *Constitution Act, 1867* or by virtue of s.88 of the *Indian Act* [R.S.C. 1985, c. 1-5]. *[Delgamuukw (S.*C.C.), *supra* note 1, at para. 206]

McLachlin J. concurred with the Chief Justice, and added that she was "also in substantial agreement with the comments of Justice La Forest": *ibid*., at para. 209. Gonthier J. did not sit on the case, and Sopinka J. took no part in the judgment.

8 Note that the Court of Appeal unanimously reversed McEachern C.J.'s holding at trial, *Delgamuukw v. British Columbia* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.), at 462-78, that Aboriginal title in British Columbia was generally extinguished before the province joined Canada in 1871: *Delgamuukw* (C.A.), *supra* note 5,

When British Columbia joined Canada in 1871, subject to the Terms of Union[9] the provisions of the *Constitution Act, 1867*,[10] including the division of powers in ss. 91 and 92, became applicable to the new province. Section 91(24) assigns exclusive jurisdiction over "Indians, and Lands reserved for the Indians", to the Parliament of Canada.[11] So the first issue Macfarlane J.A. faced in this context was whether that conferral of legislative authority includes jurisdiction over lands held by Aboriginal title. He decided that it does, relying on the decision of the Privy Council in *St. Catherine's Milling and Lumber Company v. The Queen*, where Lord Watson stated:

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per Macfarlane J.A. at 525-31, Wallace J.A. at 595, Lambert J.A. (dissenting on other grounds) at 673-79, Hutcheon J.A. (dissenting on other grounds) at 753-54. This resolved the uncertainty on this issue left by the split Court in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313 (hereinafter *Calder*). While the matter was not specifically addressed in *Delgamuukw* (S.C.C.), *supra* note 1, it is evident from Lamer C.J.C. and La Forest J.'s judgments that they agreed with the Court of Appeal on this, as they treated Aboriginal title as a property right that exists in British Columbia today where established by the requisite proof.

9 R.S.C. 1985, App. II, No. 10. On the constitutional status of the Terms of Union, see *Attorney-General for British Columbia v. Attorney-General for Canada*, [1914] A.C. 153 (P.C.), at 164; *Reference re Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54, at 60-63. Compare *Jack v. The Queen*,[1980] 1 S.C.R. 294; *R. v. Adolph*, [1984] 2 C.N.L.R. 96 (B.C.C.A.).

10 30 & 31 Vict., c.3 (U.K.).

11 This conferral of legislative jurisdiction necessarily includes executive authority: see *Attorney-General of Canada v. Attorney-General of Quebec*, *sub nom*. *Mowat v. Casgrain* (1897), 6 Que. Q.B. 12 (Que. C.A.), at 22-24; *Bonanza Creek Gold Mining Co. v. The King*, [1916] A.C. 566 (P.C.), at 579-80; *The Queen v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*, [1981] 4 C.N.L.R. 86 (Engl. C.A.), per Lord Denning M.R. at 93.

> ... the words actually used [in s. 91 (24)] are, according to their natural meaning, sufficient to *include all lands reserved, upon any terms or conditions, for Indian occupation*. It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and *Indian affairs generally*, shall be under the legislative control of one central agency. [12]

In this regard, Macfarlane J.A.'s decision went a significant step beyond *St. Catherine's*, as in that case Lord Watson had based the Indian title of the Saulteaux Tribe on the Royal Proclamation of 1763, which specifically reserved lands for the use of the Indian nations or tribes.[13] After *St. Catherine's*, if there were Aboriginal title lands beyond the territorial scope of the Proclamation that were not otherwise reserved for the Indians, it could still be argued that those lands were not covered by s.91(24).[14] As Macfarlane J.A. decided that the Proclamation does not apply in British Columbia,[15] but held nonetheless that lands

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12 (1888), 14 App. Cas. 46 (hereinafter *St. Catherine's*), at 59, as quoted in *Delgamuukw* (C.A.), *supra* note 5, at 534 (Macfarlane J.A.'s emphasis). Macfarlane J.A. also relied on Strong J.'s dissenting judgment in the Supreme Court of Canada in that case, (1886), 13 S.C.R. 577, at 615, which he quoted in part as follows: "'Lands reserved for the Indians' embrace *'all territorial rights of Indians*, as well as those in lands actually appropriated for reserves'" (Macfarlane J.A.'s emphasis). But note that, while the federal government has jurisdiction over "Lands reserved for the Indians", Lord Watson decided in *St. Catherine's* that the underlying title to those lands (special agreement or constitutional provision apart) is held by the provinces by virtue of s.109 of the *Constitution Act, 1867*.

13 R.S.C. 1985, App. III No. 1, at 5.

14 For detailed discussion, see Robert D.J. Pugh, "Are Northern Lands Reserved for the Indians?" (1982) 60 Can. Bar Rev. 36.

15 *Delgamuukw* (C.A.), *supra* note 5, at 521; see also *per* Wallace J.A. at 593-95; compare per Lambert J.A. (dissenting in part) at 732-36, Hutcheon J.A. (dissenting in part) at 751-52.

subject to Aboriginal title in the province are "Lands reserved for the Indians", he implicitly rejected that argument.

In addition to the authority of the *St. Catherine's* decision, Macfarlane J.A. relied on a policy argument to conclude that Aboriginal title lands are under federal jurisdiction by virtue of s.91(24):

> Secondly, it is a sensible result which places the power to block improvident dispositions, or outright expropriation, of Indian lands in the hands of the legislature which was made responsible for Indian welfare generally. Indeed if the division of powers did not remove the power to extinguish aboriginal title from provincial hands, the federal government could find itself unable to protect this crucial native interest and forced to guarantee Indian welfare by other means. It would be an absurd result to find the provinces with the competence to make the federal obligation to Indians more onerous.[16]

As the federal government has responsibility for Indian welfare,[17]

Note that, in Calder, *supra* note 8, the Supreme Court split 3/3 on the issue of the application of the Royal Proclamation in British Columbia. The issue was not dealt with by the Supreme Court in *Delgamuukw* (S.C.C.), *supra* note 1.

16 *Delgamuukw* (C.A.), supra note 5, at 534-35.

17 See also *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, where La Forest J. referred to "the federal Crown's plenary responsibility respecting 'Indian Lands' (p. 123), and "its obligations to native peoples, be it pursuant to its treaty commitments, or its responsibilities flowing from S.91(24)" (p. 126). In his concurring judgment, Dickson C.J.C. also spoke of "the constitutional responsibility of Parliament for Indians and Indian lands" (p. 105), and added: "since 1867, the Crown's role has been played, as a matter of federal division of powers, by Her Majesty in right of Canada, with the *Indian Act* representing a confirmation of the Crown's historic responsibility for the welfare and interests of these peoples" (pp. 108-09). See also *Roberts v. Canada*, [1989] 1 S.C.R. 322 (hereinafter *Roberts*), especially 337, where Wilson J. for a unanimous Court said, in the context of the Indian right to occupy and use reserve lands, that the provisions of the *Indian Act*, "while not constitutive of the obligations owed how to the Indians by the Crown, codify the pre-existing duties of the

it must have the power to protect Aboriginal rights. Those rights include, but are not limited to, Aboriginal title to land, an Aboriginal right to fish, for example, can exist independently of Aboriginal land rights.[18] Macfarlane J.A. clearly recognized the potential breadth of this federal jurisdiction, as he thought "the federal power found in s.91(24) has several facets and may well embrace jurisdiction over all aboriginal rights."[19] He found support for this in *Roberts v. Canada*[20] where, in his words, "Wilson J., for a unanimous five-judge bench, held that the common law of aboriginal title underlying the fiduciary obligations of the Crown to Indian Bands comes within the term 'laws of Canada' in s.101 of the *Constitution Act*, 1867."[21] Indeed, given the decision in Roberts that the law of Aboriginal title is federal common law because of s.91(24), Macfarlane J.A.'s conclusion that "[a]t the very least Parliament has exclusive jurisdiction over aboriginal rights in land"[22] seems almost inescapable.

Having reached that conclusion, Macfarlane J.A. went on to

Crown toward the Indians".

18 See *R. v. Adams*, [1996] 3 S.C.R. 101 (hereinafter *Adams*) *R. v. Cote*, (1996] 3 S.C.R. 139 (hereinafter *Cote*); and discussion in "What's the Connection?", *supra* note 2.

19 *Delgamuukw* (C.A.), *supra* note 5, at 535.

20 *Roberts*, *supra* note 17. For commentary, see J.M. Evans and Brian Slattery, "Federal Jurisdiction - Pendent Parties - Aboriginal Title and Federal Common law - Charter Challenges - Reform Proposals: *Roberts v. Canada*" (1989) 68 Can. Bar Rev. 817.

21 *Delgamuukw* (C.A.), *supra* note 5, at 535.

22 *Ibid*.

consider whether "valid provincial legislation [can]extinguish aboriginal rights in land by the incidental effect of a valid grant of an interest in land, including natural resources".[23] He acknowledged that "valid provincial legislation may apply to Indians, so long as it is a law of general application and not one that affects their Indianness, or their status, or their core values"[24] He continued:

> The proposition that provincial laws could extinguish Indian title by incidental effect must be examined in light of an appropriate understanding of the federal immunity relating to Indians and of the aboriginal perspective. The traditional homelands of aboriginal people are integral to their traditional way of life and their self-concept. If the effect of provincial land legislation was to strip the aboriginal people of the use and occupation of their traditional homelands, it would be an impermissible intrusion into federal jurisdiction. Any provincial law purporting to extinguish aboriginal title would trench on the very core of the subject matter of s.91(24).[25]

He concluded that "the provincial legislatures have not, since Confederation, had the constitutional competence to extinguish common law aboriginal rights through the exercise of other jurisdiction - including the making of land grants."[26]

Somewhat contradictorily, Macfarlane J.A. also expressed the

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23 *Ibid*.

24 *Ibid*. Later in his judgment, Macfarlane J.A. expanded on this by recognizing that provincial laws of general application that do affect "Indianness" or the status or core values of Indians, while they cannot apply to Indians of their own force, can be referentially incorporated into federal law by s.88 of the *Indian Act*, R.S.C. 1985, c. 1-5: *ibid*., at 538-39. Section 88 will be discussed infra, in text accompanying notes 30-49, 73-82.

25 *Ibid*., at 536.

26 *Ibid*., at 537.

view that provincial Crown grants of fee simple and lesser interests in lands and resources, made before the *Constitution Act, 1982*, came into force, could not now be questioned.[27] He suggested that those grants, while ineffective to extinguish Aboriginal land rights, might nonetheless infringe them.[28] But he did not reach any definite conclusion on this issue. He observed that, in a case of infringement,

> [w]hat, if any remedy can be granted ... is an extremely complex and fact sensitive question. A remedy may lie in damages, or in a reading down of the grant to the extent that it infringes on the aboriginal [right]. The plaintiffs have taken the practical position of seeking damages from the province on the basis that liability flows from a wrongful appropriation of an Indian interest. I think that was a wise course to take.[29]

The plaintiffs' willingness to limit their claims to damages where Crown grants had been made thus allowed Macfarlane J.A. to avoid any final determination of the question of the validity of grants. He did, however, suggest a way for them to be effective, namely by relying on s.88 of the *Indian Act*[30] and the doctrine of referential incorporation. Section 88 provides:

> 88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation, or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

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27 *Ibid.*, at 535.

28 *Ibid.*, at 537.

29 *Ibid.*

30 Supra note 24.

Case law has held that the effect of s.88 is to make provincial laws of general application that would not otherwise apply to Indians because they touch on their status or capacity, or their "Indianness", apply to them by referentially incorporating those provincial laws into federal law.[31] However, Macfarlane J.A. was of the view that s.88 did not authorize the *extinguishment* of Aboriginal rights by provincial legislation, as that would require clear and plain Parliamentary intent, which he found to be lacking.[32] But he did suggest that s.88 might authorize the *infringement* of Aboriginal rights. He put it this way:

> Aboriginal right's fall within the ambit of the core values of Indians described above, and to which s.88 has been held to apply. Thus s.88, while not authorizing extinguishment of aboriginal rights, may authorize provincial interference with aborigina1 rights; provincial laws may affect, regulate, diminish, impair or suspend the exercise of an aboriginal right. Of course, the operation of such incorporated laws is subject to s.35 of the *Constitution Act, 1982.*
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> In short, provincial land and resource laws affecting aboriginal rights may be given force as federal laws through the operation of s.88 of the *Indian Act.*[33]

With. all due respect, I think Macfarlane J.A.'s conclusions in

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31 *Dick v. The Queen*, [1985] 2 S.C.R. 309 (hereinafter *Dick*), at 326-28; *Cote*, *supra* note 18, at 191. For critical commentary, see Leroy Little Bear, "Section 88 of the Indian Act and the Application of Provincial Laws to Indians", in J. Anthony Long and Menno Boldt, eds., *Governments in Conflict? Provinces and Indian Nations in Canada* (Toronto: University of Toronto Press, 1988), 175, at 180-87; Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 308, at 368-80.

32 *Delgamuukw* (C.A.), *supra* note 5, at 539.

33 *Ibid*.

this last quotation suffer from two oversights. First of all, if s.88 does not authorize extinguishment of Aboriginal rights because there is no clear and plain Parliamentary intent to that effect, where is the clear and plain intent that s.88 was meant to permit provincial laws to "diminish, impair or suspend the exercise" of Aboriginal rights? Or does the clear and plain test not apply to infringements of Aboriginal rights that fall short of extinguishment?

In his discussion of the test, Macfarlane J.A. related it specifically to extinguishment, without limiting its application to that context. He found the test to be rooted in the well-known presumption against interpreting legislation as interfering with property and other vested rights unless the statute is incapable of any other construction. He relied, for example, on *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board,* where Duff C.J.C. said this:

> A legislative enactment is not to be read as *prejudicially affecting accrued rights,* or *'an existing status*, ... unless the language in which it is expressed requires such a construction. The rule is described by Coke as a 'law of Parliament' .... meaning, no doubt, that it is a rule based on the practice of Parliament; *the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference*.[34]

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34 [1933] S.C.R. 629, at 638, as quoted in *Delgamuukw* (C.A.), *supra* note 5, at 523 (Macfarlane J.A.'s emphasis, references omitted) . See also *Attorney-General for Canada v. Hallet & Carey Ld.,* [1952] A.C. 427 (P.C.) , at 450, also relied on by Macfarlane J.A. For discussion of this rule in the contexts of delegation of legislative and creation of executive authority, see Kent McNeil, "Racial Discrimination and Unilateral Extinguishment

Macfarlane J.A. expressed the view that "the clear and plain test should be applied with as much vigour to aboriginal title as it is to traditional property rights."[35] He found support for this approach in "the special relationship between the Crown and aboriginal people which has existed since the assertion of sovereignty" and the need to uphold "the honour of the Crown".[36] He concluded as follows:

> The clear and plain test, whether applied to vested rights, property rights, or aboriginal rights, ensures respect for and protection of those special rights. Although aboriginal rights cannot be easily described in terms of English property law, they are to be regarded as unique and important. But, like vested rights and property rights, they may be *impaired* or *extinguished* with or without compensation *by a clear and plain exercise of competent legislative power*. However, the legislative intention to do so will be implied only if the interpretation of the statute permits no other result. [37]

From this, there appears to be no reason why the clear and plain test should be applied any less rigorously to infringement than it is to extinguishment of Aboriginal title.[38]

Secondly, by saying that "provincial *land and resource laws*

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of Native Title" (1996) 1 A.I.L.R. 181, at 186-87.

35 *Delgamuukw* (C.A.), *supra* note 5, at 523.

36 *Ibid*., at 523, 524.

37 *Ibid*., at 524-25 (my emphasis).

38 Note that in leading Supreme Court of Canada decisions on S.88 of the *Indian Act*, such as *Kruger v. The Queen*, [1978] 1 S.C.R. 104 (hereinafter *Kruger*) and *Dick*, neither Aboriginal title nor other Aboriginal rights were in issue: see *Dick*, *supra* note 31, at 315. Consequently, the Court has not yet dealt with the question of whether s.88 clearly and plainly authorizes infringements of Aboriginal rights falling short of extinguishment.

affecting aboriginal rights may be given force as federal laws through the operation of s.88",[39] Macfarlane J.A. inferred that s.88 referentially incorporates provincial laws of general application that touch on Aboriginal land rights. In fact, in the many cases involving s.88 that have reached the Supreme Court of Canada, it has never been held that the section has that effect. The Supreme Court specifically avoided the question in *Derrickson v. Derrickson*.[40] Moreover, in *Corporation of Surrey v. Peace Arch* [41] the British Columbia Court of Appeal itself held unanimously that provincial laws relating to use of lands do not apply on Indian reserves, as the use of reserve lands is within exclusive federal jurisdiction over "Lands reserved for the Indians". Section 88 was not even mentioned in the *Peace Arch* decision, presumably because it was not considered to be relevant. It was, however, referred to in *R. v. Isaac*, where MacKeigan C.J.N.S., after relying on *Peace Arch* to conclude that reserve land use comes within exclusive federal jurisdiction, said this:

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39 *Delgamuukw* (C.A.), *supra* note 5, at 539 (my emphasis).

40 [1986] 1 S.C.R. 285 (hereinafter *Derrickson* (S.C.C.)). Notably, in the British Columbia Court of Appeal's unanimous decision that was affirmed by the Supreme Court, it was held that s.88 is inapplicable to Indian lands: *see Derrickson v. Derrickson*, [1984] 3 C.N.L.R. 58 (B.C.C.A.) (hereinafter *Derrickson* (C.A.)), at 61. Also, in *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695 (hereinafter *Cardinal*), at 727, Laskin J. (as he then was), dissenting on other grounds, said that s.88 "deals only with Indians, not with Reserves".

41 (1970), 74 W.W.R. 380 (hereinafter *Peace Arch*), cited with apparent approval in *Cardinal*, *supra* note 40, per Martland J. (for the majority) at 704-05, Laskin J. (dissenting on other grounds) at 718-19.

> Section 88 merely declares that valid provincial laws of general application to residents of a province apply also to Indians in the province. It does not make applicable to Indian reserve land a provincial game law which would have the effect of regulating use of that land by Indians. It does not enlarge the constitutional scope of the provincial law which is limited by the federal exclusivity of power respecting such land.[42]

The reason why s.88 is not generally regarded as including provincial laws relating to land is that the section refers only to the application of provincial laws to Indians, not to Indian lands. When this omission is coupled with the fact that s.91(24) of the Constitution Act, 1867, contains not one but two heads of power -"Indians *and* Lands reserved for the Indians"[43] - the legislative intent seems to have been to limit referential incorporation to provincial laws affecting Indians, and exclude provincial laws touching on Indian lands. This interpretation of s.88 is supported by the well-established rule that statutes affecting Aboriginal

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42 (1975), 13 N.S.R. (2d) 460 (N.S.S.C., App. Div.) (hereinafter *Isaac*) , at 474. For further authority that s.88 only makes provincial laws apply to Indians, not Indian lands, see *R. v. Johns* (1962), 133 C.C.C. 43 (Sask. C.A.), at 47; *Re Park Mobile Homes Sales Ltd. and Le Greely* (1978), 85 D.L.R. (3d) 618 (B.C.C.A.) (hereinafter *Park Mobile Homes*), at 619; *Millbrook Indian Band v. Northern Counties Residential Tenancies Board* (1978), 84 D.L.R. (3d) 174 (N.S.S.C.) (hereinafter *Millbrook Indian Band* (S.C.)), at 181-83, affirmed without reference to s.88, sub nom. *Attorney-General of Nova Scotia v. Millbrook Indian Band* (1978), 93 D.L.R. (3d) 230 (N.S.S.C., App. Div.) (hereinafter *Millbrook Indian Band* (App. Div.); *Palm Dairies Ltd. v. The Queen*, [1979] 2 C.N.L.R. 43 (F.C.T.D.) , (hereinafter *Palm Dairies*) , at 48; *The Queen v. Smith*, [1980] 4 C.N.L.R. 29 (F.C.A.), at 78, reversed on other grounds, without reference to s.88, [1983] 1 S.C.R. 554 (hereinafter *Smith* (S.C.C.)); *R. v. Fiddler*, [1994] 1 C.N.L.R. 121 (Sask. Q.B.) (hereinafter *Fiddler*), at 127-28.

43 *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031 (hereinafter *Four B Manufacturing*), *per* Beetz J. at 1049-50 (Beetz J.'s emphasis).

peoples should be generously and liberally construed, and any ambiguities resolved in their favour.[44] If it contains ambiguity, s.88 should therefore be interpreted so that referential incorporation extends only to provincial laws of general application that affect Indians, not Indian lands.[45]

There is a further reason why the scope of s.88 should be limited as much as possible. As Macfarlane J.A. said, the honour of the Crown is at stake in its dealings with the Aboriginal peoples.[46] How would that honour be upheld by Parliamentary delegation of authority to the provinces to infringe Aboriginal rights through the mechanism of referential incorporation? Would this not be a dishonourable abdication of the responsibility that was placed primarily on the federal government by s.91(24) of the

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44 E.g., see *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at 36; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at 402; *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (hereinafter *Sparrow*), at 1107-08*; Mitchell, supra* note 17, *per* La Forest J. at 142-43, Dickson C.J.C. at 98-100.

45 Academic opinion supports this position: see Kenneth Lysyk, "The Unique Constitutional Position of the Canadian Indian" (1967) 45 Can. Bar Rev. 513, especially 554, and "Constitutional. Developments Relating to Indians and Indian Lands: An Overview", in *Special Lectures of the Law Society of Upper Canada 1978* (Toronto: Richard De Boo Ltd., 1978), 201, at *227* note 49; Patricia Hughes, "Indians and Lands Reserved for the Indians: Off-Limits to the Provinces?" (1983) 21 Osgoode Hall L.J. 82, at 97; Douglas Sanders, "The Constitution, the Provinces, and Aboriginal Peoples", in Long and Boldt, *supra* note 31, 151, at 287 note 14; Little Bear, *supra* note 31, at 187; Robert A. Reiter, *The Law of First Na*tions (Edmonton: Juris Analytica Publishing Inc., 1996), 201.

46 See also *Sparrow*, *supra* note 44, at 1107-09, 1114; *R. v. Badger*, [1996] 1 S.C.R. 771 (hereinafter *Badger*), *per* Cory J. at 794; *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (hereinafter *Van der Peet*), per Lamer C.J.C. at 537.

Constitution Act, 1867?[47] To avoid this result, a generous and liberal interpretation of s.s8, in favour of Aboriginal peoples, would limit referential incorporation to provincial laws that touch on Indianness without infringing Aboriginal rights.[48]

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47 See *supra* note 17. Apparently, a major reason why jurisdiction over "Indians, and Lands reserved for the Indians", was assigned to Parliament in the first place was that the federal government would be further from local interests, and so was thought to be more likely to protect and deal fairly with the Aboriginal peoples (in other words, more likely to uphold the honour of the Crown): see Douglas Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada", in Stanley M. Beck and Ivan Bernier, eds., *Canada and the Constitution: The Unfinished Agenda* (Montreal: Institute for Research on Public No Policy, 1983), vol. 1, 225, at 238; Peter W. Hogg, *Constitutional Law of Canada*, Loose-leaf Ed. (Toronto: Carswell, 1997-), 27-2. Also, empowering the provinces to infringe Aboriginal rights would allow them "to make the federal obligation to Indians more onerous" by diminishing those rights, avoidance of which was one of the reasons Macfarlane J.A. gave for concluding that, at the very least, s.91(24) gives Parliament exclusive jurisdiction over Aboriginal land rights: *Delgamuukw*, *supra* note 5, at 535; see *supra*, text accompanying notes 16-22.

48 This is consistent with Supreme Court decisions in *Kruger*, *supra* note 38, and *Dick, supra* note 31, which involved on provincial laws that were not alleged to infringe Aboriginal rights: see especially *Dick*, at 315. See also *Van der Peet*, supra note 46, at 536-37, where Lamer C.J.C. related the interpretive principle in favour of Aboriginal peoples directly to the honour of the Crown. For an argument that, as a consequence of s.35(l)of the *Constitution Act*, *1982*, s.88 is constitutionally invalid, see Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261, at 284-86. Compare *R. v. Alphonse*, [1993] 4 C.N.L.R. 19 (B.C.C.A.) (hereinafter *Alphonse*), where Macfarlane J.A. held that s.88 is not inconsistent with s.35(l). In a judgment concurred in by Taggart, Hutcheon and Wallace JJ.A., he decided that provincial laws infringing Aboriginal rights (in this case, a game law) can be referentially incorporated by s.88, but only if the infringement is shown to be justified under the *Sparrow* test (which the Crown in that case failed to do). Lambert J.A. , concurring, did not address the issue of the constitutional validity of s.88, as he held that a provincial law that infringes Aboriginal hunting rights is not referentially incorporated by s.88 in any case because the infringement prevents it, in effect, from being a law of general application. Significantly, in his view the intent of s.88 was not

To sum up, Macfarlane J. A. held that s.91(24) gives Parliament exclusive jurisdiction over Aboriginal title lands. This led him to conclude that, since Confederation, the provincial legislatures have had no power to extinguish Aboriginal land rights. Moreover, s.88 of the *Indian Act* did not confer authority on the provinces to extinguish those rights, as that would require a clear and plain intention which is not revealed by s.88. However, Macfarlane J.A. seems to have thought that, at least prior to the enactment of s.35(l) of the *Constitution Act, 1982*, provincial laws of general application, either of their own force or by referential incorporation into federal law by s.88, could infringe Aboriginal land rights without actually extinguishing them. For reasons elaborated above, this appears to be inconsistent with his views on extinguishment. In any event, he did not reach a final conclusion on the matter of infringement, as, in his words:

> The record in this case and the submissions which have been made are not sufficiently specific to permit the detailed and complex analysis which is required. I think the parties are correct in saying that these issues are ripe for negotiation and reconciliation.[49]

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to authorize infringements of Aboriginal rights, but to extend the benefits of provincial legislation to Indians on reserves, which was thought at the time to be prevented by the theory that reserves were enclaves where provincial laws could not apply of their own force:

> It seems to me that the legislative purpose of s.88, when it was enacted [in 1951, as s.87], was to overcome the enclave theory with respect to laws that were broadly general in their application and so to extend to Indians the benefits of social and commercial legislation which were being extended to all other people in the province in enactments dealing with such things as credit, insurance, the family, and the acquisition of goods. [p. 55]

See also *R. v. Dick*, [1993) 4 C.N.L.R. 63 (B.C.C.A.).

49 *Delgamuukw* (C.A.), *supra* note 5, at 533. To this, Macfarlane J.A. added that, where there are competing interests, the various parties whose rights might be affected should be represented.

As mentioned earlier, Lamer C.J.C. , in the leading Supreme Court judgment in *Delgamuukw*, came to virtually the same conclusions as Macfarlane J.A. on the issue of federal and provincial jurisdiction. He discussed this issue in the context of the following question: "Did the province [of British Columbia] have the power to extinguish aboriginal rights after 1871, either under its own jurisdiction or through the operation of s.88 of the *Indian Act*?"[50] To answer this question, he looked first at federal jurisdiction under s.91(24) of the *Constitution Act, 1867*, which, as we have seen, assigned exclusive jurisdiction over "Indians, and Lands reserved for the Indians", to the Parliament of Canada.

Separating that assignment of jurisdiction into its two constituent parts, Lamer C.J.C. examined the meaning of "Lands reserved for the Indians" first. Like Macfarlane J-A., he found the issue of whether those words include lands held by Aboriginal title as well as Indian reserves to have been settled by the Privy Council in the *St. Catherine's* case.[51] Having reached the conclusion that s.91(24) "carries with it the jurisdiction to

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50 *Delgamuukw* (S.C.C.), *supra* note 1, heading after para. 171.

51 *Supra* note 12.

legislate in relation to aboriginal title", the Chief Justice said "[i]t follows, by implication, that it also confers the jurisdiction to extinguish that title."[52] Since that jurisdiction is exclusive, the provinces have no power to extinguish Aboriginal title directly.

The government of British Columbia tried to avoid this result by arguing that, by virtue of s.109 of the *Constitution Act, 1867*, the Crown in right of the province has the underlying title to lands held by Aboriginal title, and that "this right of ownership carried with it the right to grant fee simples which, by implication, extinguish aboriginal title, and so by negative implication excludes aboriginal title from the scope of s.91(24)."[53] Lamer C.J.C. rejected this convoluted argument because it failed to take account of the language of s.109, which he quoted as follows:

> 109. All Lands, Mines, Minerals and Royalties belonging to the several Provinces of Canada ... at the Union ... shall belong to the several Provinces ... subject to any trusts existing in respect thereof, and to any Interest other than that of the Province in the same.[54]

Commenting on this section, the Chief Justice said this:

> Although that provision vests underlying title in provincial Crowns, it qualifies provincial ownership by making it subject to 'any Interest other than that of the Province in the same'. In *St. Catherine's Milling*, the Privy Council held that aboriginal title was such an interest, and rejected the argument that provincial

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52 *Delgamuukw* (S.C.C.), *supra* note 1, at para. 174.

53 *Ibid.*, at para. 175.

54 *Constitution Act, 1867*, *supra* note 10, as quoted in *Delgamuukw* (S.C.C.), *supra* note 1, at para. 175.

> ownership operated as a limit on federal jurisdiction. The net effect of that decision, therefore, was to separate the ownership of lands held pursuant to aboriginal title from jurisdiction over those lands. Thus, although on surrender of aboriginal title the province would take absolute title, jurisdiction to accept surrenders lies with the federal government. The same can be said of extinguishment - although on extinguishment of aboriginal title, the province would take complete title to the land, the jurisdiction to extinguish lies with the federal government.[55]

The significance of this last passage from Lamer C.J.C.'s judgment goes well beyond the issue of jurisdiction to extinguish Aboriginal title. By affirming that Aboriginal title is an interest in land within the meaning of s.109, the Chief Justice made clear that it is a legally-protected property right.[56] So even if the provinces had jurisdiction to extinguish Aboriginal title prior to the enactment of s.35(l) of the *Constitution Act, 1982*, exercise of that jurisdiction would be a violation of the proprietary rights of the holders of that title. In the absence of clear and plain statutory authority, that could not be done by issuance of a Crown grant, as the Crown generally does not have prerogative power to abrogate or derogate from property or other legal rights.[57] Taken to its logical conclusion, the argument of

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55 *Delgamuukw* (S.C.C.), *supra* note 1, at para. 175.

56 Other passages from his judgment confirm this. *E.g.* , see *ibid*., at para. 138: "What aboriginal title confers is the right to the land itself."

57 See William Blackstone, Commentaries on *the Laws of England*, 21st ed. (London: Sweet, Maxwell and Stevens & Norton, 1844), vol. 1, 141-45; *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1973-86), vol. 8 (1974), para. 828; McNeil, supra note 34. It is fundamental to the rule of law that the Crown cannot infringe legal rights without statutory authority: see *Entick v. Carrington* (1765), 19 St. Tr. 1029 (C.P.); *Roncarelli v.*

the British Columbia government would mean that the province could extinguish the real property rights of anyone in British Columbia, simply by granting their lands to someone else.[58]

Duplessis, [1959] S.C.R. 121. This common law protection prevents the Crown from seizing property or otherwise infringing legal rights by act of state within its own dominions: see *Walker v. Baird*, [1892] A.C. 491 (P.C.); *Johnstone v. Pedlar*, [1921] 2 A.C. 262 (H.L.); *Eshugbayi Eleko v. Government of Nigeria*, [1931] A.C. 662 (P.C.), at 671; *Attorney-General v. Nissan*, [1970] A.C. 179 (H.L.); *Buttes Gas v. Hammer*, [1975] Q.B. 557 (C.A.), at 573. Although in times of war the Crown does have extraordinary power to seize private property for defence, that still cannot be done without payment of compensation: see *Burmah Oil Co. v. Lord Advocate*, [1965] A.C. 75 (H.L.), where Lord Reid said at 102 that, "even at the zenith of the royal prerogative, no one thought that there was any general rule that the prerogative could be exercised, even in times of war or imminent danger, by taking property required for defence without making any payment for it".

58 In its Supreme Court of Canada Factum, dated March 30, 1997, cross-appealing on the issue of the province's jurisdiction to extinguish Aboriginal title, at para. 12-17, British Columbia supported its remarkable claim of power to extinguish that title by grant by reference to *United States v. Santa Fe Pacific Ry. Co.*, E 314 U.S. 339 (1941); *Mabo v. Queensland* [No. 2] (1992), 175 C.L.R. 1 (Aust. H.C.); and *Wik Peoples v. Queensland* (1996), 141 A.L.R. 129 (Aust. H.C.). However, examination of American case law, including the *Santa Fe Pacific* case, reveals that, ever since the decision of Marshall C.J. in *Johnson v. M'Intosh*, 8 Wheat. 543 (1823), the position in the United States has been that grants of land held by Aboriginal title do not extinguish that title; rather, they take effect subject to it: see Felix S. Cohen, "Original Indian Title" (1947) 32 Minnesota L. Rev. 28; Kent McNeil, "Extinguishment of Native Title: The High Court and American Law"' (1997) 2 A.I.L.R. 365. As for the *Mabo* and *Wik* decisions, they do support British Columbia's claim, but only by treating Native title in a racially discriminatory way that does not accord it the same common law protection as non-Indigenous land rights in Australia: see McNeil, *supra* note 34. (of course, the *Delgamuukw* decision makes the extinguishment aspect of those Australian decisions inapplicable in Canada for division of powers reasons as well, as provincial statutes containing authority to extinguish Aboriginal title by grant would encroach on exclusive federal jurisdiction: see text accompanying note 52, *supra*, and notes 60-82, *infra.*) Moreover, in its Cross-Appeal Factum the province did not support its claim of power to extinguish Aboriginal title by grant by any post-Confederation statutory authority (I suspect that one would search in vain for legislation in any province that would authorize

Not since *Magna Carta* has the Crown had that kind of power.[59]

But as we have seen, Lamer C.J.C. held in *Delgamuukw* that, since Confederation, the provinces have lacked even the *legislative* authority to extinguish Aboriginal title. In addition to the authority of the *St. Catherine's* decision, the Chief Justice used the same policy argument as Macfarlane J.A., namely that

> …separating federal jurisdiction over Indians from jurisdiction over their lands would have a most unfortunate result - the government vested with primary constitutional responsibility for securing the welfare of Canada's aboriginal peoples would find itself unable to safeguard one of the most central of native interests - their interest in their lands.[60]

Lamer C.J.C. then went on to extend federal jurisdiction over "Lands reserved for the Indians" not just to Aboriginal title, but also to Aboriginal rights in relation to land that fall short of title. An Aboriginal right to fish in a particular location, for example, may be just as fundamental to Aboriginal peoples as title to the land itself, and so exclusive federal jurisdiction must include power to legislate in relation to that kind of right as well.[61]

Having found "Lands reserved for the Indians" to include all

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such arbitrary and unprecedented violations of property rights).

59 Magna Carta, 17 John (1215), c.29, provided that "[n]o Freeman shall ... be disseised of his Freehold ... but by the lawful Judgement of his Peers, or by the law of the Land." As Lord Parmoor stated in *Attorney-General v. De Keyser's Royal Hotel*, [1920] A.C. 508 (H.L.), at 569, "[s]ince Magna Carta the estate of a subject in lands or buildings has been protected against the prerogative of the Crown."

60 *Delgamuukw* (S.C.C.), *supra* note 1, at para. 176.

61 *Ibid*., referring to *Adams*, *supra* note 18.

Aboriginal land rights, Lamer C.J.C. turned to the meaning of "Indians" in s.91(24). While acknowledging that the Court has not had occasion in the past to define the extent of federal jurisdiction over Indians, he said that, "at the very least", it includes a "core of Indianness" which is protected "from provincial intrusion, through the doctrine of interjurisdictional immunity."[62] That core of Indianness, he explained,

> ... encompasses the whole range of aboriginal rights that are protected by s.35(1). Those rights include rights in relation to land; that part of the core derives from s. 91 (2 4)' s reference to 'Lands reserved for the Indians'. But those rights also encompass practices, customs and traditions which are not tied to land as well; that part of the core can be traced to federal jurisdiction over 'Indians'. Provincial governments are prevented from legislating in relation to both types of aboriginal rights.[63]

Because "[1]aws which purport to extinguish those rights ... touch the core of Indianness which is at the heart of s.91(24)," such laws "are beyond the legislative competence of the provinces to enact."[64]

Up to this point, we have been examining the portions of Lamer C.J.C.'s judgment that deal with provincial inability to legislate directly in relation to Indians or Indian lands, or, to put it another way, to single them out for special treatment. He went on to acknowledge, however, that "notwithstanding s.91(24), provincial laws of general application apply *proprio vigore* to Indians and

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62 *Delgamuukw* (S.C.C.), *supra* note 1, at para. 177-78.

63 *Ibid*., at para. 178.

64 *Ibid*.

Indian lands."[65] For example, provincial labour relations laws and traffic laws have been held to apply of their own force on Indian reserves.[66] But the question the Chief Justice said must be answered for the purposes of *Delgamuukw "is* whether the same principle allows provincial laws of general application to *extinguish* aboriginal rights."[67] His answer to this was no, for two reasons.

First, Lamer C.J.C. said that it takes "clear and plain" legislative intent to extinguish Aboriginal rights,[68] and no provincial law could meet that test for extinguishment without crossing the line into federal jurisdiction. He put it this way:

> My concern is that the only laws with the sufficiently clear and plain intention to extinguish aboriginal rights would be laws in relation to Indians and Indian lands. As a result, a provincial law could never, *proprio vigore,* extinguish aboriginal rights, because the intention to do so would take the law outside provincial jurisdiction.[69]

Secondly, the Chief Justice said that "s.91(24) protects a core of federal jurisdiction *even from provincial laws of general application,* through the operation of the doctrine of interjurisdictional immunity. ,[70] Aboriginal rights, he said, "are

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65 *Ibid*., at para. 179.

66 Four B Manufacturing, *supra* note 43; *R. v. Francis*, [1988] 1 S.C.R. 1025.

67 *Ibid*., at para. 180 (my emphasis).

68 See discussion of this test in text accompanying notes 32-38, *supra*.

69 *Delgamuukw* (S.C.C.), *supra* note 1, at para. 180.

70 *Ibid*., at para. 181 (my emphasis).

part of the core of Indianness at the heart of s.91(24)."[71] So even prior to the enactment of s.35(i) of the *Constitution Act, 1982*, those rights "could not be extinguished by provincial laws of general application."[72]

Lamer C.J.C. then turned to s.88 of the *Indian Act* to see whether it authorizes extinguishment of Aboriginal rights by provincial laws of general application through referential incorporation of those laws into federal law. He pointed out that "s.88 does not 'invigorate' provincial laws which are invalid because they are in relation to Indians and Indian lands".[73] What *s.88* does, he explained, is extend "the effect of provincial laws of general application which cannot apply to Indians and Indian lands because they touch on the *Indianness* at the core of s.91(24)."[74] While the reference to Indian lands in these passages might be taken to imply that s.88 makes the included provincial laws applicable to Indian lands as well as to Indians, I think that would be reading much too much into Lamer C.J.C.'s words. We have seen that, although the Court in *Derrickson* left the question of whether s.88 makes provincial laws applicable to Indian lands open,

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71 *Ibid*. Lamer C.J.C. found support for this in his decision in *Van der Peet*, *supra* note 46, in reference to which he said that the Aboriginal rights recognized and affirmed by s.35(l) of the *Constitution Act, 1982*, were described "as protecting the occupation of land and the activities which are integral to the distinctive aboriginal culture of the group claiming the right": *ibid*

72 *Ibid*.

73 *Ibid*., at para. 182 (my emphasis).

74 *Ibid*. (my emphasis), relying on *Dick*, *supra* note 31.

numerous court decisions, including decisions of at least three provincial courts of appeal, have held that the section does not have that effect.[75] It is inconceivable that the Chief Justice intended to overrule those decisions with such vague language, without reference to them and without any discussion of the compelling arguments against such an interpretation.[76]

To the question of whether s.88 authorizes extinguishment of Aboriginal rights by provincial laws of general application, Lamer C.J.C. answered no because the section "does not evince the requisite clear and plain intent" to do that.[77] He concluded his short discussion of this issue by adding:

> I see nothing in the language of the provision which even suggests the intention to extinguish aboriginal rights.

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75 See *supra* notes 40-42 and accompanying text.

76 See *supra*, text accompanying notes 43-45. Also, Lamer C.J.C.'s decision in *Delgamuukw* that Indian lands are not limited to reserves for the purposes of s.91(24) in fact weighs against an interpretation of s.88 that would make provincial laws of general application applicable to those lands. The provisions of the *Indian Act* relating to lands generally apply only to Indian reserves, not to Aboriginal title lands. Moreover, in its application to "Indians" the Act, and hence s.88, applies only to those persons who are within the definition of that term in the Act itself (usually referred to as status Indians); it does not apply. to the whole category of "Indians" in s.91(24), which includes non-status Indians, Inuit, and arguably Metis: see *Hogg*, *supra* note 47, at 27-3 to 27-4, 27-13 note 64; *Alphonse*, *supra* note 48, *per* Macfarlane J.A. at 37-38, Lambert J.A. at 61. Section 88 cannot be interpreted to make provincial laws apply to Indian lands, including Aboriginal title lands, without excluding lands held by Aboriginal peoples like the Inuit who are outside the scope of the Act. This might lead to anomalous and discriminatory results which could be avoided by excluding all Aboriginal lands (including reserves) from the reach of s.88, an interpretation which is fully justified by the omission of any mention of Indian lands in the section.

77 *Delgamuukw*(S.C.C.), *supra* note 1, at para. 183.

> Indeed, the explicit reference to treaty rights in s.88 suggests that the provision was clearly not intended to undermine aboriginal rights.[78]

This passage suggests not only that s.88 does not authorize *extinguishment* of Aboriginal rights, but that it does not authorize *infringement* of those rights either, as that too would "undermine" those rights. As discussed above, this interpretation upholds the honour of the Crown,[79] is consistent with the Court's jurisprudence on the section,[80] and accords both with the general principle that legislative provisions are to be interpreted to preserve vested rights,[81] and with the more specific principle that statutes relating to the Aboriginal peoples are to be construed generously and liberally, and any ambiguities resolved in their favour.[82]

To sum up, on my reading on Lamer C.J.C.'s discussion of federal and provincial jurisdiction over Aboriginal rights, including Aboriginal title and other rights in relation to land, ever since Confederation the provinces have lacked the power not only to extinguish, but also to infringe, those rights. Moreover, s.88 of the *Indian Act*, while making provincial laws of general application apply to Indians by referential incorporation, does not authorize extinguishment of Aboriginal rights. Further, it has been held in numerous cases that s.88 does not make any provincial

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78 *Ibid*.

79 See *supra* notes 46-48 and accompanying text.

80 See *supra* note 48.

81 See *supra* notes 34-38 and accompanying text.

82 See *supra* note 44 and accompanying text.

laws apply to Indian lands, but even if the section did have that effect, it reveals no clear and plain intention to authorize infringement of Aboriginal title, or indeed of any Aboriginal rights, whether in relation to land or not.

However, when Lamer C.J.C.'s discussion of federal and provincial jurisdiction is compared with his discussion of infringement of Aboriginal rights and the test of justification for infringement in the context of s.35(1) of the *Constitution Act, 1982*, 1 think certain inconsistencies emerge. The Chief Justice began his discussion of infringement as follows:

> The aboriginal rights recognized and affirmed by s.35(1), including aboriginal title, are not absolute. Those rights may be infringed, both by the federal (e.g., *Sparrow*) and provincial (e.g., Cote) governments. However, s.35(1) requires that those infringements satisfy the test of justification.[83]

Both Sparrow[84] and *Cote*[85] involved Aboriginal fishing rights, not Aboriginal title to land. In *Cote*, the accused Algonquins were charged, *inter alia*, with entering a controlled harvest zone without paying the fee required for motor vehicle access by Quebec's *Regulation* respecting controlled zones[86] Lamer C.J.C., writing the main judgment, found that the accused had established that they had an existing, site-specific Aboriginal right to fish

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83 *Delgamuukw* (S.C.C.), *supra* note 1, at para. 160.

84 *Supra* note 44.

85 *Supra* note 18.

86 R.R.Q. 1981, Supp., at p.370, O.C. 426-82 (24/02/82), as amended by O.C. 1283-84 (06/06/84), made under An Act *respecting the conservation and development of wildlife*, S.Q. 1983, c.39.

for food within the controlled zone. Turning to the question of infringement, he decided that the provision in question did not infringe that right, as what it imposed was a user fee that was applied to maintain the roads and facilities in the controlled zone, rather than a revenue generating tax. As the fee actually improved transportation within the zone, he found that it "effectively facilitates rather than restricts the constitutional rights of the appellants."[87]

For our purposes, what is interesting - and in my view disturbing - about the *Cote* decision is the ease with which the Chief Justice concluded that the justification test applies to provincial infringements of Aboriginal rights. He dealt with this in the following paragraph:

> In *Sparrow*, the Court set out the applicable framework for identifying the infringement of an aboriginal right or treaty right under s.35(l) of the *Constitution* Act, 1982. It should be noted that the test in *Sparrow* was originally elucidated in the context of a federal regulation which allegedly infringed an aboriginal right. The majority of recent cases which have subsequently invoked the *Sparrow* framework have similarly done so against the backdrop of a federal statute or regulation. See, e.g., *Gladstone*.[88] But it is quite clear that the *Sparrow* test applies where a provincial law is alleged to have infringed an aboriginal or treaty right in a manner which cannot be justified: *Badger*,[89] *supra*, at para. 85 (application of *Sparrow* test to provincial statute which violated a treaty right). The text and purpose of s.35(l) do not distinguish between federal and provincial laws which restrict aboriginal or treaty rights, and they should both be subject to the same standard of constitutional scrutiny.[90]

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87 *Cote*, *supra* note 18, at 189.

88 *R. v. Gladstone*, [1996] 2 S.C.R. 723 (hereinafter *Gladstone*).

89 *Supra* note 46.

90 *Cote*, *supra* note 18, at 185 (footnotes added).

What is missing here is any mention of the question of whether the provinces have constitutional authority to infringe Aboriginal and treaty rights, given exclusive federal jurisdiction over "Indians, and Lands reserved for the Indians".[91] This division of powers question logically precedes the issue of the applicability of the *Sparrow* test, as that test obviously is not available to justify infringements by provincial laws that encroach on federal jurisdiction.[92]

This takes us back to the *Badger* decision, which Lamer C.J.C. relied on for his conclusion in *Cote* that the Sparrow test applies to provincial legislation. In *Badger*, three Treaty 8 Cree Indians were variously charged with hunting moose out of season and without 13 licences, contrary to provisions of the *Alberta Wildlife Act*.[93] They relied on their treaty right to hunt, paragraph 12 of the Alberta Natural Resources Transfer Agreement (hereinafter NRTA),[94]

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91 Note that Lamer C.J.C. did not even mention s.88 of the *Indian Act*, let alone rely on it, in the portion of his judgment dealing with provincial infringement of Aboriginal rights. He did, however, refer to s.88 when he dealt with the issue of a possible treaty right to fish and the protection treaty rights are accorded by the section: see *infra*, text accompanying notes 98-99.

92 See Slattery, *supra* note 48, at 284-85; *Alphonse, supra* note 48, *per* Macfarlane J.A. at 37: s.35(l) analysis "stands as a *separate and subsequent review*, which is properly done after division of powers issues have been resolved" (my emphasis).

93 S.A.1984, c. W-9.1.

94 Schedule (2) to the *Constitution Act*, 1930, 20-21 Geo. V, c. 26 (U.K.), reproduced in R.S.C. 1985, App. II, No. 26. Note that the main purpose of this agreement, like equivalent agreements with

and the constitutional protection accorded to their treaty rights by s.35(l) of the *Constitution Act, 1982*. *A* major issue in the case was whether their treaty right to hunt had been extinguished and replaced by paragraph 12, which provides:

> 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, 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.[95]

Cory J., writing the principal judgment, decided that the treaty right had been modified, but not extinguished, by paragraph 12, and so was recognized and affirmed in 1982 by s.35(l). After finding that this modified treaty right was infringed by the licensing provision of the *Wildlife Act*, he turned to the issue of justification:

> In my view justification of provincial regulations enacted pursuant to the NRTA should meet the same test for justification of treaty rights that was set out in *Sparrow*. The reason for this is obvious. The effect of para. 12 of the NRTA is to place the Provincial government in exactly the same position which the Federal Crown formerly occupied. Thus the Provincial government has the same duty not to infringe unjustifiably the hunting right provided by Treaty No. 8 as modified by the NRTA. [96]

Manitoba and Saskatchewan that were also given constitutional status by the *Constitution Act, 1930*, was to transfer Crown lands and resources from the federal to the provincial governments, thereby putting the three prairie provinces in the same position as the other provinces in this respect.

95 R.S.C. 1985, App. II, No. 26, at 19.

96 *Badger*, *supra* note 46, at 820. For commentary, particularly on the applicability of the justification test to infringements of treaty rights, see Leonard I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test" (1997) 36 Alta. L. Rev. 149.

From this, it is apparent that the reason why Cory J. thought Alberta could avail itself of the *Sparrow* test of justification (unsuccessfully, as it turned out) was that the province had been given specific constitutional authority, by virtue of the NRTA, to legislate with respect to Indian hunting.[97] Absent that kind of

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97 Note, however, that although the NRTA has been in force since 1930 and numerous Supreme Court decisions involving the application of para. 12 have been decided, to my knowledge it had never been suggested by the Court prior to *Badger* that provincial infringements of the rights that are constitutionally guaranteed by that section could be justified: see discussion of the case law in Kent McNeil, *Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada* (Saskatoon: University of Saskatchewan Native Law Centre, 1983), 20-45. On the contrary, in *R. v. Strongquill* (1953), 8 W.W.R. (N.S.) 247 (Sask. C.A.), at 260, Gordon J.A. said, in relation to para. 12 of the Saskatchewan NRTA (which is the same as para. 12 of the Alberta NRTA), that "Indians should be preserved before moose". This passage was cited with approval by Dickson J. (as he then was) in his unanimous judgment in *Kruger*, *supra* note 38, at 112: see *infra*, text accompanying note 99. See also *Prince* and *Myron v. R.,* [1964] S.C.R. 81, where the Supreme Court disregarded the conservation concerns expressed by the majority in the Manitoba Court of Appeal, (1962), 40 W.W.R. 234. Compare *R. v. Horseman*, [1990] 1 S.C.R. 901, where Cory J. referred to conservation in reaching his conclusion that the words "for food" in para. 12 exclude commercial hunting. He did not, however, suggest that conservation could be used to justify infringements of Indian hunting that was for the purpose of obtaining food. On the contrary, at 934 he approvingly quoted and emphasized a statement by Laskin J. (as he then was), in *Cardinal*, *supra* note 40, at 722, regarding the "true effect" of para. 12: "Although inelegantly expressed s.12 does not expand provincial legislative power but contracts it" (query how Cory J. was able to reconcile his decision in *Badger* that provincial infringements of para. 12 rights can be justified with this statement).

The irony of *Badger* is that *constitutional entrenchment* of Aboriginal and treaty rights by s.35(l) of the *Constitution Act*, 1982, has actually resulted in a reduction of the protection

authority, it is difficult to understand how the provinces could have any power to infringe Aboriginal or treaty rights, given exclusive federal jurisdiction under s.91(24) of the *Constitution Act, 1867*. If constitutional authority to infringe those rights is lacking, no justification is possible.

In *Cote*, Lamer C.J.C. pointed out that, in making provincial laws of general application apply to Indians subject, *inter alia*, to the terms of any treaty, s. 88 of the *Indian Act* does not expressly allow for justification of provincial infringements of treaty rights.[98] Ironically, given the Chief Justice's view that the *Sparrow* test is available to justify provincial infringements of Aboriginal and treaty rights under s.35(l) of the *Constitution Act, 1982*, it may be that treaty rights are more fully protected under federal legislation than under the Constitution. But instead of leading Lamer C.J.C. to question the applicability of the justification test to provincial infringements in the context of s.35(l), that anomalous result made him ponder whether an

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accorded to Indian hunting, trapping and fishing rights by para. 12 of the NRTA. This has happened because enactment of s. 35(1) led to creation by the Supreme Court in *Sparrow*, *supra* note 44, of a test to justify infringements of s.35(l) rights. Prior to that, no one seems to have imagined that infringements of the constitutional rights guaranteed by para. 12 could be justified. But the creation of the justification test in Sparrow provided the Court in *Badger* with an opportunity to apply the same test to para. 12, thereby diluting the constitutional protection of the NRTA. For more detailed discussion of the pre-*Badger* case law in relation to this issue, see Kent McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 Queen's L.J. 95, at 126-29.

98 *Cote*, *supra* note 18, at 192.

equivalent test should also be made available under s.88.[99] While leaving the matter open, he suggested that a legislative solution might be appropriate. By taking the decision in *Badger* that the *Sparrow* test is available to justify provincial infringements of treaty rights out of the context of paragraph 12 the NRTA, and extending its availability to provincial legislation generally, Lamer C.J.C. in *Cote* ignored the rationale Cory J. gave for making the test available in *Badger*. Without the kind of specific constitutional authority provided by paragraph 12, provincial infringements of

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99 If made available by the Court, that would involve rejecting the view expressed by Dickson J. in *Kruger*, *supra* note 38, at 112, in relation to s.88, that if it could be shown that

> …the Province has acted in such a way as to oppose conservation and Indian claims to the detriment of the latter - to 'preserve moose before Indians' in the words of Gordon J.A. in *R. v. Strongquill* [*supra* note 97] - it might very well be concluded that the effect of the legislation is to cross the line demarking laws of general application from other enactments.

See also *Alphonse,* supra note 48, per Lambert J.A. at 60.

Moreover, in *Simon v. The Queen,* [1985] 2 S.C.R. 387, at 413, Dickson J. (as he then was), for a unanimous Court, explicitly rejected the application of provincial game laws that were for the purpose of conservation to an Indian who was exercising his treaty own right to hunt in Nova Scotia, as

> ... it is clear that under s.88 of the *Indian Act* provincial legislation cannot restrict native treaty rights. If conflict arises, the terms of the treaty prevail.

In *Badger*, *supra* note 46, at 818-19, Cory J. quoted this passage, and then distinguished *Simon:*

> The *Simon* case dealt with Provincial regulations which the government attempted to justify under s.88 of the *Indian Act*. By contrast, in this case, para. 12 of the NRTA specifically provides that the provincial government may make regulations for conservation purposes, which affect the Treaty rights to hunt.

So while Cory J. was willing to extend the application of the justification test to provincial laws in the context of the NRTA, he acknowledged its inapplicability in the context of s.88.

Aboriginal and treaty rights should be *ultra vires*. This conclusion seems even more evident since Lamer C.J.C. decided in *Delgamuukw* that "aboriginal rights are part of the core of Indianness at the heart of s.91(24)11 of the *Constitution Act, 1867*."[100] As he concluded from this that, even prior to 1982, "they could not be extinguished by provincial laws of general application",[101] they should not be infringeable by provincial legislation either because that would also encroach on exclusive federal jurisdiction.

With all due respect, it seems to me that in *Delgamuukw* Lamer C.J.C. did not really have his own views on exclusive federal jurisdiction in mind when he wrote the part of his judgment dealing with infringement of Aboriginal title. After making the general statement quoted above on infringement by federal and provincial governments,[102] he looked at the components of the justification test itself. The test has two parts. First, the government attempting to justify the infringement must show it to be "in furtherance of a legislative objective that is compelling and substantial."[103] Secondly, the infringement must be "consistent with the special fiduciary relationship between the Crown and

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100 *Delgamuukw* (S.C.C.), *supra* note 1, at para. 181.

101 *Ibid*.

102 See *supra*, text accompanying note 83.

103 *Delgamuukw* (S.C.C.), *supra* note 1, at para. 161.

aboriginal peoples."[104] The Chief Justice discussed both parts of the test in a general way in the context of the *Sparrow*[105] and *Gladstone*[106] decisions, both of which involved infringement of Aboriginal fishing rights by federal legislation. He then said that "[t]he general principles governing justification laid down in *Sparrow*, and embellished by *Gladstone*, operate with respect to infringements of aboriginal title."[107]

In regard to the application of the first part of the test to infringements of Aboriginal title, Lamer C.J.C. stated:

> In the wake of Gladstone, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the

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104 *Ibid*., at para. 162. How any infringement of Aboriginal rights can be consistent with the fiduciary relationship is puzzling, as it seems to involve violation of the basic principle that a fiduciary is bound to act in the best interests of the person(s) to whom the fiduciary duty is owed. Perhaps the explanation is that the Crown has other obligations (e.g., to the Canadian public generally) that can conflict with the duty owed to Aboriginal peoples, so the duty has to be tempered for that reason. This is achieved in part by describing the Crown/Aboriginal relationship as *sui generis* (see *Guerin v. The Queen,* [1984] 2 S.C.R. 335 (hereinafter *Guerin*), *per* Dickson J. at 385, 387), permitting the courts to apply fiduciary principles with flexibility. For discussion of conflict of interest and the *sui generis* nature of the relationship, see Leonard Ian Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996), at 264-72. See also John Borrows and Leonard I. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does It Make a Difference?" (1997) 36 Alta. L. Rev. 9. For a pre-*Delgamuukw* (S.C.C.) discussion of the justification test, see Kent McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples be Justified?" (1997) 8:2 Constitutional Forum 33.

105 *Supra* note 44.

106 *Supra* note 88.

107 *Delgamuukw* (S.C.C.), *supra* note 1, at para. 165.

> prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that 'distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community' *([Gladstone,]* at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis."[108]

For the purposes of this article, what is remarkable about this passage is that most of the activities mentioned - things like agriculture, forestry and mining - are primarily within provincial jurisdiction by virtue of the constitutional division of powers. With respect, the Chief Justice seems to have assumed that British Columbia (and so the other provinces as well) has constitutional authority to infringe Aboriginal title for these kinds of purposes, without considering whether that authority is consistent with the conclusion reached elsewhere in his judgment that the Canadian Parliament has exclusive jurisdiction over Aboriginal title.

This discrepancy is all the more glaring when account is taken of Lamer C.J.C.'s description of Aboriginal title in *Delgamuukw*. He began his discussion of this by affirming that Aboriginal title *is sui generis,* in the sense that it is unlike other interests in land recognized by the common law. Its uniqueness stems in part from its dual source in occupation of land prior to assertion of

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108 *Ibid*.

British sovereignty and in pre-existing systems of Aboriginal law. As a result,

> ... its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives.[109]

Two *sui generis* features of Aboriginal title mentioned by the Chief Justice are its inalienability, other than by surrender to the Crown,[110] and its communal nature. Regarding the latter, he said:

> Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community.[111]

Turning to the actual content of Aboriginal title, the Chief Justice said that it can be summarized by two propositions. First, "aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures."[112] Where Aboriginal title is concerned, he thus modified the test he laid out in *Van der Peet,* by which other Aboriginal rights are limited to practices, customs and traditions

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109 *Ibid*., at para. 112.

110 *Ibid*., at para. 113. As we have seen, Lamer C.J.C. made clear that jurisdiction to accept surrenders lies with the federal government: see supra, text accompanying note 55.

111 *Ibid*., at para. 115. For discussion of the relationship between the communal nature of Aboriginal title and self-government, see "Aboriginal Rights in Canada", *supra* note 2.

112 *Delgamuukw* (S.C.C.), *supra* note 1, at para. 117.

integral to the distinctive Aboriginal culture in question.[113] Secondly, there is an inherent limit on Aboriginal title that prohibits use of the land "in an manner that is irreconcilable with the nature of the attachment to the land which forms the basis of the group's claim to aboriginal title."[114] This restriction is designed to maintain the continuity of an Aboriginal community's relationship with its lands in the future. In Lamer C.J.C.'s words, "uses of the lands that would threaten that future relationship are, by their very nature, excluded from the content of aboriginal title."[115] However, he emphasized that this is not

> ... a limitation that restricts the use of the land to those activities that have traditionally been carried out on it. That would amount to a legal straitjacket on aboriginal peoples who have a legitimate legal claim to the land. The approach I have outlined above allows for a full range of uses of the land, subject only to an overarching limit, defined by the special nature of the aboriginal title in that land.[116]

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113 *Van der Peet*, *supra* note 46. For commentary, see John Borrows, "The Trickster: Integral to a Distinctive Culture', (1997) 8:2 Constitutional Forum 27; Leonard I. Rotman, "Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism and Fiduciary Rhetoric in *Badger* and *Van der Peet*" (1997) 8:2 Constitutional Forum 40, and "Creating a Still-Life Out of Dynamic Objects: Rights Reductionism at the Supreme Court of Canada" (1997) 36 Alta. L. Rev. 1; Janice Gray, "O Canada! - *Van der Peet* as Guidance on the Construction of Native Title Rights" (1997) 2 A. I.L.R. 18; Kelly Gallagher-Mackay, "Interpreting Self -Government: Approaches to Building Cultural Authority" [1997] 4 C.N.L.R. 1; Russel Lawrence Barsh and James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993; Kent McNeil, "Reduction by Definition: The Supreme Court's Treatment of Aboriginal Rights in 1996" (1997) 5: 3 & 4 Canada Watch 60; "What's the Connection?", *supra* note 2; "Aboriginal Rights in Canada", *supra* note 2.

114 *Delgamuukw*, *supra* note 1, heading after para. 124.

115 *Ibid*., at para. 127.

116 Ibid., at para. 132.

It is not my intention in this article to analyze the Chief Justice's general description of Aboriginal title.[117] Instead, I want to focus on his conclusion that "aboriginal title encompasses the right to exclusive use and occupation of the land".[118] The inherent limit described above may place some restrictions on the *range of uses* the holders of Aboriginal title may make of their lands, but it does not diminish the *exclusivity* of their right to use and occupation.[119] Because their right is exclusive, no one else has the right to use or occupy their lands. As Lamer C.J.C. said, "[e]xclusivity, as an aspect of aboriginal title, vests in the aboriginal community which holds the ability to exclude others from the lands held pursuant to that title."[120] So any intrusion on their lands, unless authorized by law, would be a violation of their rights and an actionable trespass.

The Chief Justice nonetheless said that this right to exclusive use and occupation can be intruded on by governments, as long as this can be justified under the *Sparrow* test. It needs to

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117 For a preliminary look at this, see "Aboriginal Rights in Canada", *supra* note 2.

118 *Delgamuukw* (S.C.C.), *supra* note 1, at para. 117: see *supra*, text accompanying note 112.

119 To give an analogy, nuisance and zoning laws restrict the uses that fee simple landholders may make of their lands, but do not affect the exclusivity of their right to use and occupation.

120 *Delgamuukw* (S.C.C.), *supra* note 1, at para. 155. See also para. 158: "Exclusive possession is the right to exclude others."

be kept in mind that what he is envisaging here is infringement, not just of property rights, but of property rights that are constitutionally protected by s.35(1) of the *Constitution Act, 1982*. He nonetheless suggested that "conferral of fee simples for agriculture, and of leases and licences for forestry and mining", may be justifiable infringements of Aboriginal title if they "reflect the prior occupation of aboriginal title lands".[121] This implies that governments can justifiably infringe Aboriginal title by creating private interests in land that are inconsistent with Aboriginal titleholders' rights to exclusive use and occupation. With all due respect, this flies in the face of the protection the common law has always accorded to property rights, and makes the constitutionalization of Aboriginal title by s.35(1) virtually meaningless.[122]

When exclusive federal jurisdiction in relation to Aboriginal

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121 *Ibid*., at para. 167.

122 Aboriginal title has constitutional protection that is not enjoyed by non-Aboriginal property rights in Canada, and so it should be much more secure against government interference. But even apart from its constitutional status, Aboriginal title is, entitled to the legal protection against infringement accorded to all property rights by the common law: see McNeil, *supra* note 34, especially 182-90. Indeed, at least since *Magna Carta* property has been a fundamental common law right: see *supra* notes 57, 59. Undoubtedly, there would be a public outcry in British Columbia if the legislature attempted to make a law authorizing the taking of privately-owned lands by conferral of fee simple interests on other individuals or of forestry or mining leases on private corporations (this would require clear and plain legislation: see *supra*, text accompanying notes 34-38). And yet Lamer C.J.C. seems to think this would be acceptable where Aboriginal title is concerned, despite the fact that it has constitutional protection not enjoyed by other property rights. While this vital issue cannot be discussed further here, I plan to pursue it in an upcoming paper.

title is combined with Lamer C. J. C.' s description of the content of that title as the right to exclusive use and occupation, provincial authority to infringe Aboriginal title seems to be excluded. In *Derrickson,*[123] the Supreme Court was faced with the issue of whether the provisions of Part 3 of the British Columbia *Family Relations Act*[124] relating to division of family assets apply to lands on an Indian reserve. The appellant argued that "the pith and substance of the *Family Relations Act is* the division of matrimonial property, not the use of Indian lands", and that the Act "in no way encroaches an the exclusive federal jurisdiction as to the use of Indian lands."[125] Chouinard J., for the Court, rejected this argument. He expressly agreed with the following statement which he quoted from the Attorney General of Canada's factum:

> In essence, Part 3 of the *Family Relations Act* is legislation which regulates who may *own or possess land* and other property. Its true nature and character is to regulate *the right to the beneficial use of property* and its revenues and the disposition thereof.[126]

He accordingly held that the provisions of that Part, though of general application, could not apply of their own force to reserve lands, as the "right to possession of lands on an Indian reserve is manifestly of the very essence of the federal exclusive legislative

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123 (S.C.C.), *supra* note 40.

124 R.S.B.C. 1979, c.121.

125 *Derrickson* (S.C.C.), *supra* note 40, at 294.

126 *Ibid*., at 295 (my emphasis).

power under s.91(24) of the *Constitution Act, 1867*."[127]

By holding that Aboriginal title amounts to a right of exclusive use and occupation and that Aboriginal title lands are "Lands reserved for the Indians" for the purposes of s.91(24), the *Delgamuukw* decision has extended the application of *Derrickson* to those lands. So any provincial legislation which regulates "the right to the beneficial use of property" or "who may own or possess land"[128] cannot apply of its own force to Aboriginal title lands. Moreover, provincial laws that do not purport to transfer rights of use or occupation, but do limit the ways property owners can use their lands, have to be read down as well so that they do not apply to Aboriginal title lands. In the *Peace Arch* decision, referred to earlier, the British Columbia Court of Appeal held that zoning bylaws and building codes made by a municipality under provincial statutory authority, and regulations made under the provincial Health Act,[129] "are directed to the use of land."[130] MacLean

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127 *Ibid*., at 296. Chouinard J. went on to consider whether s.88 of the Indian Act referentially incorporated the provisions, and held that it did not, as they conflicted with provisions of the *Indian Act* relating to possession of reserve lands (as we have seen, he did not decide whether s.88 even extends to provincial laws relating to land: see *supra* notes 40-45 and accompanying text). See also *Paul v. Paul*, [1986] 1 S.C.R. 306. For commentary, see Richard H. Bartlett, "Indian Self-Government, the Equality of the Sexes, and Application of Provincial Matrimonial Property Laws" (1986) 5 Can. J. Fam. L. 188; Mary Ellen Turpel, "Home/Land" (1991) 10 Can. J. Fam. L. 17.

128 *Ibid*., at 295: see *supra*, text accompanying note 126.

129 R.S.B.C. 1960, c.170.

130 *Peace Arch*, *supra* note 41, at 383. Compare *Brantford (Township) v. Doctor*, [1996] 1 C.N.L.R. 49 (Ont. Gen. Div.), where Kent J. distinguished *Peace Arch*, and applied provisions of the

J.A., for the Court, said that it follows from this,

> ... if these lands are 'lands reserved for the Indians' within the meaning of that expression as found in sec. 91(24) of the *B.N.A. Act, 1867* [now the *Constitution Act, 1867],* that provincial or municipal legislation purporting to regulate the use of these 'lands reserved for the Indians' is an unwarranted invasion of the exclusive legislative jurisdiction of Parliament to legislate with respect to 'lands reserved for the Indians'.[131]

Peace Arch was cited with apparent approval by the Supreme Court in *Cardinal*,[132] *and* was applied by the British Columbia Court of Appeal in its decision in *Derrickson*.[133]

Other cases since *Peace Arch* have affirmed that provincial laws of general application relating to use of land cannot apply to lands that are under exclusive federal jurisdiction by virtue of

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Building Code Act, S.O. 1992, c. 23, and regulations thereunder, requiring building permits and regulating swimming pools, to Indian lands. Under the heading "Public Policy", at 53, he said:

> The societal interest sought to be protected by the provincial legislation is the safety and health of all inhabitants of the province .... There should be no enclave where some persons are left unprotected because others are not required to comply with codified safe and healthy building and construction practices. The *legislation applies directly and specifically to conduct. It only incidentally relates to land.* [my emphasis]

This decision is justifiable if the legislation, in pith and substance, is in relation to safety and health rather than use of land: see *infra* notes 139-45 and accompanying text. However, Kent J.'s decision to that effect is debatable, and seems to me to be inconsistent with *Peace Arch*.

131 *Peace Arch*, *supra* note 41, at 383.

132 See *supra* note 41. See also *Smith* (S.C.C.), *supra* note 42, at 565-67.

133 *Derrickson* (C.A.), *supra* note 40, affirmed *Derrickson supra* note 40.

s.91(24).[134] For instance, in *R. v. Isaac*[135]. the Nova Scotia

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134 *Western Industrial Contractors Ltd. V. Sarcee Developments Ltd.* (1979), 98 D.L.R. (3d) 424, might appear to be an exception. In that case, a two to one majority of the Alberta Supreme Court, Appellate Division, held that provincial builders' lien legislation applied to a leasehold held by an Indian-owned corporation on a reserve, permitting a contractor to file a lien against the leasehold. The majority decided that, as the corporation was not an "Indian" within the meaning of the *Indian Act*, the provincial legislation applied to the *leasehold interest*, which was held not to be Indian land within the scope of s.91(24). However, the legislation could not apply to the *Indian band's reversionary interest,* as that was still Indian land under exclusive federal jurisdiction. While *Peace Arch* was cited and lamely distinguished because the legislation in question there no related to land use, the two decisions do seem to be inconsistent with one another, as *Peace Arch* also involved a leasehold interest in reserve lands held by two non-Indian corporations. The *Sarcee* decision has been described as "controversial" and "legally very doubtful": Sanders, *supra* note 45, at 157; moreover, it also appears to conflict with *Palm Dairies, supra* note 42. But in any case, the application of *Sarcee* is limited in two important respects: (1) it only applies where a *non-Indian* holds an interest in Indian land, and (2) given that *Peace Arch* was distinguished because it involved land use, apparently *Sarcee* is inapplicable where the provincial legislation relates to use of Indian land, even by a non-Indian leaseholder.

Compare *Re Stony Plain Indian Reserve* No. 135, [1982] 1 C.N.L.R. 133 (hereinafter *Re Stony Plain*), where the Alberta Court of Appeal considered both *Peace Arch* and *Sarcee* at 149-50, and, while expressing "some difficulty" with the conclusion in the former case regarding the inapplicability of provincial laws to the leasehold, said that, "[i]nsofar as the *Peace Arch* decision recognized that provincial legislation relating to use could be inapplicable as inconsistent with the reversionary interest [held by the Indian band], we express no disagreement." The Court added at 151 that "[w]e accept the general proposition that provincial legislation relating to use of reserve lands is inapplicable to lands that are found to be reserved for Indians". As authority, the Court cited *Cardinal, supra* note 40, at 705, where Martland J., referring to *Peace Arch* with apparent approval, said that "[o]nce it was determined that the lands remained lands reserved for the Indians, Provincial legislation relating to their use was not applicable." See also *Paul v. Paul*, [1985] 2 C.N.L.R. 93 (B.C.C.A.), (affirmed *Paul* (S.C.C.), *supra* note 127), where Seaton J.A., at 97, used this same quotation from *Cardinal* to support his decision that s.77 of the *Family Relations Act*, R.S.B.C. 1979, c.121, whereby an interim order can be made for exclusive occupation of a matrimonial home, does not apply on an Indian reserve because such an order gives "a right of occupancy" and

Supreme Court, Appeal Division, relied on *Peace Arch* to conclude that the Canadian Parliament has exclusive jurisdiction over Indian hunting on reserves because hunting is a use of the land. MacKeigan C.J.N.S. elaborated as follows on the meaning of use of land:

> To shoot a rabbit, deer or grouse on land, especially Indian reserve land, is as much a use of that land as to cut a tree an that land, or to mine minerals, extract oil from the ground, or farm that land, or, as in the *Peace Arch* case, *supra*, erect a building on that land - all of which are activities unquestionably exclusively for the federal government to regulate.[136]

"deals with the use of land", which are matters of exclusive federal jurisdiction.

135 *Supra* note 42.

136 *Ibid*., at 469. For commentary on *Isaac*, see McNeil, *supra* note 97, at 14-17. Compare *Francis, supra* note 66, at 1028, where La Forest J. said that "[i]n *Kruger v. The Queen*, [1978] 1 S.C.R. 104, this Court held that general provincial legislation relating to hunting applies on reserves, a matter which is obviously far more closely related to the Indian way of life than driving motor vehicles" (my emphasis) . This is a puzzling statement, as in *Kruger* the accused were in fact hunting off their reserve (see p. 106, as well as p. 111, from which it appears that the fact they were hunting off their reserve was relevant to the decision), and the provincial game law in question was held to apply to them as a result of s.88 of the Indian Act. Moreover, La Forest J.'s *obiter* statement is hard to reconcile with *Cardinal, supra* note 40, which he also relied on. In *Cardinal* Martland J. held that, as provincial game laws that did not relate to Indians *qua* Indians would have applied of their own force to Indians *off reserves* prior to the enactment of para. 12 of the NRTA in 1930, in order to achieve the paragraph's purpose of securing the continuance of the supply of game for the Indians' support and subsistence the federal government "agreed to the imposition of Provincial controls over hunting and fishing, which, previously, the Province might not have had the power to impose" (p. 708). He accordingly decided that para. 12 had the effect of making provincial game laws apply to *Indians on reserves* in Alberta, subject to the proviso that the province cannot interfere with their right to hunt and fish for food on reserve lands, as those are lands to which they have a right of access within the meaning of para. 12.

However, not every activity conducted on reserve land is a use of the land that will attract exclusive federal jurisdiction under s.91(24). For example, in *Four B Manufacturing*[137] a majority of the Supreme Court held that a business which made shoes, although conducted in a building on a reserve, was subject to the Ontario *Labour Relations Act*[138] This is because the making of shoes is not a use of land as such, nor are provincial laws governing employer-employee relations generally directed at land use.[139] So provincial laws can apply on Indian lands, as long as they not in pith and substance in relation to land.[140] Thus, in *R. v. Francis* La Forest J., for a unanimous Court, held that, "in the absence of conflicting federal legislation, provincial motor vehicle laws of general application apply *ex proprio vigore* on Indian reserves."[141] Obviously, in pith and substance such laws relate to the safe operation of motor vehicles, not to land use. The main issue to be resolved, therefore, in determining the applicability of provincial laws of general application on Indian reserves is

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137 *Supra* note 43.

138 R.S.O. 1970, c.232.

139 This meant that the provincial legislation did not encroach on federal jurisdiction over "Lands reserved for the Indians". But the majority held as well that there was no encroachment either on federal jurisdiction over the other subject matter in s.91(24), namely "Indians", as the legislation did not touch on "Indianness" or Indian status.

140 And as long as they are not in relation to Indians: see *supra*, text accompanying notes 24, 62-63, 69-73; Cardinal, *supra* note 40, per Martland J. at 703; *Four B Manufacturing, supra* note 43, per Beetz J. at 1048-49.

141 *Francis, supra* note 66, at 1028.

whether or not those laws are in relation to land. If not (and as long as they do not touch on "Indianness"[142]) , they will apply there of their own force .[143] But if they are in relation to land - especially if they relate to use or occupation of land - they will not apply to reserve lands.[144] On this, the cases examined

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142 See *supra*, text accompanying notes 31, 71-74.

143 See *Rempel Brothers Concrete Ltd. V. Chilliwack (District)* (1994), 88 B.C.L.R. (2d) 209 (B.C.C.A.), at 214, where Hinkson J.A., for the Court, held that a municipal by-law, regulating soil removal and deposit in order to pay for damage to roads caused by trucks moving the soil, applies on an Indian reserve because it "has only an incidental effect, if any, on Indian lands", and does not "regulate use of land". In *Fiddler*, *supra* note 42, Noble J. held that starting a fire on an Indian reserve does not affect Indianness or amount to a use of the land, accordingly, *the Prairies and Forest Fires Act,* S.S. 1982-83, c. P-22.1, applies *ex proprio vigore* to an Indian who starts a fire on a reserve in contravention of the Act, which "is clearly a safety law" (p. 127). Compare *R. v. Sinclair*, [1978] 6 W.W.R. 37 (Man. Prov. Ct.), where the opposite conclusion was reached with respect to equivalent Manitoba fire-prevention legislation.

144 *Derrickson* (S.C.C.), *supra* note 40; *Paul*, *supra* note 127; *Peace Arch, supra* note 41; *Isaac*, *supra* note 42; *Palm Dairies*, *supra* note 42; *Re Stony Plain, supra* note 134. See *also Millbrook Indian Band* (S.C.), *supra* note 42 (affirmed Millbrook Indian Band (App. Div.), supra note 42, without dealing with the constitutional issue), where Morrison J., relying on *Peace Arch* and *Isaac*, held that the *Residential Tenancies Act*, 1970 (N.S.), c.13, is in relation to use of land, and so does not apply on Indian reserves. Compare *Park Mobile Homes, supra* note 42, where Farris C.J.B.C.,. for the Court, held that a provision of the *Landlord and Tenant Act*, 1974 (B.C.), c.45, restricting the right of a landlord to raise rent for residential premises, applies to rental of a mobile home pad on an Indian reserve. The Chief Justice distinguished *Peace Arch* because the legislation in question in that case related to use of land, whereas he found that the specific provision in question in the case before him did not. For informative discussion of what use of land means in this context, see *Hughes*, *supra* note 45, at 97-103.

Obviously, provincial laws that are specifically directed at Indian lands, and so not of general application, will not just be *read down* to make them inapplicable to those lands (which is what the courts did in the above case where provincial laws of general application were found to relate to use or occupation of lands),

above are all in agreement.[145]

Since the decision of the Supreme Court in *Delgamuukw*, the case law involving the applicability of provincial laws on reserves relates equally to Aboriginal title lands. In *Delgamuukw*, Lamer C.J.C. agreed with Dickson J.'s holding in *Guerin* that the same legal principles govern the Aboriginal interest in reserve lands and Aboriginal title lands, as that interest "is the same in both cases".[146] As we have seen, that interest is "the right to the land itself", which "encompasses the right to exclusive use and

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but will be struck down as *ultra vires*. In *Hopton v. Pamajewon*, [1994] 2 C.N.L.R. 61, leave to appeal refused, *sub nom*. *Attorney-General for Ontario v. Pamajewon*, [1994] 2 S.C.R. v., the Ontario Court of Appeal unanimously held that s.257 of the Municipal Act, R.S.O. 1980, c.302, providing, *inter alia*, that "all roads passing through Indian lands are common and public highways",

> ... cannot mean that roads on or passing through Indian lands become public highways by the simple operation of that section. This would be legislation in relation to a matter coming within the exclusive legislative authority of Parliament and, as such, would be *ultra vires*. Section 257 of the *Municipal Act* can do no more than declare public highways for valid provincial purposes roads that have become public highways pursuant to the provisions of the *Indian Act* by surrender to the Crown and transfer of administration and control of the land to the province. [p. 70]

145 The only discrepancies I have found in the case law are over whether a leasehold interest held by a non-Indian on a reserve is to be classified as "Land reserved for the Indians" (see *supra* note 134), and whether a provincial law is to be characterized as a law in relation to land or in relation to some other matter, such as safety or health (see *supra* notes 130, 143, 144). But once land is classified as reserve land, and a provincial law is characterized as a law in relation to land, the law undoubtedly cannot apply to that land. Moreover, in no case that I am aware of has s.88 of the Indian Act been used to make such a law apply to Indian land: for discussion of s.88, see *supra* notes 30-48, 73-82, and accompanying text.

146 *Delgamuukw* (S.C.C.), *supra* note 1, at para. 120, quoting from *Guerin, supra* note 107, at 379.

occupation of the land".[147] Moreover, the federal Parliament has the same exclusive jurisdiction over both Indian reserves and Aboriginal title lands.[148] As Lamer C.J.C. said in *Delgamuukw*, the "vesting of exclusive jurisdiction with the federal government over Indians and Indian lands under s.91(24), operates to preclude provincial laws in relation to those matters."[149] This is precisely what was said in *Derrickson, Peace Arch*, and *Isaac* about the applicability of provincial laws on reserves.[150] So with respect to the application of provincial laws, as with the nature of the Aboriginal interest, reserve lands and Aboriginal title lands are in the same position - they both enjoy identical constitutional division of powers protection against provincial legislation.[151]

CONCLUSIONS

The *Delgamuukw* decision clarified that federal jurisdiction over "Lands reserved for the Indians" extends to Aboriginal title lands. Moreover, Lamer C.J.C. held that this jurisdiction, because

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147 *Delgamuukw* (S.C.C.) , *supra* note 1, at para. 138, 117, respectively: see *supra* notes 56, 112.

148 *Ibid*. , at para. 174-76: see *supra*, text accompanying notes 51-61.

149 *Ibid*., at para. 179.

150 It accords as well with the other cases cites *supra* in notes 134, 143-44.

151 Due to the doctrine of paramountcy, however, provisions of the *Indian Act* may provide additional statutory protections to reserve lands that are not enjoyed by Aboriginal title lands.

it is exclusive, prevents provincial laws from extinguishing Aboriginal title, either directly or indirectly. This is because *s.91(24)* of the *Constitution Act, 1867,* "protects a core of federal jurisdiction even from provincial laws of general application, through the operation of the doctrine of interjurisdictional immunity."[152] As aboriginal rights, including Aboriginal title, are "part of the core of Indianness at the heart of *s.91(24)* ", even prior to their recognition and affirmation by s.35(l) of the *Constitution Act, 1982,* "they could not be extinguished by provincial laws of general application."[153]

But given that Aboriginal title is at the heart of federal jurisdiction along with other Aboriginal rights, and so is *inextinguishable* by provincial legislation, it should be *uninfringeable* by provincial legislation as well. Provincial laws infringing Aboriginal title might encroach less upon federal jurisdiction than laws resulting in extinguishment, but they would encroach nonetheless because the infringement would touch upon the core of Indianness at the heart of *s.91(24).*[154] They should therefore be inapplicable to Aboriginal title lands. This conclusion is solidly supported by *Derrickson* and numerous other cases that have held that provincial laws in relation to land do

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152 *Delgamuukw* (S.C.C.) , *supra* note 1, at para.181: see *supra,* text accompanying notes 62-72.

153 *Ibid.*

154 Even provincial *laws that have not been shown to infringe an Aboriginal right* cannot apply of their own force to regulate Indian hunting if that would impair Indianness: see *Dick, supra* note 31.

not apply to "Lands reserved for the Indians", even if those laws are of general application. So provincial laws do not have to be *directed at those lands* to be inapplicable to them - as long as they are *in relation to land,* and particularly if they affect use or occupation of it, they cannot apply to "Lands reserved for Indians" without encroaching on exclusive federal jurisdiction. Moreover, this conclusion was reached in *Derrickson* and other cases where no infringement of Aboriginal title or other Aboriginal rights was even alleged. So if a provincial law is in relation to land *and* infringes Aboriginal title, there is a two-fold reason for excluding the application of that law. As a result, in areas of the provinces where Aboriginal title can be proven to exist today, provincial laws in relation to land are inapplicable, especially to the extent that they infringe Aboriginal title.

Logically, this division of powers analysis precedes consideration of the issue of whether infringements of Aboriginal title can be justified. If the provinces have no jurisdiction to infringe Aboriginal title, they obviously cannot justify infringements by resorting to the *Sparrow* test. In other words, that test is simply not available to justify provincial infringements of Aboriginal title that are unconstitutional because they offend the division of powers by encroaching on exclusive federal jurisdiction. So the part of Lamer C.J.C.'s judgment in *Delgamuukw* relating to justification of infringements of Aboriginal title cannot apply to provincial legislation. Justification is only available to a legislature having constitutional authority

over Aboriginal title, and under our Constitution the only legislature with that authority is the Parliament of Canada.

The implications of these conclusions for the distribution of federal-provincial powers in provinces like British Columbia with large, unsettled Aboriginal land claims are obviously enormous. Exclusive federal jurisdiction over Aboriginal title lands means that provincial jurisdiction in areas that are subject to that title is severely limited. The provinces are barred not only from infringing and extinguishing Aboriginal title, but also from regulating the use of those lands by laws of general application. In concrete terms, this means that the provinces cannot derogate from Aboriginal title by granting interests in land, or even licences for resource extraction, to third parties. Nor can the provinces undertake developments of their own, such as hydroelectric projects, on Aboriginal title lands. Those kinds of activities would clearly violate the Aboriginal titleholders' right of exclusive use and occupation. Even laws like zoning regulations that place restrictions on the uses that can be made of land or building codes that regulate the manner in which particular uses are carried out appear to be inapplicable. The only provincial laws that could touch on Aboriginal title lands without violating federal jurisdiction would be laws that, in pith and substance, were in relation to a provincial area of jurisdiction other than land and did not otherwise impair the status and capacity of Aboriginal peoples.

While these conclusions may appear startling, they are the

logical result of a string of judicial decisions, culminating in *Delgamuukw*. Moreover, they are consistent with the original scheme of Confederation, which placed jurisdiction over and responsibility for "Indians, and Lands reserved for the Indians", in the hands of Parliament. As Lord Watson pointed out in the *St. Catherine's* case, the plain policy of the *Constitution Act*, 1867, was to place all lands reserved for Indian occupation, and Indian affairs generally, under the legislative control of one central authority, so that uniformity of administration would be ensured.[155] As a corollary to this, Lamer C.J.C. -recognized in *Delgamuukw* that "the government vested with primary constitutional responsibility for securing the welfare of Canada's aboriginal peoples" needed to be able to "safeguard one of the most central native interests - their interest in their lands."[156] Barring the provinces from extinguishing, infringing and regulating Aboriginal title is thus not just consistent with, but also essential to, the fulfillment of Parliament's jurisdiction and responsibility. Provincial access to the lands and resources accorded to them by s.109 of the *Constitution Act,1867*,[157] has therefore always been subject to settlement of unextinguished Aboriginal title claims by the federal

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155 *Supra* note 12 and accompanying text.

156 *Delgamuukw* (S.C.C.), *supra* note 1, at para. 176: see *supra* notes 16-17, 60, and accompanying text.

157 See *supra*, text accompanying notes 54-55.

government.[158] Seen in this light, provincial opposition to the settlement of Aboriginal land claims in the past was clearly a policy blunder of major proportions. In British Columbia, at least, that blunder could have been avoided if the province had listened to Aboriginal demands for treaties.[159] That may be the ultimate irony of the situation the province finds itself in today.

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158 In the *St. Catherine's* case, *supra* note 12, at 59, Lord Watson said that the provinces' beneficial interest in Indian lands becomes "available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title" (I am grateful to Hamar Foster for pointing this passage out to me). Moreover, in the case of the territories out of which the three prairie provinces were formed, settlement of Aboriginal title claims by the federal government was expressly mandated by the Rupert's Land and North-Western Territory Order of June 23, 1870, in R.S.C. 1985, App. II, No. 9: see Kent McNeil, *Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations* (Saskatoon: University of Saskatchewan Native Law Centre, 1982).

159 See generally Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia*, 1849-1989 (Vancouver: University of British Columbia Press, 1990); Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia*, 1774-1890, 2nd ed. (Vancouver: University of British Columbia Press, 1992) ; Hamar Foster, "Letting Go the Bone: The Idea of Indian Title in British Columbia", in Hamar Foster and John McLaren, eds., *Essays in the History of Canadian Law: British Columbia and the Yukon* (Toronto: University of Toronto Press, Vol. VI of the Osgoode Society Series, 1995), 28.