Canadian Provincial Legislative Powers and Aboriginal Rights Since *Delgamuukw*: Can a Province Infringe Aboriginal Rights or Title?

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In 1888, the Judicial Committee of the Privy Council in the case of *St Catherine's Milling* signalled to the provinces that Aboriginal title lands would not be available as 'a source of revenue' to the provinces until that title had been extinguished.[2] One hundred years later, the Privy Council's statement continues to be a valid warning to provinces in their dealings with Aboriginal title lands. In the 1997 decision of *Delgamuukw v British Columbia,*[3] the Supreme Court left the question of provincial jurisdiction to infringe or regulate Aboriginal title unclear and unresolved.

The *Delgamuukw* court clarified that federal government's legislative and executive jurisdiction over 'Lands reserved for the Indians' under s 91(24) of the Constitution Act 1867 includes within its meaning Aboriginal title lands.[4] Given that federal jurisdiction over Aboriginal title is exclusive under s 91 (24) of the Constitution Act 1867, could a province have the constitutional power to infringe or regulate Aboriginal title? In this paper I will examine the consequences of exclusive federal jurisdiction over Aboriginal title lands. I will consider the impact of this on the provinces' jurisdiction and the extent to which provincial laws can apply to Aboriginal title lands. I will further discuss the constitutional question of whether a province can infringe or affect Aboriginal title or Aboriginal rights. If the provinces are found to have no

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2 *St Catherine's Milling Co v R* [1889] 14 AC 46 at 59. 'The fact that the power of legislating for Indians and [their lands] has been entrusted to…the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.' See Foster, H, 'Aboriginal title and the provincial obligation to respect it: is *Delgamuukw v British Columbia* "invented law"?' (1998) 56 The Advocate 221.

3 [1997] 3 SCR 1010; 153 DLR (4th) 193 (hereinafter *Delgamuukw*). Although the Supreme Court at 1107 and 1109, found that the provinces had neither the power nor the jurisdiction to extinguish Aboriginal title, it was suggested that provinces have the power to infringe or regulate Aboriginal title. However, this latter issue was not examined in depth. The court in *Delgamuukw* focused on defining the content of Aboriginal title to land, the requirements as to proof of Aboriginal title, and the use of oral histories as evidence.

4 Constitution Act 1867 (UK), s 91(24), Chapter 3 (hereinafter Constitution Act 1867). See *Delgamuukw* [1997] 3 SCR 1010 at 1116–18, *per* Lamer CJC.

power to infringe Aboriginal title, serious consequences will result for provincial land and resource development laws which affect Aboriginal title.

Resolution of the above issues first requires an examination of the distribution of powers between federal and provincial legislatures under the Constitution Act 1867 in relation to Indian matters.[5] It is essential to ascertain the applicable principles for determining which enacted laws apply to Aboriginal lands and to Aboriginal rights. Secondly, an examination of jurisdiction is required to determine whether any applicable laws are capable of extinguishing, infringing or regulating Aboriginal rights or title to land.

Jurisdiction and the division of powers

Provincial legislative powers are set out primarily in s 92 of the Constitution Act 1867. Provincial jurisdiction under s 92 includes general jurisdiction over property and civil rights.[6] Section 91(24) of the Constitution Act 1867 vests in the federal parliament exclusive power to legislate in relation to Indians, and Lands reserved for the Indians'. Thus federal parliament, on the authority of s 91(24), is given power to legislate in relation to matters usually within provincial jurisdiction, such as property and civil rights, where Indians and reserved lands are concerned.

In accordance with general constitutional principles, if a subject matter is exclusively within the provincial sphere it would be outside federal legislative competence, and so federal legislation involving such subject matters would be invalid.[7] However, pursuant to s 91(24), federal legislation that applies to Indians will be valid provided that it can be categorised to be 'in pith and substance' as dealing with Indian matters. The federal parliament has validly legislated on matters such as education, wills and estates in relation to Indian concerns, although these are areas within the provincial legislative domain. As

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5 Section 91(24) states that 'Indians, and Lands reserved for the Indians' are under the exclusive legislative authority of the Parliament of Canada. See generally for a discussion of s 91(24) Hogg, P, *Constitutional Law of Canada,* loose-leaf, 4th edn, 1997, Toronto: Carswell, Chapter 27; McNeil, K, 'Aboriginal title and the division of powers: rethinking federal and provincial jurisdiction' (1998) 61 Saskatchewan L Rev 431; McNeil, K, *Defining Aboriginal Title in the 90s: Has the Supreme Court Finally Got It Right?,* 1998, Toronto: Robarts Centre for Canadian Studies, York University; Slattery, B, 'The constitutional guarantee of Aboriginal and treaty rights' (1983) 8 Queens LJ 233; Slattery, B, 'First nations and the constitution: a question of trust' (1992) 71 Canadian Bar Rev 261; Slattery, B, 'Understanding Aboriginal rights' (1987) 66 Canadian Bar Rev 727; Hughes, P, 'Indians and lands reserved for the Indians: off limits to the provinces?' (1983) 21 Osgoode Hall LJ 82; Sanders, D, "The application of provincial laws', in Morse, BW (ed), *Aboriginal Peoples and the Law,* 1989, Ottawa: Carleton UP.

6 Section 92, however, contains no jurisdiction for the provinces to make laws in relation to Indians or Indian lands. See generally Reiter, RA, *The Law of First Nations,* 1996, Canada: Juris Analytica Publishing Inc, 192.

7 The second part of s 91(24) is an exception to the provinces' general jurisdiction over property. However, Parliament under the pogg (peace, order and good government) residual power in s 91 can legislate in provincial areas of jurisdiction in national emergencies and for matters of pressing national importance. See Hogg, *op cit,* fn 5, Chapter 17.

'Indians, and Lands reserved for the Indians' are within the federal sphere, a province has no power to legislate in relation to such matters. However, provincial laws that address matters falling within provincial jurisdiction can apply to areas within the federal sphere.[8] This overlapping of provincial and federal jurisdiction is referred to as the 'double aspect' doctrine[9] and allows certain provincial laws of general application to apply to Aboriginal people. This will be dealt with below.

Federal jurisdiction

The exclusive federal legislative power in s 91(24) over 'Indians, and Lands reserved for the Indians' comprises two heads of power: one that applies only to 'Indians', whether they reside on reserve lands or not; and another that extends to both Indians and non-Indians where laws relate to 'Lands reserved for the Indians'.[10] However, exactly what these heads of power comprise is not always clear.[11] Pursuant to s 91(24) of the Constitution Act 1867 the federal parliament enacted the Indian Act.[12]

The meaning of 'Lands reserved for the Indians'

Exactly which lands will come within the meaning of 'Lands reserved for the Indians'?[13] The phrase, 'Lands reserved for the Indians', has always been recognised as including land specifically set aside as Indian reserves.[14] Generally, reserved land comprises land held by Indians by virtue of a Crown grant, by legislation, land set aside by the Crown as a reserve, or land excepted from a surrender by Indians of land to the Crown.[15] In *St Catherine's Milling,* the Privy Council held that all lands reserved in any way (including lands

8 In relation to jurisdiction regarding Indians, see *Delgamuukw* [1997] 3 SCR 1010; 153 DLR (4th) 193 at 1115–21; see also *Cardinal v Attorney General of Alberta* [1974] SCR 695 at 703. See generally Slattery (1987), *op cit,* fn 5, 776 and see Hogg, *op cit,* fn 5, Chapter 27.

9 See Hogg, P, *Constitutional Law of Canada,* Student Edition 2002, Toronto: Carswell, 363–64, 401–18.

10 See Hogg, *op cit,* Ch 27–2. See also Lysyk, KM, The unique constitutional position of the Canadian Indian' (1967) 45 Canadian Bar Review 513 at 514. See *Four B Manufacturing Ltd v United Garment Workers* [1980] 1 SCR 1031; [1979] 4 CNLR 21 at 26, Beetz J stated that:
'The power of Parliament to make laws in relation to Indians is the same whether Indians are on a reserve or off a reserve. It is not reinforced because it is exercised over Indians on a reserve any more than it is weakened because it is exercised over Indians off a reserve.'

11 See Woodward, J, *Native Title,* loose-leaf, Scarborough, Ontario: Carswell, 88.

12 RSC 1985, c I–5. This legislation generally, although not exclusively, applies to Indians as defined by the Indian Act.

13 See generally Slattery (1987), *op cit,* fn 5 'Understanding Aboriginal rights' at 772–74. Lands in which Aboriginal people have an interest generally comprise Aboriginal title lands (recognised by the common law) and reserve lands. In some cases reserve land may be traced to common law Aboriginal title.

14 See Hogg, *op cit,* fn 5, Ch 27–5. 'Reserve' is defined in part in s 2 of the Indian Act to mean a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band.

15 See Slattery (1987), *op cit,* fn 5, 771.

reserved by the Royal Proclamation of 1763) are 'Lands reserved for the Indians'.[16] Lamer CJC relied on this in *Delgamuukw* to include Aboriginal title lands within the meaning of 'Lands reserved for the Indians' and thus within federal jurisdiction.[17] Prior to *Delgamuukw* it was unclear whether Aboriginal title at common law was under federal or provincial jurisdiction.[18] The Supreme Court in *Delgamuukw* recognised that the federal head of constitutional power over 'Indians, and Lands reserved for the Indians' encompasses not only jurisdiction over reserve lands but also jurisdiction to legislate in relation to all land held under Aboriginal title.[19] In *St Catherine's Milling,* the Privy Council observed that '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 authority'.[20]

The Delgamuukw court recognised that not only did exclusive federal jurisdiction extend to Aboriginal title, but it also included jurisdiction over Aboriginal rights.[21] Lamer CJC considered that the federal jurisdiction over 'Indians' in s 91(24) included a 'core of Indianness' which encompassed the whole range of Aboriginal rights,[22] including practices, customs and traditions which are not tied to the land.[23] Those rights within the 'core of Indianness' were recognised by Lamer CJC as being beyond the range of legislative competence.[24] Thus, the federal government's exclusive legislative power in

16 The Privy Council in *St Catherine's Milling* (1889) 14 AC 46 at 59, *per* Lord Watson, found that reserved land includes all lands reserved, upon any terms or conditions, for Indian occupancy. The Privy Council considered that s 91(24) covers not only those tracts of land set aside after the Royal Proclamation of 1763 but also land occupied by virtue of the Royal Proclamation.

17 *Delgamuukw* [1997] 3 SCR 1010 at 1116–17.

18 See *Roberts v Canada* [1989] 1 SCR 322.

19 Lamer CJC in *Delgamuukw* [1997] 3 SCR 1010 at 1117, as did Macfarlane in the Court of Appeal in *Delgamuukw v British Columbia* (1993) 104 DLR 470, (hereinafter *Delgamuukw* (CA)) found that the Privy Council in the *St Catherine's Milling* case, (1889) 14 AC 46 at 59, had settled the issue that those words include lands held by Aboriginal title.

20 *St Catherine's Milling, ibid* at 59. As Lamer CJC said in *Delgamuukw, ibid* at 1117, the effect of this decision was to separate the ownership of lands held pursuant to Aboriginal title from jurisdiction over those lands. See, Slattery (1987), *op cit,* fn 5, 774.

21 *Delgamuukw, ibid* at 1118.

22 *Delgamuukw, ibid* at 1119. In *Delgamuukw, ibid* at 1117–8, Lamer CJC further stated 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 Aboriginal rights and interests—their lands'.

23 *Delgamuukw, ibid* at 1119.

24 *Delgamuukw, ibid* at 1119. Lamer CJC noted that the Court has held that s 91(24) protects a 'core' of Indianness from provincial intrusion, through the doctrine of interjurisdictional immunity. His Honour further stated that 'Provincial governments are prevented from legislating in relation to both types of Aboriginal rights' ie, rights in relation to land and other rights. Lamer CJC did not define the complete extent of the 'core of Indianness'. It had been indicated that exclusive federal jurisdiction would extend to the status and capacity of Indians. See *Natural Parents v Superintendent of Child Welfare and The Petitioners For Adoption* [1976] 2 SCR 751 at 760–63 (hereinafter *Natural Parents v Superintendent of Child Welfare*).

relation to specific Aboriginal rights such as fishing and hunting was acknowledged.

Implications of exclusive federal jurisdiction

What implications follow from the exclusive federal jurisdiction over Aboriginal title and rights? Both reserve lands[25] and Aboriginal title lands involve a right to the 'exclusive use and occupation' of the land;[26] therefore it would be expected that jurisdictional powers over both types of land would be similar. As the federal government has exclusive jurisdiction in relation to Aboriginal lands, this would mean that, prior to the constitutional entrenchment of Aboriginal rights in 1982,[27] the federal parliament would have had the exclusive power to extinguish Aboriginal title.[28]

Another implication of the federal government's exclusive jurisdiction in relation to Aboriginal title is that grants of title issued by the provinces, where Aboriginal title was unextinguished, could potentially be invalid. (In British Columbia this would involve grants from 1871, when British Columbia joined the Confederation.) The provincial underlying title would remain subject to the Aboriginal title. Any action here by the Aboriginal title holders might, however, be subject to the statutes of limitation. Statutes of limitation, being provincial statutes and not federal statutes, will be subject to the same rules of application to which provincial laws are subject in relation to Aboriginal lands.[29]

Doctrine of interjurisdictional immunity

Section 91(24) of the Constitution Act 1867 protects a 'core' of federal jurisdiction from provincial laws of general application through the doctrine of

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25 Refer to the definition of 'reserve' in s 2 of the Indian Act.

26 In *Delgamuukw* [1997] 3 SCR 1010 at 1083, Lamer CJC recognised Aboriginal title as a right to the exclusive use and occupation of the land. See also Dickson J in *Guerin v Canada* [1984] 2 SCR 335 at 379, recognising that the interest in Aboriginal title and reserve lands is the same. This was affirmed by Lamer CJC in *Delgamuukw* at 1085.

27 Constitution Act 1982, s 35.

28 This was recognised in *Delgamuukw* [1997] 3 SCR 1010 at 1119. Extinguishment is discussed in detail below. It was also recognised by Lamer CJC in *R v Van der Peet* [1996] 2 SCR 507 at 538 that the enactment of s 35(1) of the Constitution Act 1982, prevents even Parliament from extinguishing Aboriginal rights.

29 Provincial legislation, including statutes of limitation, may not apply to Aboriginal title, unless referentially incorporated by federal legislation under s 88 of the Indian Act. Refer to the discussion below. In the British Columbia Supreme Court decision in *Stoney Creek Indian Band v British Columbia* [1998] BC 2468 (currently on appeal to the BCCA) Lysyk J found that the provincial Limitations Act was not applicable to extinguish a cause of action for damages for an unauthorised road on Indian land and for possessory title. The British Columbia Court of Appeal (Quicklaw [1999] BCJ No 2196 6 October 1999) overruled (on a technicality) the decision of Lysyk J. It was considered that this issue was not suitable for resolution in a summary way without consideration of all the evidence and in addition because of an important constitutional implication of the case the appeal court thought it unjust to reach such a conclusion. See also *Chippewas of Sarnia Band v Canada* [1999] OJ 1406, (Quicklaw) (AG) decision of the Ontario (Gen Div) 1999 (on appeal to the Ontario Court of Appeal) where it was found that provincial limitation statutes were not constitutionally applicable in a claim for recovery of Aboriginal title land.

interjurisdictional immunity. This doctrine prevents the provinces from enacting legislation which affects a vital part of the subject matter within the exclusive federal jurisdiction.[30] Otherwise valid provincial laws will be read down if the doctrine of interjurisdictional immunity is infringed. The 'core' of subject matter of federal jurisdiction has been described as laws that affect 'Indians *qua Indians*' or 'Indianness',[31] the 'core of Indianness',[32] the 'status or capacity' of Indians,[33] or the 'use and possession of land'.[34] It is for this reason that provincial laws which affect 'Indianness' are unable, of their own force, to affect Aboriginal rights or title.[35] However, it may be possible for laws of general application that affect Indians to be referentially incorporated into federal law by s 88 Indian Act to apply to Indians.[36] But it is doubtful whether referential incorporation would allow such laws to apply, through s 88 of the Indian Act, to reserve lands, as the weight of the case law and legal principle is against such an interpretation.[37] The above mentioned principles, together with the doctrine of interjurisdictional immunity, would be applicable to Aboriginal lands.[38]

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30 See Beetz J in *Four B Manufacturing v United Garment Workers* [1980] 1 SCR 1031 at 1047. See also *Bell Canada v Quebec* [1988] 1 SCR 749.

31 *Four B Manufacturing* [1979] 4 CNLR 21 at 25. See also *R v Sutherland* [1980] 2 SCR 451 at 455; *Re Stony Plain Indian Reserve No 134* [1982] 1 WWR 302 at 321–22 (Alta CA). The phrase 'Indianness' is used by Beetz J in *Dick v The Queen* [1985] 2 SCR 309 at 326 (hereinafter *Dick's* case). See also *Four B* at 25.

32 See *Dick's* case, *ibid* at 326, 315. See *R v Francis* [1988] 1 SCR 1025.

33 See *Kruger and Manuel v R* [1978] 1 SCR 104 at 110 where Dickson J stated that:

> 'The fact that a law may have graver consequences to one person than to another does not, on that account alone, make the law other than one of general application…. The line is crossed, however, when an enactment, though in relation to another matter, by its effect impairs the status or capacity of a particular group.'

Beetz J in *Dick's* case [1985] 2 SCR 309 at 323–24 explained that laws which crossed the line of general application were those which either overtly or colourably, single out Indians for special treatment or impair their status as Indians. See also *Natural Parents v Superintendent of Child Welfare* [1976] 2 SCR 751 at 761.

34 See *Derrickson v Derrickson* [1986] 1 SCR 285 (hereinafter *Derrickson*); *Corporation of Surrey v Peace Arch* (1970) 74 WWR 380 (BCCA); *Paul v Paul* [1985] 2 CNLR 93. Contrast and compare *Oka (Municipality) v Simon* [1998] 2 CNLR 205 where the Quebec Court of Appeal found that the only use of land that came within the 'core of Indianness' was an Indian use.

35 Similarly provincial laws are not able to affect treaty rights. (See s 88 of the Indian Act.)

36 Refer to the discussion of s 88 Indian Act below. This is supported by *Dick's* case [1985] 2 SCR 309 that s 88 of the Indian Act applied to referentially incorporate provincial laws that affected Indianness by impairing the status or capacity of Indians; in this case in relation to Indian hunting. The legislation in question was a law of general application and thus applicable to the Indian person by referential incorporation. See Hogg, *op cit,* fn 5, Ch 27. See Slattery (1987), *op cit,* fn 5, 774–82.

37 See McNeil, K, 'Aboriginal title and section 88 of the Indian Act' (2000) 34(1) UBC Law Review 159; Bankes, N, '*Delgamuukw,* division of powers and provincial land and resource laws: some implications for the provincial resource rights' (1998) 32(2) UBC Law Review 317 and see Peeling, A, 'Provincial jurisdiction after *Delgamuukw*', presented at the British Columbia Continuing Legal Education Society Conference, Vancouver, March 1998.

38 In *Delgamuukw* [1987] 3 SCR 1010, it was accepted that this doctrine did apply to Aboriginal land. See Lamer CJC at 1121.

'Core' of exclusive federal jurisdiction

Exactly what does the 'core of Indianness' comprise? 'Indianness' would comprise the essential characteristics of the Indian people as a people.[39] It has been described broadly as including the 'political, social and economic life of the Indian community'.[40] 'Indianness' will vary from group to group depending on the essential culture of the Indian group. Certainly the right to the 'use and possession' of land would be a part of the 'core of Indianness', and therefore the Indian right to use and possess the land could not be affected by provincial law.[41] However, in *Oka (Municipality) v Simon,*[42] the Quebec Court of Appeal found that while the exclusive core of federal jurisdiction includes the possession of land and the Indian use of the land, it does not necessarily include general use of the land. On this view, provincial laws of general application could apply of their own force if they do not affect the Indian use of the land. Hunting and fishing by many Aboriginal people on reserve land is not only an important part of their lives, but also involves the use of land and would be a part of the 'core of Indianness',[43] In *Van der Peet,*[44] Lamer CJC described Aboriginal rights as activities which were integral to the distinctive Aboriginal culture of the group claiming the right. Any such activities, whether on reserve land or not, which meet this

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39 See Reiter, *op cit,* fn 6, 122. In the case of *Natural Parents v Superintendent of Child Welfare* [1976] 2 SCR 751 at 760–61, Laskin CJ considered that a provincial adoption statute (to the extent that it had the effect that the Indian status of a child would be removed) would touch 'Indianness'.

40 Sanders, *op cit,* fn 5, 242. In *Lovelace v Ontario* [2000] 1 SLR 950, the court found that the exclusion of non-status Indians from a provincial program involving the distribution of profits from a casino on an Indian reserve did not impair the status or capacity of non-status Indians and therefore it did not affect 'Indianness'. In *Kitkatla Band v Minister of Small Business, Tourism & Culture* [2002] SLR 31, the Supreme Court found that provincial laws authorising the cutting of culturally modified trees did not affect the 'core of Indianness'. However, the court acknowledged that it may be that in different circumstances heritage sites could be a key part of the collective identity of people and that some component of cultural heritage could go to the core of a community's identity.

41 *Derrickson* [1986] 1 SCR 285. Consideration of Aboriginal title or Aboriginal rights which involve the 'use and possession' of land will also be relevant in the discussion of whether s 88 of the Indian Act applies to 'Lands reserved for the Indians'. Refer to the discussion below.

42 [1998] 2 CNLR 205. The Quebec Court of Appeal in *Oka (Municipality) v Simon,* considered that the question of Indianness was relevant where 'Lands reserved for the Indians' was concerned. In this respect the court differed from, and disagreed with, the interpretation in *Corporation of Surrey v Peace Arch* (1970) 74 WWR 380 where the type of use was not considered relevant. Should 'Indian use' include any use by an Indian, in addition to anything that affects an 'Indian as an Indian'?

43 See *R v Isaac* (1975) 13 NSR (2d) 460. In *Kruger and Manuel* [1978] 1 SCR 104, it was found that Indian hunting off reserve was subject to provincial law. However, in *Dick's* case [1985] 2 SCR 309 at 320–321, Beetz J assumed without deciding that a provincial hunting law did not apply proprio vigore to an Indian band as this activity was 'at the centre of what they do and what they are'. Beetz J agreed with the view argued in the lower courts that hunting was part of the 'Indianness' of the band. However, the provincial law in question was found to be a law of general application and the fact that it regulated an Indian as an Indian did not detract from this. However, the court's conclusion in the *Dick* case was not a general conclusion in relation to Aboriginal groups. It will always depend on the culture of the particular group. See also *R v Sutherland* [1980] 2 SCR 451 and *Moosehunter v R* [1981] 1 SCR 282.

44 Supra note 28 at 537. See for commentary Borrows, J, 'The trickster: integral to the distinctive culture' (1997) 8 Constitutional Forum 27.

test would come within the 'core of Indianness'[45] and thus would be immune from provincial law.

Activities on reserve land that come within the 'core of Indianness', or activities which amount 'in pith and substance' to a use of the land (which would bring those activities within the exclusive federal jurisdiction under s 91(24) of the Constitution Act 1867), will not be governed by provincial laws.[46] In *Derrickson v Derrickson* it was argued that 'the pith and substance' of the provincial Family Relations Act was the division of matrimonial property, and not 'the use of Indian lands', and that this legislation did not 'encroach on the exclusive federal jurisdiction as to the use of Indian lands'.[47] In rejecting this argument, Chouinard J agreed with the Attorney General of Canada that this legislation regulated not only who may own or possess the land, but also regulated the right to the beneficial use of the property and its revenues. Chouinard J therefore found these provisions 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 power under s 91(24) of the Constitution Act 1867'.[48] The decision in *Derrickson* has arguably been extended in its application by the *Delgamuukw* decision that Aboriginal title is a right of exclusive use and occupation and that Aboriginal title lands are 'Lands reserved for the Indians' for the purpose of s 91(24).[49] Thus if provincial legislation regulates the ownership and possession of property,[50] such legislation cannot apply of its own force to Aboriginal title lands.[51]

In *Corporation of Surrey v Peace Arch,*[52] the British Columbia Court of Appeal found those provincial laws which relate to the *use* of lands do not apply on Indian reserves, because the use of reserve land is within the federal government's exclusive jurisdiction. The court found that zoning by-laws and building codes made by a municipality under provincial legislation, and regulations made under the provincial health laws, involved the use of the land, and accordingly were not

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45 See Lamer CJC in *Delgamuukw* [1997] 3 SCR 1010 at 1121. However, Lamer CJC in his comments in relation to infringement by provinces failed to follow through to the conclusion that this would produce immunity from provincial law.

46 This is so even if these laws are not in relation to Indians i.e. are laws of general application.

47 *Derrickson* [1986] 1 SCR 285 at 294.

48 *Ibid* at 296.

49 *Delgamuukw* [1997] 3 SCR 1010.

50 In accordance with the view of the Quebec Court of Appeal in *Oka v Simon* [1998] 2 CNLR 205, legislation which regulates the right to beneficial use of property could apply of its own force to Aboriginal title lands as the non-Indian use of land reserved for Indians is not at the core of federal jurisdiction in s 91(24) of the Constitution Act 1867. It is the Indian use of land rather than the general use of land that is reserved for the Indians which lies at the core of federal jurisdiction. Leave to appeal to the Supreme Court has been refused in this case. *Oka v Simon* [1999] CSCR 76 (Quicklaw).

51 See McNeil, 'Aboriginal title and the division of powers', *op cit,* fn 5,458.

52 (1970) 74 WWR 380 (BCCA). Justice Martland in *Cardinal's* case [1974] SCR 695 at 705, in commenting on *Surrey v Peace Arch* stated that 'Once it was determined that the lands remained lands reserved for the Indians, provincial legislation relating to their use was not applicable'.

applicable to reserves as the federal parliament has exclusive jurisdiction over 'Lands reserved for the Indians'. In *R v Isaac,*[53] the court also considered that provincial laws of general application relating to use of the land cannot apply to Indian reserve lands that are under exclusive federal jurisdiction. Therefore, laws that affect the ways in which property owners use land have to be read down so that such laws do not apply to Aboriginal title lands.[54]

Activities on reserve land that do not come within the 'core of Indianness', or which do not amount 'in pith and substance' to a use of the land, will be governed by provincial laws.[55] In *Four B Manufacturing Ltd v United Garment Workers of America,*[56] a shoe manufacturing business on an Indian reserve was found to be subject to the Ontario labour relations laws. Here the activity conducted on the land, shoe manufacturing, was not within the 'core of Indianness'. In addition, the laws governing employer/employee relations did not involve use of the land. Also, in *R v Francis,*[57] provincial motor vehicle laws were found to apply on Indian reserves. Such laws 'in pith and substance' relate to the use of motor vehicles and not the use of the land.

The real question here is how are the laws to be characterised? Provided provincial laws are not characterised as relating directly to Indian land use or to the occupation of land, and do not affect Indians *qua* Indians, then such laws

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53 (1975) 13 NSR (2d) 460 at 474 (NSSC AD). MacKeigan CJ at 467 noted that provincial legislation cannot validly regulate the reserves as land, cannot regulate the use of that land, and cannot control the resources on that land. If a provincial game law is clearly a land use law, it cannot apply on a reserve. He further noted at 469 that the hunting by an Indian is traditionally so much a part of his use of his land and its resources as to be for him, peculiarly and specially, integral to that land.

54 See McNeil, 'Aboriginal title and the division of powers', *op cit,* fn 5, 458. In *Western Industrial Contractors Ltd v Sarcee Developments Ltd* (1980) 98 DLR (3d) 424 a builder's lien filed pursuant to provincial legislation was found to apply to a company which held a lease acquired pursuant to a conditional surrender by an Indian band of reserve land to the Crown. The fact that the Indian band retained a beneficial interest in the lands did not prevent the provincial legislation from applying. Note that here the lien was only against the company's leasehold interest and therefore did not impact on the beneficial or residual interest of the Indian band. Had the lien been sought against the Indian interest in the land this would have been seen as an infringement of federal jurisdiction under s 91(24), at 432, *per* Morrow JA. In *Re Stony Plain Indian Reserve No 135* [1982] 1 CNLR 133 at 149–50 the Alberta Court of Appeal in considering the application of provincial laws in the case of Indian reservation land being surrendered for the purpose of leasing, found that provincial laws of general operation which impair the full enjoyment of land or an interest therein would be inapplicable. Surrendered lands, even if such lands no longer remain part of a reserve under the Indian Act, continue to be 'Lands reserved for the Indians' within the meaning of s 91(24), and thus are under federal legislative jurisdiction. The court agreed with the *Peace Arch* decision in so far as the decision recognised that provincial legislation relating to use could be inapplicable as inconsistent with the reversionary interest. In *Paul v Paul* [1986] 1 SCR 306, the Supreme Court found that a certificate of occupancy issued under the Indian Act includes a right of occupation and accordingly an order for occupancy under the provincial Family Relations Act interferes with that Indian right of occupation. In the British Columbia Court of Appeal in *Paul v Paul* [1985] 2 CNLR 93 Seaton JA considered that, as the Indian Act regulates who may possess and use reserve land, provincial legislation which purports to do the same has no application to Indian reserve lands. In the Supreme Court, Chouinard J considered this case to be indistinguishable from *Derrickson's* case [1986] 1 SCR 285.

55 Provided also that such laws are not in relation to Indians, ie the laws are laws of general application.

56 [1980] 1 SCR 1031; [1979] 4 CNLR 21.

57 [1988] 1 SCR 1025.

will apply to activities on reserve land. If provincial laws relate to the Indian use or occupation of the land, such laws will not apply of their own force on reserve lands.[58]

Provincial jurisdiction and legislative powers

In what circumstances can provincial laws apply to Indians or Indian lands?[59] As discussed above, the *Delgamuukw* court considered that the interest in reserve land and the interest in Aboriginal land is the same.[60] Therefore (subject to certain statutory exceptions),[61] the body of case law regarding the application of provincial laws on Indian reserve land should apply to Aboriginal title lands.[62]

Despite s 91(24) having the effect of vesting the exclusive jurisdiction over 'Indians, and Lands reserved for the Indians' in the federal parliament, some provincial laws 'of general application' do apply *proprio vigore* to 'Indians, and Lands reserved for the Indians'.[63] Also, despite the federal Indian Act occupying the field—at least to some extent—in relation to 'Indians', provincial laws of

58 See McNeil, 'Aboriginal title and the division of powers', *op cit,* fn 5,461–62.

59 See generally McNeil, *op cit,* fn 37; Bankes, *op cit,* fn 37; Little Bear, L, 'Section 88 of the Indian Act and the application of provincial Laws to Indians' in Long JA and Boldt M (eds), *Governments in Conflict,* Toronto: University of Toronto Press; Sanders, D, 'The Constitution, the provinces and Aboriginal peoples', in Long and Bolt (eds), *Governments in Conflict,* Toronto: University of Toronto Press; Sanders, *op cit,* fn 5; Sanders, D, 'Indian hunting and fishing rights' (1974) 38 Saskatchewan Law Review 43; Hogg, *op cit,* fn 5, Ch 27–8; Hughes, *op cit,* fn 5; Reiter, *op cit,* fn 6, 191–224; Woodward, *op cit,* fn 11, Chapters 3 and 4; Pugh RD, 'Are Northern lands reserved for the Indians?' (1982) 60 Canadian Bar Review, 36; Wilkins, K, 'Of provinces and section 35 Rights' (1999) 22 Dalhousie Law Journal 185.

60 *Delgamuukw* [1997] 3 SCR 1010 at 1085, *per* Lamer CJC, citing *Guerin v Canada* [1984] 2 SCR 335 at 379.

61 Provincial laws that are dependent for their application on the Indian Act provisions would not apply to Aboriginal title lands, as the Indian Act, in its application to lands, is generally limited to reserve lands. See, for example, s 35 of the Indian Act which allows provincial compulsory acquisition laws to apply to reserve lands in certain circumstances. In addition any regulations made pursuant to the Indian Act would also be inapplicable. Sections 57 and 73(1) authorise the Governor in Council to make regulations involving, *inter alia,* reserve land and its use. For example, the Indian Mining Regulations (CRC 1978 c 965, SOR/90–468) which apply to surrendered mines and minerals under reserve lands referentially incorporate some provincial laws. A separate Act deals with oil and gas, the Indian Oil and Gas Act (RSC 1985, c 1–7, originally enacted SC 1974–75–76, c15). The Governor in Council pursuant to this legislation has made regulations, the Indian Oil and Gas Regulations, 1955 (SOR 94–753), containing rules relating to the oil and gas on 'Indian lands'. These regulations also referentially incorporate some provincial laws. Section 4 requires persons involved in oil and gas activities on Indian reserves to comply with 'all provincial laws applicable to non-Indian lands that relate to the environment or to the exploration for, or development, treatment, conservation or equitable production of, oil and gas and that are not in conflict with the Act and these Regulations'. Thus neither the Indian Act nor the regulations made pursuant to the Act would apply to Aboriginal title lands situated outside reserves. See McNeil, *op cit,* fn 37.

62 Except to the extent that the application of provincial laws are excluded by the provisions of federal legislation such as the Indian Act See *Derrickson* [1986] 1 SCR 285.

63 *Delgamuukw* [1997] 3 SCR 1010 at 1119. However, this is subject to the qualification that laws of general application which affect 'Indianness' cannot apply of their own force. See the discussion below. See *Dick's* case [1985] 2 SCR 309 and *Four B Manufacturing v United Garment Workers* [1980] 1 SCR 1031.

general application will not be prevented from applying to Indians.[64] In addition, provincial legislation may incidentally affect a matter assigned exclusively to the federal parliament, including 'Indians, and Lands reserved for the Indians', provided that the provincial law does not touch the central core of federal legislative power in s 91(24) of the Constitution Act 1867.[65] Also, the theory that Indian reserves are federal 'enclaves' in which no provincial laws apply has been rejected by the courts.[66] The Canadian Supreme Court has recognised that provincial laws may (in certain circumstances within the provinces' spheres of legislative competence) apply to Indians.[67]

Provincial 'laws of general application'

As discussed above, provincial legislation may apply on reserves in a limited range of circumstances. Laws of general application may apply to Indians or to Indian land. What is meant by a 'law of general application'? In *Kruger and Manuel v R,*[68] Justice Dickson stated:

> There are two indicia by which to discern whether or not a provincial enactment is a law of general application. It is necessary to look first to the territorial reach of the Act. If the Act does not extend uniformly throughout the territory, the inquiry is at an end, and the question is answered in the negative. If the law does extend

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64 The Indian Act applies pursuant to s 91(24) of the Constitution Act 1867. However, the federal legislation cannot be said to fully occupy the field completely, as all s 91(24) 'Indians' are not 'Indians' within the meaning of the Indian Act. For example, Inuit are expressly excluded by s 4 of the Indian Act but the Inuit are included under s 91(24) of the Constitution Act 1867. See *Reference re Term 'Indians'* [1939] SCR 1.

65 See Peeling, *op cit,* fn 37. An example given by Peeling is of an Indian going to hunt but infringing traffic laws on the way to hunting.

66 See *Cardinal v Attorney General of Alberta* [1974] SCR 695. The *Four B Manufacturing* case [1980] 1 SCR 1031; [1979] 4 CNLR 21, and the case of *R v Francis* [1988] 1 SCR 1025 also rejected this theory. Professor Hogg states in relation to the enclave theory that:
'The theory was always implausible, because it involved a distinction between the first and second branches of s 91(24) for which there is no textual warrant, and it placed the second branch ('lands reserved for the Indians') in a privileged position enjoyed by no other federal subject matter…there is no constitutional distinction between 'Indians' and 'Lands reserved for the Indians' and provincial laws may apply to both subject matters.' (Emphasis added.) Hogg, *op cit,* fn 5, Chapter 27–11. 'May' is the qualifier here. The enclave theory was based on the 'Lands reserved for the Indians' element of s 91 (24) and never existed in relation to the 'Indians' part of s 91 (24).

67 This is discussed generally below. Provincial laws of general application can apply to Indians of their own force. If such laws (that is laws of general application) affect 'Indianness' or affect 'Indians as Indians' then such laws will not be applicable of their own force, but may be applicable through referential incorporation pursuant to s 88 of the Indian Act. See *Dick's* case [1985] 2 SCR 309. However, provincial laws that are in conflict with the Indian Act or other federal legislation will not apply to Indians or Indian land due to the doctrine of paramountcy; provincial laws that single out Indians or Indian reserve land will not be laws of general application and will also not be applicable; and provincial laws which involve the use (or at the very least Indian use) of Indian reserve land, even if they are laws of general application, won't apply on reserves due to s 91(24) and will not be referentially incorporated by s 88 of the Indian Act. See Sanders, 'The Constitution, the provinces and Aboriginal peoples', *op cit,* fn 59.

68 [1978] 1 SCR 104 at 110. In *Kruger and Manuel's* case, the British Columbia Wildlife Act was found to be a law of general application as it had a uniform operation and in its object and purpose it was not directed at Indians.

> uniformly throughout the jurisdiction, the intentions and the effects of the enactment need to be considered. The law must not be 'in relation to' one class of citizens in object and purpose. But the fact that the law may have graver consequences to one person than to another does not, on that account alone, make the law other than one of general application. There are few laws which have a uniform impact. The line is crossed, however, when an enactment, though in relation to another matter, by its effect impairs the status or capacity of a particular group.

Therefore, a provincial law of general application must be one that applies throughout the province[69] and must be a law that is intended to and does, in effect, apply generally to everyone.[70] Such laws would include traffic laws, health and safety requirements, and social and economic regulations.[71] However, if a provincial law of general application affects an Indian as an Indian, then, to that extent, such law could not apply to Indians of its own force.[72] In addition, for any provincial law to be valid it must come within a provincial head of power; otherwise, such law would be *ultra vires* and therefore invalid.[73]

Provincial laws which do not apply to Indians

Provincial laws, other than those of general application, will not usually be applicable to Indians or on Indian reserve land.[74] Inapplicable provincial laws include the following types of legislation. First, provincial laws which are directed at Indians or Indian land, that is, that single out Indians or Indian land for special treatment, are *ultra vires* because they infringe federal jurisdiction.

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69 See *Oka (Municipality) v Simon* [1998] 2 CNLR 205 where the Quebec Court of Appeal found that a municipal law that applied uniformly throughout the territory of the municipality was a law of general application although such law did not apply throughout the territory of the province. The law in issue was not one that was directed at a particular group of citizens.

70 See Beetz J in *Dick's* case [1985] 2 SCR 309 at 323–24, where he stated that in considering whether a law is one of general application '[E]ffect and intent are both relevant. Effect can evidence intent. But in order to determine whether a law is not one of general application, the intent, purpose or policy of the legislation can certainly not be ignored: they form an essential ingredient of a law which discriminates between various classes of persons, as opposed to a law of general application'. See also *Kruger and Manuel v R* [1978] 1 SCR 104.

71 Hogg, *op cit,* fn 5, Chapter 27–9. Professor Hogg states that the 'situation of Indians and Indian reserves is thus no different from that of aliens, banks, federally-incorporated companies and interprovincial undertakings. These, too, are subjects of federal legislative power, but they still have to pay provincial taxes, and obey provincial traffic laws, health and safety requirements…and the myriad of other provincial laws which apply to them in common with other similarly-situated residents of the province'.

72 However, such laws may be referentially incorporated by s 88 of the Indian Act subject to the provisions in that section. See *Dick's case* [1985] 2 SCR 309.

73 Hogg, *op cit,* fn 5, Chapter 27–8.

74 See generally in relation to the exclusionary rules pertaining to provincial legislation: Hogg, *op cit,* fn 5, Chapter 27; Sanders, *op cit,* fn 5, 242; Hughes, *op cit,* fn 5; Woodward, *op cit,* fn 11; and Reiter, *op cit,* fn 6.

Such laws are invalid.[75] Secondly, the doctrine of federal paramountcy will render provincial laws that are inconsistent with federal laws (and that includes the Indian Act) inoperative.[76] Thus, if the federal government enacts positive federal legislation it may, through the doctrine of paramountcy, prevent provincial laws from applying to Indians or 'Lands reserved for the Indians'.[77] Thirdly, s 35 of the Constitution Act 1982 gives constitutional status to 'existing' Aboriginal and treaty rights, and protects those rights from both federal and provincial laws purporting to affect those rights. This is discussed in further detail below.[78] Fourthly, in the three prairie provinces, the Indian rights to fish, trap and hunt for food are protected by 'The Natural Resources Transfer Agreements',[79] and provincial laws are inapplicable to the extent to which such laws are inconsistent with those rights.[80] Fifthly, and most significantly for our purposes, s 91(24) protects a 'core' of federal jurisdiction from provincial laws of general application through the doctrine of interjurisdictional immunity (see discussion above).

Section 88 of the Indian Act

Section 88 of the *Indian Act* creates an exception to the rule that provincial laws do not apply to Indians or to Indian land if such laws touch the 'Indianness' at the core of s 91(24) of the Constitution Act 1867.[81] Section 88 allows provincial 'laws of general application'[82] which would not otherwise

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75 See Hogg, *op cit,* fn 5, Chapter 27–10. *R v Sutherland* [1980] 2 SCR 451 (where the provincial law was invalid); *Dick's* case [1985] 2 SCR 309 at 322–23 *(obiter); Natural Parents v Superintendent of Child Welfare* [1976] 2 SCR 751; *Hopton v Pamajewon* [1994] 2 CNLR 61–70. See also Lysyk, *op cit,* fn 10, 535–6.

76 See Hogg, *op cit,* fn 5, Chapter 27–11; Woodward, *op cit,* fn 11,126. The rule of paramountcy allows both federal and provincial laws to co-exist provided that there is no actual conflict between the laws. In the case of conflict the federal law prevails, and the conflicting provincial law will be read down to avoid the conflict.

77 See Little Bear, *op cit,* fn 59. See Slattery (1992), *op cit,* fn 5, 283, who argues that this doctrine of paramountcy would also apply where an Aboriginal government, within its sphere of authority, enacts divergent legislation which would prevent provincial statutes from applying.

78 Indian Act, s 88 also protects Indian treaty rights from provincial laws. See *R v Cotè* [1996] 3 SCR 139.

79 These Agreements were given constitutional force by the Constitution Act 1930,20–21 George V c 26 (UK). Reproduced in RSC 1985, Appendix No 26.

80 However, *R v Badger* [1996] 1 SCR 77; [1996] 2 CNLR 77, appears to allow provincial infringement of these rights if the justification test in *R v Sparrow* [1990] 1 SCR 1075 can be met. *Badger's* case was referred to with approval by the Supreme Court in *R v Marshall* [1999] SCR 456.

81 *Dick's* case [1985] 2 SCR 309 at 326–28; *Bruce v Yukon Territory (Commissioner)* [1994] 3 CNLR 25. See generally Imai, S, *The 1998 Annotated Indian Act* (1998, Carswell, Thomson, Canada); McNeil, *op cit,* fn 37; Wilkins, K 'Still crazy after all these years: section 88 of the Indian Act at fifty' (2000) 38(2) Alta Law Review 458; Wilkins, *op cit,* fn 59; Bankes, *op cit,* fn 37.

82 In *R v Sutherland* [1980] 2 SCR 451, the Supreme Court found that laws of general application refer only to provincial laws. Federal laws apply of their own force pursuant to s 91(24) of the Constitution Act 1867. The Supreme Court in *R v George* [1966] SCR 267 had taken a similar view and found an Indian guilty of an offence under the Migratory Birds Convention Act (RSC 1952, c 179), on the

apply to Indians to be referentially incorporated into federal law, and thus made applicable to 'Indians'.[83] Section 88 provides:

> 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 law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.[84]

Section 88 does not 'invigorate' provincial laws which are invalid because the laws single out Indians for special treatment or because the laws discriminate against Indians, nor does s 88 apply where the laws relate to Indian lands.[85] It is clear that s 88 will not assist a provincial law to apply if a direct conflict exists between the provincial law and either the Indian Act or other federal legislation. Due to the express terms of s 88, the section will not assist a provincial law in applying where treaty rights exist.[86]

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ground that s 88 did not prevent the application of that legislation to Indians who were exercising treaty rights to hunt. Here the court followed *Sikyea v The Queen* [1964] SCR 642.

83 *Dick's* case [1985] 2 SCR 309 at 322, held that s 88 involved referential incorporation by parliament of provincial laws of general application. See also *R v Francis* [1988] 1 SCR 1025 at 1030–31 and *Derrickson* [1986] 1 SCR 285. Referential incorporation is the process by which provincial legislation is incorporated into federal legislation thus making the provincial law the same as if it were a valid federal law. The doctrine of referential incorporation allows parliament or a legislature in enacting a statute which is within its constitutional power to adopt the laws of the other institution. Therefore, for the purposes of its statute, the Indian Act, the federal parliament adopts provincial laws as its own. Pursuant to s 88 of the Indian Act, provincial laws of general application are transformed into federal laws and these provincial laws apply with full force. If s 88 had not referentially incorporated such laws they could not constitutionally apply to Indians and such laws would be 'read down' to achieve that result. See Hogg, *op cit,* fn 5. See also Carter, R 'The application of provincial laws to status Indians under section 88 Indian Act', in Native Law Seminars, Native Law Centre, University of Saskatoon, Saskatchewan, 1987.

84 The limitations in s 88 which prevent provincial 'laws of general application' from applying to 'Indians' are as follows:

- The terms of a treaty prevail against 'laws of general application' in the case of conflict.
- A conflict with any other Act of the Parliament of Canada, ie, federal statutes.
- If the 'law of general application' is inconsistent with any provision in the Indian Act.
- If the 'law of general application' conflicts with any order, rule, regulation or by-law made under the Indian Act, or if any order, rule, regulation or by-law made under the Indian Act 'occupies the field', then the 'law of general application will not apply'. See Hogg, *op cit,* fn 5.

85 See Lamer CJC in *Delgamuukw* [1997] 3 SCR 1010 at 1122 quoting Professor Hogg. Section 88 of the Indian Act refers only to 'Indians' and not to 'Lands reserved for Indians'. Regarding Indian lands refer to the discussion below. Until the 1973 decision in *Cardinal's* case it was unclear whether s 91 (24) of the Constitution Act 1867 prevented all provincial laws from applying to Indians on reserve land. The Supreme Court of Canada in that case rejected the 'enclave theory' in the sense that it could no longer be said that provincial laws could never apply. In *Cardinal's* case Martland J left open the broad question of the application of provincial law on reserves as the application of the provincial game law in question in that case was dependent on the Natural Resources Transfer Agreement. *Cardinal's* case [1974] SCR 695 at 703. The application of some provincial laws to Indians on reserve land was confirmed in *Four B Manufacturing* [1980] 1 SCR 1031; [1979] 4 CNLR 21.

86 *R v White and Bob* (1965) 52 DLR (2d) 481; *Simon v The Queen* [1985] 2 SCR 387; *Quebec v Sioui* [1990] 1 SCR 1025; *R v Cotè* [1996] 3 SCR 139.

Object and purpose of s 88

Section 88 (originally s 87)[87] was enacted as part of the 1951 amendments to the Indian Act. What was Parliament's intention when s 88 of the Indian Act was enacted?[88] From the debate relating to the 1951 amendments in the House of Commons, it appears that s 88 was designed to ensure that Indian treaty rights in relation to hunting and fishing were preserved from interference by provincial laws.[89] If this was Parliament's intention, then s 88 would be a restatement of the then current law.[90] When s 88 was introduced, legal authority indicated that Indians could hunt freely on reserves without provincial interference, and could hunt off reserves in accordance with treaty rights, with provincial legislation,[91] or with the Natural Resources Transfer Agreements.[92] It

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87 Statutes of Canada, 1951 c 29, s 87. See generally Leslie J and Maguire R (eds), *The Historical Development of the Indian Act,* 2nd edn, 1978, Ottawa: Treaties and Historical Research Centre, Research Branch, Corporate Policy, Indian and Northern Affairs Canada.

88 The House of Commons debates on the 1951 amendments to the Indian Act (Bill 79) indicate very little discussion directly concerning s 87 (as it was then enacted). In the process leading to the amendment of the Indian Act the House of Commons appointed a Special Joint Committee of the Senate and House of Representatives (1946–48) (hereinafter referred to as SJC) to examine and consider the Indian Act. This Committee issued reports in 1946, 1947 and 1948 and prepared draft legislation to amend the Act. Debates, 2d Sess, 21 st Parl, at 3936.

89 The Minister of Indian Affairs, Mr Harris, in the second reading speech on the Bill to amend the Indian Act noted that the Minutes of Evidence and Reports of the Special Joint Committee of the Senate and the House of Commons indicated that most Indian witnesses considered that because of provincial laws, particularly game and fishing laws, Indian treaty rights had been restricted. The Minister further noted that 'court decisions have upheld the right of the Indian to hunt and fish, in some cases, in what appears to be a contradiction of provincial game laws'. In view of this the Minister considered that a policy of co-operation with provincial governments should be continued to obtain the maximum conservation of game and fish together with continued Indian rights (House of Commons Debates, 16 March 1951, 1354).
The Minutes of Evidence of SJC reveal concerns by Indians in relation to their treaty rights. A submission to the Committee in 1947 by a band from Watson Lake, Yukon, stated that they wish the Indian Act changed to override the British Columbia provincial game laws (SJC: 1947, 2038). A submission in 1946 to the Committee by the North American Indian Brotherhood states that the Brotherhood considers that 'by virtue of their treaty rights, Indians are not liable to any provincial laws within their territories respecting fishing, hunting and trapping and, therefore, are not liable to take out licences from the provincial governments to fish, hunt and trap within their territories'. (SJC: 1946, 428–29). In *R v George* [1966] SCR 267, the Supreme Court considered that the object and intent of s 88 of the Indian Act, (at that date s 87) was to make Indians, who were under the exclusive legislative jurisdiction of Parliament by virtue of s 91 (24), subject to provincial laws of general application. The court noted that s 88 was not intended to be a declaration of the paramountcy of treaties over federal legislation. The reference to treaties was incorporated in that section, the purpose of which was to make provincial laws applicable to Indians, so as to preclude those laws from interfering with rights under treaties.

90 Indian representatives, on requesting clarification of s 88, were said to be informed that provincial laws would not apply if they contravened any treaty, and/or any Act of parliament, for example the Indian Act. See Summary of the Proceeding of a Conference with Representative Indians held in Ottawa, 1951, House of Commons, in Debates, 4th Sess 21st Parl, 16 March 1951 at 1364–67.

91 Prior to the 1951 amendment provincial laws did not apply to Indians on reserve, but such laws were generally regarded as applying (subject to certain exceptions which include treaty rights) to Indians off reserve. See *R v Jim* (1915) 22 BCR 106 where provincial game laws were found not to apply to Indian reservations and see *R v Rogers* (1923) 2 WWR 353 (Man CA) where Indians were found to be subject to off reserve laws. Prior to the 1951 amendments the courts appeared to have allowed broad

should also be remembered that in 1951, when s 88 was enacted (as s 87), it was unclear whether Aboriginal rights existed at common law. Formal recognition of such Aboriginal rights occurred in the 1973 Supreme Court decision in *Colder v Attorney General of British Columbia.*[93] The parliamentary debates reveal no apparent suggestion that this section was designed to widen the scope of provincial laws applicable to Indians,[94] nor do the debates reveal any consideration of the question of the application of provincial laws to 'Lands reserved for the Indians'.

Application of provincial laws

As noted above, s 88 can make provincial laws apply to Indians where such laws have a severe affect on 'Indianness' by impairing the status or capacity of Indians, or where such laws touch on the 'core of Indianness'.[95] The decision in *Dick v The Queen* (*Dick's* case)[96] confirmed that s 88 is not simply a statement of the

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provincial powers to apply to Indians off reserve. See also *R v Martin* (1917) 39 DLR 635; *R v Discon and Baker* (1968) 67 DLR (2nd) 619; *R v Dennis* (1975) 2 WWR 630. Section 88 may have been intended to be declaratory of the law prior to the 1951 amendment; however, as discussed above, *Dick's* case recognises that s 88 incorporates by reference provincial laws of general application which touch on 'Indianness' (*Dick's* case [1985] 2 SCR 309 at 326–28). However, as Leroy Little Bear comments, 'if the section was simply declaratory [of the application to Indians] of existing game laws, its utilization for the application of run-of-the-mill provincial legislation to Indians is one that should never have occurred'. Little Bear, *op cit,* fn 59,184. See generally Pratt, A, 'Federalism in an era of Aboriginal self government', in Hawkes, DC (ed), *Aboriginal Peoples and Government Responsibility* (1989, Ottawa: Carleton University Press) and also Bartlett, R, *The Indian Act of Canada* (University of Saskatchewan, Native Law Centre, 1980, 5–8 and 24–29.

92 These agreements were given constitutional force by s 1 of the Constitution Act 1930, 20 & 21 Geo V c 26 (UK).

93 [1973] SCR 313. This could explain why treaty rights were specified as protected in s 88 from provincial laws while Aboriginal rights were not so protected. See McNeil, *op cit,* fn 37.

94 However, in the SJC's Report 1948 it was recommended that consideration be given to arrangements to bring Indians within the scope of provincial legislation in relation to certain matters which were dealt with under provincial legislative powers. The matters listed for consideration by the Provinces included provincial fish and game laws; fur conservation and development and Indian traplines; education; provincial liquor legislation; health and social security. (SJC 1948,187–190.) See generally *The Historical Development of the Indian Act,* 1975, Policy, Planning and Research Branch, Department of Indian and Northern Affairs.

95 See generally Hogg, *op cit,* fn 5, Chapter Ch 27–13; Little Bear, *op cit,* fn 59 and see Lamer CJC in *Delgamuukw* [1997] 3 SCR 1010 at 1122. Lambert JA, in *R v Dick* (1983) 22 CNLR 134, found that the provincial law which infringed hunting rights was not referentially incorporated by s 88 because a law which infringes an Aboriginal right cannot be a law of general application. However, in *Dick's* case [1985] 2 SCR 309, Beetz J criticised Lambert JA in the Court of Appeal for using the same test to assess whether an Act was a law of general application and for determining whether such law could be referentially incorporated under s 88. In *Dick's* case the Wildlife Act was found to be a law of general application because the 'intent', 'purpose' and 'policy' of the Act was not to single out Indians for particular treatment. The court considered the legislative intent of the British Columbia legislature to determine whether the law was one of general application.

96 *Ibid.*

general constitutional position, nor is it merely declaratory of existing law.[97] Section 88 does expand the body of provincial law applicable to Indians.[98] *Dick's* case has subsequently been reaffirmed in later cases.[99] Section 88 will referentially incorporate provincial game laws where such laws touch the 'core of Indianness'. For example, although hunting is central to the culture of the group in question, and thus provincial game laws can not apply *proprio vigore,* s 88 could referentially incorporate such laws to apply to Indians.[100] In *R v Alphonse,*[101] the British Columbia Court of Appeal found that s 88 would referentially incorporate provincial laws regarding hunting. Therefore it seems that, subject to s 35 of the Constitution Act 1982, provincial laws impacting on Aboriginal rights, such as hunting and fishing, could be referentially incorporated by s 88 and so apply to Indians undertaking such activities off reserve.[102] It is unclear whether s 88 will referentially incorporate such laws to apply on reserve.[103]

Can s 88 apply to 'Lands reserved for the Indians'?

Can provincial laws that involve 'possession and use of the land' apply to Indian land through s 88? In other words, does s 88 referentially incorporate provincial laws which can't apply of their own force and make them apply to s 91(24) 'Lands reserved for the Indians'? A literal reading of s 88 would indicate

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97 Provincial law has applied to Indians as persons since at least the decision in *R v Hill* (1907) 15 OLR 406 (Ont CA) where provincial laws licensing physicians were applied to Indians. Until *Dick's* case [1985] 2 SCR 309, s 88 had appeared to be merely declaratory of what the law was prior to the enactment of s 88 of the Indian Act. However, the result of this decision was that s 88 incorporates by reference provincial laws of general application which touch on 'Indianness'.

98 See Hogg, *op cit,* fn 5, 27–13. Thus provincial laws that do affect 'Indianness', etc. will be referentially incorporated unless one of the provisos in s 88 prevents that from happening. See also Little Bear, *op* cit, fn 59, 183.

99 See *Derrickson's* case [1986] 1 SCR 285 and *R v Francis* [1988] 1 SCR 1025.

100 In *Dick's* case [1985] 2 SCR 309, the provincial *Wildlife Act* was referentially incorporated through s 88 to apply to an Indian hunting off reserve land. Also in *Kruger and Manuel v R* [1978] 1 SCR 104, provincial game laws were found to be applicable to Indians hunting off reserve.

101 [1993] 4 CNLR 19 (hereinafter *Alphonse's* case). In *Alphonse's* case, the referential incorporation under s 88 was conditional on any infringement created by that law being justified under the *Sparrow test.* This the Crown has failed to do in that case.

102 Refer to the discussion of s 35 and critique of *Alphonse's* case below.

103 In *R v Isaac* (1975) 13 NSR (2d) 46, provincial game laws were found not to apply on Indian reserves as hunting was a use of the land. In *R v Jim* (1915) 26 CCC 236 (BCSC) and in *R v Rogers* (1923) 2 WWR 353 provincial game laws were found not to apply on reserve land. While the Supreme Court in *Cardinal's* case [1974] SCR 695, found that provincial game laws applied to Indians on reserve land, these laws were applicable by virtue of s 12 of the Natural Resources Transfer Agreements which section specifically provided for their application. Provincial game laws have been found to apply to non-Indians hunting on reserve *R v Morley* [1932] 2 WWR 193 (BCCA) and *R v McLeod* [1930] 2 WWR 37 (BC Co Ct). However, the validity of these decisions may be questionable after the decision in *Surrey v Peace Arch* (1970) 74 WWR 380. See McNeil, K, *Indian Hunting Trapping and Fishing Rights in the Prairie Provinces of Canada,* (1983, University of Saskatchewan Native Law Centre, 1983 13–17 and see also McNeil, *op cit,* fn 37, notes 53–58 and accompanying text. Refer also to the discussion below in relation to whether s 88 can apply to 'Lands reserved for the Indians'.

that s 88 would not extend to reserve land.[104] The wording in s 88 specifies 'Indians', with no mention of 'Lands reserved for the Indians'; therefore, the section should apply provincial laws to Indians and not to Indian lands.[105] Section 91(24) of the Constitution Act 1867 has been interpreted by the courts as containing two heads of power: 'Indians' *and* 'Lands reserved for the Indians'.[106]

The Supreme Court of Canada has yet to definitively answer the question whether a provincial law can be referentially incorporated to apply to Indian reserves by s 88 of the Indian Act.[107] The case law so far indicates that provincial laws of general application apply by referential incorporation only to Indians, and not to lands reserved for Indians.[108] This is the position where the provincial laws relate to land use.[109] Support for this view can be found in *Cardinal v Attorney General of Alberta General*).[110] Laskin J (dissenting on other grounds) considered that s 88 deals only with Indians, and not with reserves.[111] However, provincial laws can incidentally affect 'Lands reserved for

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104 Section 88 of the Indian Act relates only to Indians; it does not refer to 'Lands reserved for the Indians'. The Supreme Court in *Derrickson* [1986] 1 SCR 285 referred to the Attorney General of Ontario's argument that provincial laws of general application, including laws relating to land, apply to Indians on reserves as elsewhere. Chouinard J at 299 quoted this argument:
'…Parliament has enacted, in section 88 of the Indian Act, law concerning the exposure of Indians to 'all laws of general application from time to time in force in any province'. It makes no difference whether those laws are in relation to lands or some other class of subjects. In either event, they are applicable to Indians subject to the limits prescribed in the section. There is no reason to import into the construction of the words in section 88 the fact that Parliament has pursuant to section 91 (24), not one but two subjects within its legislative authority.'
However, the court neither accepted nor dismissed this argument. If this argument were accepted then s 88 could make provincial laws apply to 'Indian use of Aboriginal title lands'.

105 See McNeil, *op cit,* fn 37,180 who notes that 'one would expect Parliament to express itself clearly if it intended to authorise the intrusion of provincial laws into both heads of s 91(24) power'.

106 *Four B Manufacturing* [1980] 1 SCR 1031 at 1049–50.

107 See generally Hughes, *op cit,* fn 5, 97–103; Bankes, ND, *The Constitutional Framework for the Development and Regulation of Energy Projects on Indian and Metis Lands in Alberta,* 1986, Edmonton: Environmental Law Centre at 16–18; 'Provincial jurisdiction and resource development on Indian reserve lands', in Saunders, O (ed), *Managing Natural Resources in a Federal State,* 1986, Toronto: Carswell; Saunders, D, *Indians and the Law: The Application of Provincial Laws to Indians and Indian Lands,* 1983 BC Continuing Legal Education; Ladner, HG, *The Application of Provincial Legislation—The Residential Tenancy Act,* 1983, BC Continuing Legal Education.

108 Laws that relate directly to 'Lands reserved for the Indians' will be invalid and cannot be referentially incorporated by s 88 of the Indian Act. See *Hopton v Pamajewon* [1994] 2 CNLR 61–70 70, and see *Delgamuukw* [1997] 3 SCR 1010 at 1122. See also Lambert JA in *Paul v BC (Forest Appeals Commission)* [2001] BCJ 1227 (BCCA).

109 At least three provincial Court of Appeal decisions (*Corporation of Surrey v Peace Arch Enterprises* (1970) 74 WWR 380; *Re Stoney Plain Indian Reserve No 135* [1982] 1 CNLR 133 and *R v Isaac* (1975) 13 NSR (2d) 460 have held that s 88 does not have the effect of applying provincial laws to reserve land. Until the Supreme Court decides otherwise that is the law, at least in those provinces. The Saskatchewan Court of Appeal in *R v John* (1962) 133 CCC 43 at 47, also considered that s 88 relates to Indians and not to reserves. Compare *Oka v Simon* [1998] 2 CNLR 205.

110 [1974] SCR 695 at 727.

111 The majority in *Cardinal's* case, *ibid,* refused to accept that Indian reserves were enclaves which were withdrawn from the application of provincial legislation. In *Cardinal's* case both Laskin J (dissenting) at 715 and Martland J at 708 indicated that provincial game laws may not apply on Indian

the Indians' where such laws relate primarily to another head of provincial power.[112]

In the 1970 decision of *Corporation of Surrey v Peace Arch Enterprises,*[113] the construction of buildings on reserve land that was surrendered and leased to non-Indians under the Indian Act was found to be exempt from provincial zoning laws, as such laws sought to control the use of the Indian land.[114] The use was a non-Indian one—an amusement park which had no Indian character whatsoever. It has been noted by Professor Hogg that the construction of buildings on reserve land seems tenuously related to 'Indianness', but it is directly related to 'Lands reserved for the Indians'.[115] Section 88 itself was not referred to by the court in the *Surrey* case.[116] In the 1975 decision of the Nova Scotia Supreme Court, Appeal Division, in *R v Isaac,*[117] it was found that s 88 would not make applicable to Indian reserve land a provincial game law which would have the effect of regulating the use of that land by Indians.[118] Both the *Surrey v Peace Arch* and *R v Isaac* cases pre-dated the 1985 Dick's case interpretation of s 88, where it was found that s 88 applies to referentially incorporate into federal law, provincial laws which impact on 'Indianness'.[119] However, *Dick's case* concerned the application of provincial laws to Indians,

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reserve land of their own force. Laskin J went on to say that s 88 would not make the provincial game laws apply on reserves. He stated at 727–28 that:
The section deals only with Indians, not with Reserves, and is, in any event, a referential incorporation of provincial legislation which takes effect under the section as federal legislation… If the *Wildlife Act* of Alberta is such an enactment as is envisaged by s 88, an Indian who violated its terms would be guilty of an offence under federal law and not of an offence under provincial law.'
Martland J found it unnecessary to consider the effect of s 88 of the Indian Act. *Cardinal's* case at 705.

112 *R v Francis* [1988] 1 SCR 1025; *Rempel Brothers Concrete v Chilliwack (District)* (1994) 88 BCLR (2d) 209 (BCCA); *Delgamuukw* [1997] 3 SCR 1010 at 1120.

113 (1970) 74 WWR 380 (BCCA).

114 *Ibid.* In *Brantford (Township) v Doctor* [1996] 1 CNLR 49, regulations requiring building permits for swimming pools were applied to Indian lands. These regulations were regarded as only incidentally relating to land. While the decision in *Surrey v Peace Arch* was distinguished in *Brantford's* case it was not overruled by the Supreme Court in *Derrickson's* case.

115 Hogg, *op cit,* fn 5, 27–11.

116 MacLean JA stated in *Surrey's* case, *ibid* at 383, that, if:
'These lands are "Lands reserved for the Indians" within the meaning of that expression as found in s 91(24) of the *BNA 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".'

117 (1975)13 NSR(2d) 460.

118 *R v Isaac, ibid* at 474, MacKeigen CJNS stated that:
'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.'

119 As a result of the *Dick* case [1985] 2 SCR 309, provincial laws of general application which affect 'Indianness' apply by referential incorporation under s 88, apart from the exceptions discussed previously. Indians are therefore subject to extensive provincial legislation. See Little Bear, *op cit,* fn 59, 183.

and not to Indian land. The case did not address the question of whether s 88 can apply in relation to 'Lands reserved for the Indians'. Courts appear to have distinguished between legislation which relates to land itself and legislation which applies to the user of the land and the activities of that user.[120] It seems that provincial laws of general application which affect users as persons, as opposed to the use of reserve land itself, will be applicable on Indian land.[121] In *R v Duncan Supermarket Ltd,*[122] the court found that provincial legislation which required retail businesses to close on certain holidays did apply to a business conducted on reserve land. McKenzie J found that the question was whether the relevant sections of the Act applied to the use of the land, as contrasted to being directed to the activities of the user of the land. The British Columbia Court of Appeal, in *Rempel Brothers Concrete v Chilliwack (District),*[123] found that a municipal by-law which imposed a soil removal and deposit fee applied on reserve lands, as the by-law had only an incidental effect, if any, on the reserve land and did not regulate the use of the land. The British Columbia Supreme Court, in *Froste v Bob,*[124] indicated that the provincial Occupiers Liability Act applied to rodeo grounds on reserve lands, as the court found that the occupier was in breach of duty under that Act. In *Mission (District) v Dewdney/Aloutte Assessor Area No 13,*[125] the British Columbia Court of Appeal considered that while reserve lands which were occupied by non-Indians were liable to assessment under provincial legislation, the same Act did not apply to an Indian lessee of reserve lands. In *R v Fiddler,*[126] the court found that provincial legislation prohibiting the lighting of fires without adequate precautions to control the fire was a safety law of general application, and was not a regulation of the use of the land.[127]

A builder's lien was not permitted to be registered over reserve land which had been leased in the case of *Palm Dairies v The Queen*.[128] However, in the 1979 decision of *Western Industrial Contractors Ltd v Sarcee Developments*

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120 Note that in the *Oka v Simon* [1998] 2 CNLR 205, the court considered that the use must be an Indian use. See also Clark, R, *The Application of Provincial laws to Status Indians Under Section 88 of the Indian Act,* 1987, College of Law, University of Saskatchewan, Saskatoon, Native Law Seminars 10. Woodward, *op cit,* fn 11, 124–26.

121 See Sanders, *op cit,* fn 5, 461. In only one case that I am aware of, *R v Superior Concrete* ((1986) unreported, Vancouver County Court, May), did the court explicitly acknowledge this to be a factor. See *R v Duncan Supermarket Ltd* (1982) 135 DLR (3rd) 700, where this distinction also appears to be made.

122 *Ibid,* at 709 (BCSC). Section 88 was not referred to by the court in this case. *Surrey's* case (1970) 74 WWR 380 (BCCA), was distinguished as the court considered that the legislation was not directed to the use of the land.

123 (1994) 88 BCLR (2d) 209 (BCCA) at 214.

124 (1993) unreported, Doc No Kamloops 15187, January.

125 [1993] 1 CNLR 66.

126 [1994] 4 CNLR 99 at 127–28 (Sask QB). In *R v Sinclair* [1978] 6 WWR 37 it was found that provincial law which regulated the setting of fires was not applicable to Indian land.

127 Noble J in *Fiddler's* case, *ibid.*

128 (1978) 91 DLR (3rd) 665.

Ltd,[129] the Alberta Supreme Court, Appellate Division, allowed a building contractor to file a lien against an Indian-owned corporation which held a lease on reserve land.[130] The court applied provincial legislation in relation to a builder's lien to attach to a leasehold interest on reserve land. The Indian band's reversionary interest in the reserve lands was considered to remain part of the exclusive federal jurisdiction, and accordingly the provincial legislation was inapplicable to that reversionary interest.[131] The Alberta Court of Appeal, in 1982, in *Re Stoney Plain Indian Reserve No 135,*[132] stated that 'we accept the general proposition that provincial legislation relating to the use of reserve lands is inapplicable to lands that are found to be reserved for Indians'. In *Re Stoney* Plain,[133] the court considered that s 88 did not apply in relation to surrenders of Indian land. In *CP Ltd v Paul,*[134] the court considered that, as a constitutional matter, provincial legislation which enabled title to land to be acquired by prescription would not apply to Indian land.

In relation to provincial residential tenancies law applying on reserves, the cases are divided. In 1978, in *Millbrook Indian Band v Northern Counties Residential Tenancies Board,*[135] the court held that the Nova Scotia Residential Tenancies Act[136] did not apply on reserve land as the relationship between landlord and tenant was a proprietary one, and the legislation therefore related to the use of the land. A different position was taken in the 1978 decision in *Re Mobile Homes Sales Ltd and Le Greey,*[137] where the court found that a provision in the British Columbia Landlord and Tenant Act,[138] which prevented the landlord increasing the rent of residential premises, did apply to the lease of a mobile home on an Indian reserve, as this did not affect the use of the land. In 1982, in the case of *Toussowasket Ent Ltd v Mathews,*[139] it was found

129 (1980) 98 DLR (3d) 424.

130 The corporation was not considered by the court to be 'Indian' within the meaning of the Indian Act and the leasehold interest was not considered to be Indian land within the scope of s 91(24). *Surrey and Peace Arch* (1970) 74 WWR 380 (BCCA), was distinguished by the court in *Sarcee* as the lien was against the company's leasehold interest and did not impact on the interest of the Indian band in the land. However, *Peace Arch* also involved a leasehold interest in reserve lands held by non-Indian corporations and it is arguable that the decisions are in conflict with one another.

131 This decision has been criticised. See McNeil, 'Aboriginal title and the division of powers', *op cit,* fn 5, 459. McNeil considers that this decision is limited in two ways: first, it applies only where a non-Indian holds an interest in reserve land as this interest is outside s 91(24), and secondly, *Surrey v Peace Arch, ibid,* was distinguished because it involved land use. Therefore, *Sarcee* would seem not to be applicable if the provincial legislation relates to the use of Indian land, even by a non-Indian. See also the criticism of this decision by Sanders, 'The Constitution, the provinces, and Aboriginal peoples', *op cit,* fn 59, 157.

132 [1982] 1 CNLR 133.

133 *Ibid.*

134 [1989] 1 CNLR 47 at 57 (SCC).

135 (1978) 84 DLR (3rd) 174 at 181–83.

136 SNS 1970c 13.

137 (1978) 85 DLR (3d) 618 at 619.

138 1974 (BC)c 45.

139 [1982] BCD Civ 1863–01.

that the same Residential Tenancy Act applied to a non-Indian on reserve land. However, in 1992, in *Matsqui Indian Band v Bird,*[140] the same Residential Tenancy Act was held not to apply on Indian reserve lands. Despite this finding, the court was prepared to allow the common law of landlord and tenant to govern the interpretation of lease contracts on reserve land.

The question of whether s 88 applied to Indian lands was avoided by the Supreme Court in *Derrickson's* case.[141] In that case, a request was made for an order for half of family assets, where the family real property was reserve land held pursuant to certificates of possession. The court found that the right to possession of lands on reserves was a matter of exclusive federal legislative power, and that provincial laws which affected the right to possession and use of Indian land[142] could not apply of their own force.[143] The court did recognise that provincial legislation could be incorporated through s 88 of the Indian Act. It was argued that s 88, properly interpreted, made provincial laws applicable to reserve lands. The court did not dismiss this argument, as it did not have to decide the issue of referential incorporation.[144] It was found that, even if the provincial legislation relating to lands was generally incorporated, the provincial legislative provisions involving matrimonial property were inconsistent with the provisions of the Indian Act,[145] and thus the doctrine of paramountcy applied.[146]

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140 [1993] 3 CNLR 80. In *Anderson v Triple Creek Estates* (BCSC) (1990) unreported, Doc No Westminster A 90 1403, 18 July it was held that occupation is part of possession. Here the court refused to review an eviction notice under provincial legislation which was issued to a tenant in a mobile home park on Indian reserve lands.

141 *Derrickson* [1986] 1 SCR 285 at 297–99.

142 Compare the decision by the Quebec Court of Appeal in *Oka* [1998] 2 CNLR 205, where the use had to be an Indian use of land to come within the exclusive federal legislative power.

143 Chouinard J in *Derrickson* [1986] 1 SCR 285 at 296 stated:
'The right to possession of lands on an Indian reserve is manifestly of the very essence of the federal exclusive legislative power under s 91(24) of the *Constitution Act* 1867. It follows that provincial legislation cannot apply to the right of possession of Indian reserve lands.'
The decision in Derrickson was followed in *Paul v Paul* [1986] 1 SCR 306, where the Supreme Court found that provincial legislation relating to the occupation of a matrimonial home could not apply on reserve land. In the British Columbia Court of Appeal it was stated that such an order for 'occupancy' deals with the use of the land and these matters come within federal jurisdiction. See also, *Paul v Paul* [1985] 2 CNLR 93 at 97. In *George v George* [1993] 2 CNLR 112 the British Columbia Supreme Court again found that real property on a reserve could not be sold or divided pursuant to provincial family law legislation. In these cases the provincial legislation was also in conflict with the provisions of the Indian Act and was inapplicable through paramountcy rules.

144 Chouinard J in *Derrickson, ibid* at 298 stated that:
'The submission that s 88 does not apply to lands reserved for Indians is quite simple. It is to the effect that not one but two subject matters are the object of s 91(24) of the Constitution Act 1867, namely: 'Indians' and 'Lands reserved for the Indians'. Since only Indians are mentioned in s 88, that section would not apply to lands reserved for the Indians'.

145 *Derrickson, ibid* at 302. Inconsistency of provincial laws with provisions of the Indian Act is one of the qualifications in s 88.

146 *Derrickson's* case was followed in *Simpson v Ziprick* (1995) 126 DLR (4th) 754 (BCSC), where provincial legislation, which allowed joint tenants to apply for partition under the Partition of Property Act, RSBC 1979 C 311, was not applied to reserve land through s 88. Here the provincial legislation was found to be inconsistent with the Indian Act and could not apply to lands reserved for

Generally, the cases support the conclusion that where provincial laws purport to regulate land use, such laws will be read down and have no application to reserve lands.[147] Technically, it is open to the Supreme Court to interpret s 88 so as to allow provincial laws that relate to land to apply to 'Lands reserved for the Indians'. However, good reasons exist to support the view that provincial legislation should not be applied to reserve land. Where ambiguity exists in the interpretation of a statute which affects Indians, the established rule of interpretation of such legislation is that ambiguities should be construed in favour of Aboriginal peoples.[148] Such interpretation would limit referential incorporation to provincial laws of general application that affect Indians, but would not include laws that affect Indian lands.[149] Another reason for limiting provincial laws of general application to laws that affect Indians is that the honour of the Crown could not be upheld where provincial laws infringed Aboriginal title.[150] It would be a dishonourable abdication of the responsibility that was placed on the federal government if that were permitted to occur.[151]

The *Delgamuukw* court, in reaching its decision, failed to address the issues of s 88 and referential incorporation directly, other than in the context of extinguishment of Aboriginal title.[152] Only if s 88 referentially incorporates laws in relation to Aboriginal title could provincial laws of general application, which affect possession and use of lands, apply to Aboriginal interests in land.[153] On the authority of *Alphonse's* case and *Dick's* case, provincial laws that infringe Aboriginal hunting rights can be referentially incorporated if the justification test is met.[154] In that way, provincial laws in relation to Aboriginal title could be

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Indians. In *Derrickson's* case Chouinard J questioned the right of the province to make laws dealing with the severance of a joint tenancy of Indian land. In *Re Bell and Bell* (1977) 78 DLR (3rd) 227, the Supreme Court of Ontario, however, found that partition legislation applied to reserve land.

147 However, see *Oka* [1998] 2 CNLR 205, and the accompanying text.

148 See *Nowegijick v The Queen* [1983] 1 SCR 29 at 36; *R v Sparrow* [1990] 1 SCR 1075 at 1107–08; *Simon v The Queen* [1985] 2 SCR 387 at 402.

149 See McNeil, 'Aboriginal title and the division of powers', *op cit,* fn 5, 440. Compare Wilkins, *op cit,* fn 81, 489.

150 The honour of the Crown has been referred to in *Sparrow* [1990] 1 SCR 1075 at 1107–09; *R v Badger* [1996] 1 SCR 77 at 794 *per* Cory J; *R v Van der Peet* [1996] 2 SCR 507 at 537 *per* Lamer CJC and in *Delgamuukw* [1997] 3 SCR 1010, in the Court of Appeal, *per* Macfarlane JA; and in *R v Marshall* [1999] SCR 456.

151 See also McNeil, 'Aboriginal title and the division of powers', *op cit,* fn 5,440–41.

152 See McNeil, 'Aboriginal title and the division of powers', op *cit,* fn 5,447.

153 However, provincial laws might still have some incidental effect on those interests. See Peeling, *op cit,* fn 37.

154 *Alphonse's* case [1993] 4 CNLR 19 and *Dick's* case [1985] 2 SCR 309.

effective. Lamer CJC, in *Delgamuukw,*[155] suggested that provincial laws can be made applicable to Aboriginal title lands by s 88 of the Indian Act. Such an interpretation of s 88 could result in a substantial invasion by the provinces into Aboriginal land title rights.

Is s 88 unconstitutional?

Section 35 of the Constitution Act 1982 reduces the capacity of federal parliament to erode Aboriginal rights.[156] Section 88 of the Indian Act, of itself, offers no protection to Indians in relation to laws that are inconsistent with s 35 of the Constitution Act 1982. It is only after those laws are incorporated into federal law that the *Sparrow* justification test (see below) would apply. However, the constitutional division of powers clearly places responsibility for 'Indians' with the federal government under s 91(24), and arguably the provinces have no power to infringe Aboriginal rights on their own.[157]

In *Dick's* case,[158] the British Columbia Court of Appeal expressed the opinion that s 88 is not inconsistent with s 35(1) of the Constitution Act 1982, despite the section incorporating laws affecting 'Indianness' which could therefore be inconsistent with s 35(1). In 1993, in *Alphonse's* case,[159] the

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155 Lamer CJC in *Delgamuukw* [1997] 3 SCR 1010 at 1122, considered that provincial land and resource laws affecting Aboriginal title may be given force as federal laws through the operation of s 88. (However, Lamer CJC's discussion of s 88 of the Indian Act is generally in the context of extinguishment and not infringement.) Macfarlane JA in the Court of Appeal in *Delgamuukw* (1997) 153 DLR (4th) 193 at 539, also considered that s 88 'may authorise provincial interference with Aboriginal rights; provincial laws may affect, regulate, diminish, impair or suspend the exercise of an Aboriginal right,' and that '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'. Such laws would still be subject to s 35 of the Constitution Act 1982. This approach to s 88 has been criticised. See commentary by McNeil in 'Aboriginal title and the division of powers', *op cit,* fn 5, and additional commentary by McNeil, *op cit,* fn 37. These views are re-iterated by Bankes, *op cit,* fn 37 and Wilkins, *op cit,* fn 59. For recent judicial rejection of the view that s 88 referentially incorporates provincial laws in relation to 'Lands reserved for the Indians' see Lysyk J in *Stoney Creek Indian Band v British Columbia* [1998] BC 2468. (This decision was overturned on appeal; however, the British Columbia Court of Appeal did not address the substantive issue.)

156 See *Sparrow* [1990] 1 SCR 1075 at 1109–1110 and 1113–1119. In *Sparrow,* the court considered that legislation that affects the exercise of Aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognised and affirmed under s 35(1). This test is referred to below.

157 This is because *Badger* [1996] 1 SCR 77, and *Cotè* [1996] 3 SCR 139, held and *Delgamuukw* [1997] 3 SCR 1010, repeated that this was not possible.

158 [1993] 4 CNLR 63 as *per* Macfarlane JA at 69. 'The fact that s 88 referentially incorporates laws that affect Indians qua Indians does not necessarily mean that s 88 is inconsistent with s 35(1). The purpose of s 88 is to give effect to provincial laws of general application. An unconstitutional regulation will not be incorporated as federal law. The question whether incorporated legislation may be challenged as violating s 35 (1) is distinct from the issue whether s 88 is *intra vires* the powers of parliament. Section 88 is an enabling provision. By itself it does not interfere with the exercise of Aboriginal rights. In my opinion it is not inconsistent with s 35(1)'.

159 Supra note 101. See also *R v Sundown* [1997] 4 CNLR 241 (Sask CA), *per* Vancise, affirmed by the Supreme Court of Canada [1999] 2 CNLR 289.

question of whether s 88 of the Indian Act is inconsistent with s 35(1) of the Constitution Act 1982 was again considered by that court. Macfarlane JA (Taggart, Hutcheon and Wallace JAA concurring) upheld the constitutional validity of s 88. Macfarlane JA accepted the province's argument that the section does not, in and of itself, interfere with Aboriginal rights, and therefore s 88 does not need to be justified under the *Sparrow* test. Macfarlane JA further considered the situation where the terms of incorporated provincial legislation interfered with specific Aboriginal rights. This he considered would not support the proposition that s 88 itself is unconstitutional. Macfarlane JA based this view on the *Sparrow* finding that Aboriginal rights are not absolute, and that interference with such rights can be justified. Section 88, he considered, would be unconstitutional only if Aboriginal rights were absolute.

Contrary to the views in the *Alphonse* and *Dick* cases, academic endorsement has been given to the view that s 88 itself requires justification under the *Sparrow* test.[160] It is arguable that infringement of Aboriginal rights through s 88 can be made only 'by the federal government, pursuant to federal objectives, as the provinces are barred by the division of powers from doing so'.[161] Reliance is placed on the words of Lamer CJC in *R v Adams,*[162] that in light of the Crown's fiduciary obligations to Aboriginal peoples it is impossible for parliament to put into place 'an unstructured discretionary administrative regime which risks infringing Aboriginal rights' without explicit guidelines.[163] Section 88 is seen as having many similarities with such an administrative scheme.[164] McNeil[165] and Wilkins[166] further support the interpretation that s 88 would fail to satisfy the *Sparrow* standards of 'sensitivity to and respect for the rights of Aboriginal peoples' and of 'as little infringement as possible in order to effect the desired goals', and therefore this section should be read down so that it is incapable of incorporating provincial laws that infringe Aboriginal rights.[167]

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160 See Wilkins, *op cit,* fn 59, 228, and also McNeil, *op cit,* fn 37. *Sparrow* [1990] 1 SCR 1075.
161 McNeil, *op cit,* fn 37, 167. See also Wilkins, *op cit,* fn 59.
162 [1996] 3 SCR 101, at 132.
163 See Wilkins, *op cit,* fn 81, 495 and McNeil, *op cit,* fn 37 167–68.
164 Wilkins, *op cit,* fn 59.
165 McNeil, *op cit,* fn 37.
166 Wilkins, *op cit,* fn 59, 228.
167 Wilkins, *op cit,* fn 59, quoting *Sparrow* [1990] 1 SCR 1075 at 1119. See McNeil, *op cit,* fn 37, 169. McNeil considers that the constitutional validity of s 88 depends on whether it incorporates any provincial laws that do not infringe Aboriginal rights. If s 88 incorporates some laws that do not infringe Aboriginal rights then s 88 should be read down to limit its application to those laws. He states that 'if the only laws incorporated by it [s 88] are laws that infringe Aboriginal rights…it should be struck down because it violates s 35 (1)'.

Professor Slattery[168] has also argued (prior to the Supreme Court *Delgamuukw* decision) that the federal government cannot subvert the overall constitutional scheme by enacting legislation for Indians that referentially incorporates a wider range of provincial statutes than could otherwise apply to Aboriginals under the division of powers.[169]

Even if the Supreme Court rules that s 88 is valid, but the incorporated law produced a result that was inconsistent with s 35, then the incorporated law must be read down to eliminate the unconstitutional effect.[170]

Extinguishment and infringement of Aboriginal title and s 35 of the Constitution Act 1982

The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada' are constitutionally protected by s 35(1) of the Constitution Act 1982. Aboriginal rights which are recognised and affirmed by s 35 of the Constitution Act 1982 are not absolute.[171] Such rights can, in a very limited range of circumstances, be extinguished and infringed by legislation.[172] Aboriginal title is not just a property right, but a property right that is constitutionally protected by s 35(1) of the Constitution Act 1982.[173] The actual content of Aboriginal title (which is protected by s 35) was described in *Delgamuukw* as a right to the exclusive use and occupation of the land. An inherent limit on this title prohibits the use of the land 'in a manner that is irreconcilable with the nature of the

168 See Slattery (1992), *op cit,* fn 5, 285–86.

169 Slattery (1992), *op cit,* fn 5, 285 states that 'the provinces do not possess the power to legislate in relation to Aboriginal and treaty rights' and at 286 that:
'it follows that the Federal Parliament cannot subvert the overall constitutional scheme by enacting legislation for Aboriginal peoples that referentially incorporates a wide range of Provincial statutes that could not otherwise apply to First Nations under the division of powers. Such Federal legislation, it is submitted, would seriously affect the Aboriginal right of self-government under section 35 of the *Constitution Act, 1982* and cannot meet the *Sparrow* standard of justification. So, section 88 of the current *Indian Act,* which referentially makes applicable to Indians 'all laws of general application from time to time in force in any province is of doubtful constitutional validity'.

170 McNeil, *op cit,* fn 37,165 considers that it would be impossible for a province to meet the *Sparrow* test and to show a compelling and substantial objective, respect for the Crown's fiduciary obligations and consultation without revealing an unconstitutional objective. McNeil further considers that if it is the federal government that has to establish the compelling and substantive objective, etc. how could this be done when Parliament was not involved in the enactment of the particular provincial law.

171 *Delgamuukw* [1997] 3 SCR 1010 at 1107. In *Sparrow* it was also recognised that, while s 35 restrained sovereign power, the rights recognised under s 35 were not absolute. Dickson CJ stated that 'Federal legislative powers continue including the right to legislate with respect to Indians…' And that 'federal power must, however, be reconciled with the federal duty towards the aboriginals and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.' *Sparrow* [1990] 1 SCR 1075 at 1109.

172 Refer to the discussion below in relation to the limited range of circumstances in which extinguishment of Aboriginal rights can occur. After the passage of the Constitution Act 1982, parliament cannot extinguish constitutionally protected rights.

173 McNeil, 'Aboriginal title and the division of powers', *op cit,* fn 5, 456. See also McNeil, 'Defining Aboriginal title in the 90s: has the Supreme Court finally got it right?', *op cit,* fn 5.

attachment to the land which forms the basis of the group's claim to Aboriginal title'.[174] This limit may restrict the scope of Aboriginal title but it cannot alter the exclusivity of Aboriginal title,[175] and can in no way change the fact that the Aboriginal right which is constitutionally protected is the right to the 'exclusive use and occupation of the land'. As discussed above, Aboriginal title also clearly comes within the subject matter of s 91(24) of the Constitution Act 1867.

Extinguishment of Aboriginal title and rights

Extinguishment of Aboriginal title can occur in a limited range of circumstances. These include voluntary surrender to the Crown,[176] constitutional amendment,[177] or legislation enacted by the federal parliament prior to 1982.[178] Parliament's power to extinguish legislatively existed only prior to the enactment of the Constitution Act 1982, as after that date it is not possible for Parliament to extinguish constitutionally protected rights.[179] In *Sparrow,*[180] a standard for the pre-1982 extinguishment of Aboriginal rights (including Aboriginal title) was established. That standard requires that a 'clear and plain intent' to extinguish be shown. While the standard of 'clear and plain intent' does not require language which refers expressly to extinguishment of Aboriginal rights, the standard required to establish the requisite intent is high.[181]

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174 *Delgamuukw* [1997] 3 SCR 1010 at 1088.

175 See McNeil, 'Aboriginal title and the division of powers', *op cit,* fn 5,456.

176 *Ontario (Attorney General) v Bear Island Foundation* [1985] 1 CNLR 1 affirmed by the Supreme Court on this point. See *Bear Island Foundation v Ontario (Attorney General)* [1991] 3 CNLR 79. See for commentary McNeil, K, The high cost of accepting benefits from the Crown: a comment on the Temagami Indian land case' [1992] 1 CNLR 40.

177 *R v Horseman* [1990] 1 SCR 901. While this case dealt with treaty rights, it illustrates the possibility of modifying those rights by constitutional amendment. A treaty right to hunt commercially was taken away by the Natural Resources Transfer Agreements, which were given constitutional force by the Constitution Act 1867.

178 *Sikyea v The Queen* [1964] SCR 642; *Sparrow* [1990] 1 SCR 1075. Post-s 35 of the Constitution Act 1982 this power has now been removed.

179 This was recognised by Lamer CJC in *Van der Peet* [1996] 2 SCR 507. A fortiori, the executive cannot extinguish Aboriginal rights, as the executive cannot interfere with vested rights without legislative authority. See McNeil, K, 'Racial discrimination and the unilateral extinguishment of native title' (1996) 1 AILR 181.

180 *Sparrow* [1990] 1 SCR 1073 at 1099.

181 See *R v Gladstone* [1996] 2 SCR 723. In this case the regulatory schemes affecting the fishing were found not to express a clear and plain intention to eliminate the Aboriginal right. Lamer CJ (para 38) considered that the failure to recognize an Aboriginal fishing right, and the failure to grant special protection to it, did not constitute the clear and plain intention necessary to extinguish the right. The regulations never prohibited aboriginal people from obtaining licences to fish. See also *Van der Peet, per* L'Heureux-Dube J (dissenting on other grounds) (para 138) [1996] 2 SCR 507.

Extinguishment by federal laws

As Parliament has exclusive jurisdiction in relation to 'Indians' and 'Lands reserved for the Indians', it also had exclusive jurisdiction to extinguish Aboriginal title prior to 1982.[182] The provinces have no power in the Constitution over Aboriginal title or Aboriginal rights,[183] and accordingly the provinces lack power to extinguish these rights. Because Aboriginal rights are 'part of the "core of Indianness" at the heart of s 91 (24)' under federal jurisdiction, provincial power to extinguish Aboriginal title rights has, in fact, been lacking since Confederation.[184] Thus, even prior to Aboriginal rights being protected by the Constitution Act 1982, those rights could not be extinguished by provincial laws.[185]

Extinguishment by provincial laws

Although provincial laws of general application can apply to Indians, such laws cannot extinguish Aboriginal rights. The federal government's exclusive jurisdiction in relation to extinguishment of Aboriginal rights would appear incompatible not only with any power of extinguishment, but also with any power of infringement by provincial legislatures.[186] If, however, the provincial legislatures can infringe Aboriginal rights, where does this power of infringement come from?

Underlying title to Aboriginal lands

Could provincial power to infringe Aboriginal rights be found in the fact that the underlying title to Aboriginal land is vested in the provinces? The separation of the right to the underlying title to Aboriginal land from the jurisdiction over Aboriginal land was recognised in the *St Catherine's Milling* case.[187] Section 109 of the Constitution Act 1867 vests the underlying title to Aboriginal land in the Crown in right of the provinces,[188] and not the Crown in right of the federal government. The underlying title of the provincial Crown is subject to Aboriginal title.[189] Thus, despite the federal government's exclusive legislative

182 This was recognised by the *Delgamuukw* Court [1997] 3 SCR 1010 at 1122–23. The *Delgamuukw* court found that the province can neither extinguish nor accept a surrender of Aboriginal title.

183 This is apart from the specific provisions like paragraph 12 of the Natural Resources Transfer Agreements.

184 Lamer CJC in *Delgamuukw* [1997] 3 SCR 1010 at 1119, found that laws which touch the 'core of Indianness' and purport to extinguish those rights are 'beyond the legislative competence of the provinces to enact'.

185 *Delgamuukw, ibid* at 1121.

186 Refer to the discussion below regarding infringement of Aboriginal title and rights.

187 [1889] 14 AC 46.

188 The Privy Council in *St Catherine's Milling* case, supra note 2, found that 'Lands reserved for the Indians' were not transferred to the federal government under the Constitution Act 1867. (In the three prairie provinces, it is not s 109 of the Constitution Act 1867, but Natural Resources Transfer Agreements, 1930 which are relevant.)

189 Section 109 provides that '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'.

power in relation to 'Lands reserved for the Indians', which includes unextinguished Aboriginal title lands, the federal government has no interest in the underlying (or 'radical') title to those lands. However, after a surrender to the Crown of Aboriginal title by the Indians, the province obtains a full and beneficial title to that land.[190]

The *St Catherine's Milling Case*[191] recognised that provincial ownership of the underlying title to reserve land did not operate to limit federal jurisdiction in any way. The *Delgamuukw* court rejected arguments that, as the province held the underlying title to Aboriginal land, this right carried with it the right to grant fees simple, which by implication extinguish Aboriginal title, and so, by implication, exclude the Aboriginal title from s 91(24).[192] Lamer CJC, in *Delgamuukw,* found that this argument had failed to take account of the wording of s 109, which provides that the lands belonging to the provinces are held subject to other interests in the land, which include Aboriginal title.[193] Therefore, the vesting of the underlying title in the province affords the province no jurisdiction over Aboriginal rights.

Standard to establish extinguishment

Lamer CJC, in *Delgamuukw,* found that because a law of general application cannot by definition meet the standard for extinguishment, as set out in *Sparrow*[194] (one of 'clear and plain intent'), without being *ultra vires* the province, it could never extinguish Aboriginal title.[195] Therefore, a provincial law of general application could never extinguish Aboriginal rights *proprio vigore.* An intention to extinguish Aboriginal rights would take the law outside the provincial jurisdiction. A further reason why Aboriginal rights could not be extinguished by provincial laws of general application is that Aboriginal rights form part of the 'core of Indianness' at the heart of s 91(24).[196] This would prevent any extinguishment of Aboriginal rights by the provinces even prior to the enactment of s 35(1) of the Constitution Act, 1982.

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190 *St Catherine's Milling case* [1889] 14 AC 46; *Attorney General Can v Attorney General Ont (Indian Annuities)* [1897] AC 199; *Smith v The Queen* [1983] 1 SCR 554.

191 *St Catherine's Milling, ibid.*

192 *Delgamuukw* [1997] 3 SCR 1010 at 1116–18. Lamer CJC at 1111, referred to the grant of fees simple for agriculture although His Honour did not state that the provinces could make such grants.

193 *Delgamuukw, ibid* at 1117. See also *St Catherine's Milling* [1889] 141 AC 46. Campbell J confirmed this in *Chippewas of Sarnia Band v Canada* [1999] OJ 1406, Ontario Superior Court of Justice. Campbell J, at para 377, noted that the underlying or radical title to Indian land is the Crown's, subject to the overlaying burden of unsurrendered Indian land title. He stated that 'it does not follow from the nature of the underlying title, that the unextinguished burden of *sui generis* Indian title is in the gift of the Crown to dispose without surrender'. Thus the Crown cannot grant land to a third party in a way that extinguishes Aboriginal title.

194 *Sparrow* [1990] 1 SCR 1075 at 1099.

195 *Delgamuukw* [1997] 3 SCR 1010 at 1120.

196 *Delgamuukw, ibid* at 1122 and at 1119, per Lamer CJC. La Forest (L'Heureux-Dube J concurring) also found that a province could not extinguish Aboriginal title.

Referential incorporation by s 88

Referential incorporation by s 88 of the Indian Act will not save a provincial law that involves extinguishment of Aboriginal title. Any law that meets the 'clear and plain intention' test of extinguishment would not be a law of general application.[197] Lamer CJC, in *Delgamuukw,* noted that there is nothing in the language of s 88 which suggests any intention to extinguish Aboriginal rights, and the explicit reference to treaty rights suggests that s 88 was clearly not intended to undermine Aboriginal rights. In addition, s 88 itself reveals no clear and plain intention to authorise extinguishment of Aboriginal title or Aboriginal rights.[198] Thus the court in *Delgamuukw* was clear that provinces have no power to extinguish Aboriginal title or rights.

Infringement of Aboriginal title and rights

The Supreme Court of Canada, in *R v Sparrow,*[199] recognised that all legislative infringements of s 35 constitutionally protected rights will be invalid unless the legislation meets the required standard of justification. In *Delgamuukw,* the court considered that both federal[200] and provincial[201] legislatures could infringe Aboriginal title and Aboriginal rights.[202] Although Lamer CJC found that provincial governments are able to infringe Aboriginal title and Aboriginal rights,[203] it is not clear where this power comes from.[204] It is this division of powers issue, and the question whether the provinces have the constitutional authority to infringe Aboriginal rights, which require resolution.[205] Lamer CJC

197 This is clear from the Supreme Court's decision in *Delagmuukw* [1997] 3 SCR 1010. See also McNeil, 'Aboriginal title and the division of powers', *op cit,* fn 5, 437.

198 See McNeil, 'Aboriginal title and the division of powers', *op cit,* fn 5,448.

199 *Sparrow* [1990] 1 SCR 1075 at 1109, the court stated:
'The words "recognition and affirmation" in s 35 incorporate the fiduciary relationship between the aboriginal peoples and the government and so import some restraint on the exercise of sovereign power. Rights that are recognised and affirmed are not, however, absolute. Federal legislative powers continue, including the right to legislate with respect to Indians pursuant to s 91(24) of the *Constitution Act, 1867.* This federal power must, however, be reconciled with the federal duty towards the aboriginals and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies Aboriginal rights.'

200 See Lamer CJC in *Delgamuukw* [1997] 3 SCR 1010 at 1107 and at 1111.

201 *R v Cotè* [1996] 3 SCR 139.

202 See Lamer CJC in *Delgamuukw* [1997] 3 SCR 1010 at 1107 and at 1111.

203 *Ibid* at 1107.

204 See McNeil, 'Aboriginal title and the division of powers', *op cit,* fn 5, 448–53. As McNeil notes if Aboriginal rights are within the 'core of Indianness' and thus within exclusive federal jurisdiction then where is provincial power to infringe? Lamer CJC relied on *R v Cotè* [1996] 3 SCR 139, however, this case did not deal directly with the question of exclusive federal jurisdiction and the provinces' ability to infringe Aboriginal rights. Nor could reliance be placed on *R v Badger* [1996] 1 SCR 77, as providing authority for the fact that provinces have power to infringe Aboriginal rights as in this case legislative power was conferred on the province under the Natural Resources Transfer Agreements. (This agreement was given constitutional force under s 1 of the Constitution Act 1930, 20 & 21 Geo V c 26 (UK).)

considered that provincial laws of general application, although touching on 'Indianness' at the core of federal jurisdiction, could, through s 88 of the Indian Act, be referentially incorporated to apply to Indians.[206] He stated that:

> Section 88 extends the effect of provincial laws of general application which cannot apply to Indians and Indians lands because they touch on the Indianness at the core of s 91(24). For example, provincial laws which regulated hunting may very well touch on this core. Although such a law would not apply to Aboriginal people *proprio vigore,* it would still apply through s 88 of the Indian Act, being a law of general application.

By saying this, did Lamer intend to extend s 88 to apply to Indian lands as well as to Indians? Lysyk J in *Stoney Creek Indian Band v British Columbia,*[207] in commenting on Lamer CJC's words in *Delgamuukw,* stated that, given the care taken to leave this point open in both *Derrickson's* case[208] and in *Paul v Paul,*[209] and given the current of authority to the opposite effect in other decisions, it is doubtful whether this passing reference was intended to be a considered conclusion that s 88 extends otherwise inapplicable provincial laws not only to Indians but also to Indian lands.[210]

Sparrow *justification test*

All infringements of Aboriginal rights must be justified under the *Sparrow* test.[211] In accordance with s 35(1) of the Constitution Act 1982, any laws (either federal or provincial)[212] which were found to apply to Aboriginal land would still have to meet the justification test in *Sparrow* if they infringe Aboriginal title or other Aboriginal or treaty rights.[213] The *Sparrow* test of justification has two parts. It requires that the government show first that the infringement is 'in furtherance of a legislative objective that is compelling and

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205 See McNeil, 'Aboriginal title and the division of powers', *op cit,* fn 5; Peeling, *op cit,* fn 37; and Wilkins, *op cit,* fn 59. See also Isaac T, 'Provincial Jurisdiction Adjucative Authority and Aboriginal Rights'. A comment on *Paul v B.C. (Forest Appeals Commission)* Vol 60, Part 1, 2002 The Advocate 77.

206 *Delgamuukw* [1997] 3 SCR 1010.

207 [1998] BC 2468, paras 35 and 36],

208 [1986] 1 SCR 285.

209 [1986] 1 SCR 306.

210 Lysyk's views in *Stoney Creek* are shared by McNeil, *op cit,* fn 37 at 160–64. Lysyk J further commented that the point has yet to be clearly resolved by the Supreme Court of Canada.

211 *Sparrow* [1990] 1 SCR 1075, generally at 1109–19.

212 Provincial laws could be found to apply either by referential incorporation under s 88 of the Indian Act or where provincial laws 'of general application' applied proprio vigore. Refer to the discussion above. *Delgamuukw* [1997] 3 SCR 1010 at 1120.

213 Although the *Sparrow* court [1990] 1 SCR 1015 at 1109–19, would generally indicate that the public interest is too large a test for justification, the *Delgamuukw* court has indicated that such a broad justification is possible. See Lamer CJC in *Delgamuukw, ibid* at 1111, who considered that the economic development of the province is a valid legislative objective.

substantial', and, secondly, that the infringement is 'consistent with the special fiduciary relationship between the Crown and the Aboriginal peoples'.[214]

After the decision in *R v Gladstone,*[215] the range of legislative objectives that can justify the infringement of Aboriginal title is fairly broad.[216] Lamer CJC, in *Delgamuukw,* expanded on the application of the justification test and stated:

> The range of legislative objectives that can justify the infringements of Aboriginal title is fairly broad. Most of the objectives can be traced to the reconciliation of the 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 part of, a broader social, political and economic community'… (T)he 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 kind 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'.[217]

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214 *Sparrow, ibid,* at 1109–19. Justification under *Sparrow* involves determining the effect of the order of priorities in relation to fisheries: first, conservation, secondly, Indian fishing (particularly for food requirements and social and ceremonial purposes), thirdly, non-Indian commercial fishing and fourthly, non-Indian sports fishing. The burden of conservation measures should not fall primarily upon the Indian fishery. Additional questions, within the analysis of justification, require consideration as to whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of appropriation, fair compensation is available; and whether the Aboriginal group in question has been consulted with respect to the conservation measures being implemented. Aboriginal people would be expected to be informed regarding the determination of an appropriate scheme for the regulation of their rights. *Sparrow* has been confirmed, although slightly modified, in later decisions. In *R v Gladstone* [1996] 2 SCR 723, the Supreme Court found that the *Sparrow* justification test remains good law; however, considerations in relation to priorities can differ. Where an internal limitation exists (eg, where fishing is for food, social and ceremonial purposes) the *Sparrow* test applies, but if no internal limit exists (eg, where the right is to fish commercially) then, on the priority approach taken in *Sparrow,* the Aboriginal right would be exclusive and so the priority rules are modified accordingly. In the absence of an internal limit, allocation of the resource must include an account of Aboriginal rights and must reflect the priority that Aboriginal rights have over other users. Justification requires that government demonstrate that both the process of allocation and the actual allocation reflect the prior interest of Aboriginal rights holders. Conservation continues to have priority. After conservation goals are met, objectives that can satisfy justification include the pursuit of economic and regional fairness, and the recognition of historical reliance upon and participation in the fishery by non-Aboriginal groups. See comment McNeil, K, 'How can infringements of the constitutional rights of Aboriginal peoples be justified?' (1997) 8(2) Constitutional Forum 33.
Infringements of treaty rights are also subject to the same justification requirements. See *R v Badger* [1996] 1 SCR 77 at 811–16; *R v Sundown* [1999] 1 SCR 393 at 413; and *R v Marshall* [1999] SCR 456.

215 *Gladstone, ibid.*

216 This was recognised by Lamer CJC in *Delgamuukw* [1997] 3 SCR 1010 at 1111.

217 *Ibid* at 1111.

Most of the activities mentioned by Lamer CJC (for example, agriculture, forestry and mining) are within provincial jurisdiction under s 92 of the Constitution Act 1867 in the division of powers.[218]

The justification test will not be available to justify infringements by provincial laws where such laws encroach on federal jurisdiction.[219] Despite the fact that the province has no power to make laws in relation to Indians or treaty rights under s 92 of the Constitution Act 1867, where provincial laws of general application impact on Aboriginal or treaty rights, these laws should also be subject to the justification test.[220]

Federal laws which are validly enacted pursuant to s 91(24) may be justified under the *Sparrow* test and may prevail. If provincial laws of general application impact on 'Indianness', and are accordingly referentially incorporated by s 88 of the Indian Act so as to be applicable as part of federal law, then arguably justification would be available in relation to infringement, as the provincial law is incorporated as federal legislation.[221] However, this would be subject to s 88 being found not to be unconstitutional pursuant to s 35 of the Constitution Act 1982.[222]

Sparrow and provincial legislation

The *Sparrow* court stated that one of the effects of s 35 was that it 'affords Aboriginal peoples constitutional protection against provincial legislative power'.[223] The *Sparrow* test was formulated in the context of a federal (not provincial) regulation, which infringed an Aboriginal right. An infringement of Aboriginal rights by provincial legislation would be expected to be a violation of s 35. However, despite this constitutional protection, Lamer CJC, in *Delgamuukw,* considered that the exclusive rights of Aboriginal title can be infringed by a provincial legislature where the infringement can be justified under the *Sparrow* test.[224] The examples of infringement offered by the court in *Delgamuukw*–the granting of fees simple for agriculture and of leases for forestry and mining–indicate that provincial governments can infringe Aboriginal title holders' rights to the exclusive use and occupation of land.

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218 See Hogg, *op cit,* fn 5.

219 See McNeil, 'Aboriginal title and the division of powers', *op cit,* fn 5, 450–51.

220 See *R v Badger* [1996] 1 SCR 77 at 813–16 and 820 where provincial laws in question were game laws of general application which, because they infringed treaty rights to hunt, as modified by the Natural Resources Transfer Agreement (Constitution Act 1930, 20–21 George V c 26 (UK)), were required to meet the same test of justification under *Sparrow,* This view was endorsed by the Supreme Court in *R v Marshall* [1997] SCR 456, paras 55 and 64. See also *R v Cotè* [1996] 3 SCR 139. See Slattery (1992), *op cit,* fn 5, 285.

221 See Lamer CJC in *Delgamuukw* [1997] 3 SCR 1010 at 1122.

222 Refer to the above discussion. See also McNeil, *op cit,* fn 37; McNeil, 'Aboriginal title and the division of powers', *op cit,* fn 5; and Peeling, *op cit,* fn 37.

223 *Sparrow* [1990] 1 SCR 1075 at 1105 and at 1111–20.

224 *Delgamuukw* [1997] 3 SCR 1010 at 1111.

Suggestions have been made by the Supreme Court of Canada, in *R v Cotè,*[225] that a *Sparrow* type justificatory test might be applied to provincial legislation which infringed Aboriginal rights, where that legislation was referentially incorporated by s 88 of the Indian Act.[226] Although this has never previously been done,[227] it is arguable that if s 88 of the Indian Act referentially incorporates provincial law into federal law, which applies to Indians, any infringement under the referentially incorporated law is technically justifiable, as such law has become a federal law. However, Kent McNeil assesses the position correctly in relation to provincial infringements when he states 'this makes the constitutionalisation of Aboriginal title by s 35(1) virtually meaningless'.[228]

Regulation versus extinguishment

Regulation of a right is not a partial extinguishment of that right.[229] The *Sparrow* court found that regulation by a series of legislative controls and a system of discretionary licensing systems which restricted the Aboriginal right to fish did not amount to extinguishment of that right, as there was no clear and plain intention to extinguish the right. However, regulation of Aboriginal rights, including Aboriginal title, must also be justified.[230]

Is there a difference between *infringement* and *regulation* in relation to the application of provincial laws to Aboriginal rights? Macfarlane JA, in the *Delgamuukw* Court of Appeal decision, considered that infringement means to 'affect, regulate, diminish, impair or suspend the exercise of an Aboriginal right' and not to partially extinguish.[231] Infringement appears broader than regulation, as regulation is only one of the listed ways to infringe Aboriginal title. Regulation of a right involves the exercising of jurisdiction over the right. Could an 'infringement' of Aboriginal title also be a partial extinguishment? To establish a *prima facie* infringement, it is necessary to establish one of the

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225 Supra note 79. Lamer CJC in *R v Cotè* [1996] 3 SCR 139 at 185, considered that:
'It is quite clear that the *Sparrow* test applies where a provincial law is alleged to have infringed an Aboriginal or treaty right… The text and purpose of s 35(1) 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.'
The British Columbia Court of Appeal in *Alphonse's* case [1993] 4 CNLR 19, also suggested that the *Sparrow* justification test would apply to provincial legislative infringement of Aboriginal rights.

226 Lamer CJC in *Cotè, ibid,* relied on the decision in *R v Badger* [1996] 1 SCR 77, but in that case constitutional authority authorised provincial infringements of Aboriginal treaty rights. Here a provincial statute violated a treaty right which was modified by the Natural Resources Transfer Agreement. The constitutional authority allowing infringement in this case was para 12 of the Alberta Natural Resources Transfer Agreement.

227 See *Simon's* case [1985] 2 SCR 387, where conservation was in issue.

228 McNeil, 'Aboriginal title and the division of powers', *op cit,* fn 5, 457.

229 *Sparrow* [1990] 1 SCR 1075.

230 *Sparrow, ibid; Delgamuukw* [1997] 3 SCR 1010 at 1111.

231 *Delgamuukw* (CA) (1993) 104 DLR 470 at 539.

following: that the limitation is unreasonable, or that it imposes undue hardship, or that the interference denies the preferred means of exercising the right.[232] What if the interference denies not only the preferred means to exercise the right, but also denies a substantial exercise of the right? Examples of infringement offered by the Supreme Court in *Delgamuukw* include the granting of fees simple for agriculture, and the granting of leases for forestry and mining.[233] The granting of such interests will not only have a profound impact on Aboriginal rights, but may result in the permanent destruction of certain aspects of Aboriginal title. Such grants in effect amount to *defacto expropriations* which partially extinguish aspects of Aboriginal title over that land. Expropriation of a right involves taking away the property interest. For example, if all valuable minerals are extracted, the Aboriginal interest in those minerals will be forever lost.[234] Where a grant of a fee simple is made, will the Aboriginal interest be extinguished, or will it be regarded as infringed, as was suggested in *Delgamuukw*?[235] If a fee simple is regarded as an infringement, then will Aboriginal title revive if the fee simple comes to an end? Should laws that result in the partial destruction of Aboriginal rights be classed as laws that prevent the effective enjoyment or utilisation of the 'exclusive use and occupation' of the Aboriginal title lands, and be regarded as partial extinguishments of Aboriginal title rather than as mere infringements or regulations?[236] Before an 'infringement' could amount to a partial extinguishment of Aboriginal rights, the 'clear and plain intention' test of extinguishment would have to be met. However, as noted previously, extinguishment of Aboriginal title or rights is no longer possible since the Constitution Act 1982.[237] Therefore, although provincial Acts or legislation post-1982 may meet the test for extinguishment, such Acts will not be able to effect

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232 *Sparrow* [1990] 1 SCR 1075. See also *R v Gladstone* [1996] 2 SCR 723, where the court recognised some problems with this approach.

233 *Delgamuukw* [1997] 3 SCR 1010 at 1111.

234 In *Delgamuukw, ibid* at 1068, it was found that Aboriginal title included the minerals in and on the land. Thus a provincial law authorising a mineral lease on Aboriginal title lands should be read down to restrict its application. Such a law would in effect extinguish Aboriginal rights to minerals and should be contrary to s 35 of the Constitution Act 1982.

235 In *R v Badger* [1996] 1 SCR 77, the court acknowledged that the grant of a fee simple does not have the effect of extinguishing treaty rights in relation to hunting. See also *Alphonse's* case [1993] 4 CNLR 19. Badger's case involved a hunting right and there was no question of interference with the possession of land by Indians. Will Canadian courts ultimately follow the Australian High Court decision in *Fejo v Northern Territory* (1998) 195 CLR 96, and find that a grant of a fee simple totally and permanently extinguishes Aboriginal title to land? As the Supreme Court in *Delgamuukw, ibid* at 1083, defined Aboriginal title as a right to the exclusive use and occupation of land, logically it would seem impossible for Aboriginal title and a fee simple to co-exist. Whether a fee simple can extinguish Aboriginal title or rights in Canada is subject to the constitutional division of powers question and the protection of s 35 of the Constitution Act 1982, the combined effect of which restricts any possible extinguishment to actions and legislation by the federal parliament which occurred prior to 1982 and which meet the requisite standards.

236 See *R v Gladstone* [1996] 2 SCR 723. In this case the Aboriginal right to sell herring spawn on kelp was found not to be extinguished by the prohibition of this right at certain times and also by the extensive regulatory regime in relation to this type of fishing.

237 See *Van der Peet* [1996] 2 SCR 507.

an extinguishment of Aboriginal title or rights. Whether a clear and plain provincial intention to extinguish Aboriginal rights can be established in relation to Acts or legislation prior to 1982, will only become an issue if it is found that the provinces have a constitutional right to regulate activities that relate to the 'exclusive use and occupation' of Aboriginal lands. As noted above, since 1982 generally Aboriginal title can be extinguished only by negotiated agreement or constitutional amendment.

Aboriginal lands claims agreements

As Aboriginal title is within the exclusive jurisdiction of the federal government, federal presence is constitutionally required for any current treaty negotiations. This means that, constitutionally, the provinces need no longer be involved in treaty negotiations, although politically a province's presence would be essential.[238] In the provinces where land surrender treaties were not signed, so called provincial 'Crown' land[239] could be subject to Aboriginal title.

Conclusion

Prior to *Delgamuukw,* it had been unclear whether Aboriginal title at common law was under federal or provincial jurisdiction. Lamer CJC, in *Delgamuukw,* clarified that Aboriginal title lands came within exclusive federal legislative power under s 91(24) as 'Lands reserved for the Indians'. One of the most significant questions this finding raised was: can provincial laws ever apply in relation to Aboriginal title lands?

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238 Another reason that provinces have to be included in any negotiations is that the geographical extent of Aboriginal title lands is unknown, and the Federal government cannot compromise provincial interests by agreement

239 The term 'Crown' land should not be used to refer to land held under Aboriginal title. It is generally recognised that the underlying or radical title to Aboriginal title lands is held by the Crown in right of the province, subject to the overlaying burden of unsurrendered Aboriginal title. The beneficial or absolute title to this land does not vest in the Crown until after the surrender of Aboriginal title. See s 109 of the Constitution Act 1867; *St Catherine's Milling* [1889] 14 AC 46; see also Campbell J in *Chippewas of Sarnia Band v Canada* [1999] OJ 1406, Ontario Superior Court of Justice, at para 377. The term 'Crown land' is usually defined in provincial legislation. For example, 'Crown land' is defined in the British Columbia Land Act (RSBC, 1996 c 245) to mean 'land, whether or not it is covered by water, or an interest in land vested in the government'. If land is subject to Aboriginal title then, although the underlying title remains with the Crown, can such land be said to be 'vested in the government' in the same way that a legal right to land is vested in government? To continue using the term 'Crown' land in legislation to include Aboriginal title lands is misleading, particularly where the terms of provincial legislation permit the Crown to undertake activities, such as issuing grants, in relation to 'Crown land'. In the absence of a more accurate expression, the term 'Crown' land has been used in this paper to refer to 'Crown' land which is held subject to Aboriginal title. To alleviate this identification dilemma it is suggested that, once Aboriginal lands have been identified, a public register of Aboriginal title lands be maintained by government and that a distinction be maintained in legislation in reference to Aboriginal title lands and 'Crown' land.

Can provincial laws apply to those lands of their own force? The Canadian Supreme Court had previously recognised that some provincial laws may (in certain limited circumstances within the provinces' spheres of legislative competence) apply to Indians, despite s 91(24) vesting exclusive jurisdiction over 'Indians, and Lands reserved for the Indians' in the federal parliament. Significantly, however, s 91(24) protects a 'core' of federal jurisdiction (which includes 'Indianness', Aboriginal rights, including Aboriginal title, and treaty rights) from provincial laws of general application through the doctrine of interjurisdictional immunity, requiring otherwise valid provincial laws to be read down where that doctrine is infringed. In the instance where provincial laws apply to Aboriginal title lands of their own force, and these laws infringe Aboriginal title or rights, then these laws must be justified on the standards set in *Sparrow*.

If provincial laws apply to Aboriginal title lands of their own force (for example, in relation to mining, forestry or agriculture), then can these laws apply to infringe Aboriginal title? In other words, do provinces have the constitutional legislative authority to infringe it? There is no clear authorisation in the division of powers that provides the constitutional authority for the province to infringe Aboriginal title. Such laws would seem to encroach on federal jurisdiction where Aboriginal title lands are concerned. (It is clear that provinces have no jurisdiction to extinguish Aboriginal title.)

Despite the federal 'core', certain provincial laws of general application that affect Indians can be referentially incorporated into federal law by s 88 of the Indian Act. One of the issues in determining provincial legislative powers is the question whether s 88 of the Indian Act referentially incorporates provincial laws to apply to reserve lands or to Aboriginal title lands. The weight of the case law has suggested that this section is not capable of making provincial laws apply to 'Lands reserved for the Indians'. The object and purpose of this section does not indicate that Parliament's intention in passing this amendment to the Indian Act in 1951 was otherwise. In addition, to the extent that s 88 permits infringement of Aboriginal rights, doubts exist as to its constitutional validity. Does s 88 have to meet the standards of justification required by the Supreme Court in *Sparrow*? If so, to the extent that it cannot be justified it must be read down so as not to conflict with s 35(1) of the Constitution Act 1982. Even if s 88 of the Indian Act was valid, and referentially incorporated provincial laws to reserve lands, it is not at all clear that this section could referentially incorporate provincial laws to apply to Aboriginal title lands. If it is not possible to utilise s 88 to apply provincial law to Aboriginal title lands, then on what basis could provincial laws apply to such lands?

From the above discussion, provincial power to infringe Aboriginal title rights appears to be absent.[240] Thus it follows that provincial resource development laws, such as laws in relation to mining and forestry, or laws in relation to tourism initiatives, are inapplicable to Aboriginal title lands, to the extent to which such laws impact on those lands. The consequences of this for provinces will be enormous, particularly in those provinces where few historical treaties involving Aboriginal title have been signed, namely British Columbia, the Atlantic provinces and Quebec.

240 In British Columbia, at least some provincial 'Crown' land would remain subject to Aboriginal title. (For example, Treaty 8 area in the north-east of British Columbia may continue to be subject to Aboriginal title, altought this is debatable. It is also unclear whether Aboriginal title extends to all non-treaty areas in British Columbia.) The *Delgamuukw* court could have avoided these issues by finding not that the Aboriginal interest in land was different from that held as 'Lands reserved for the Indians', but by finding that Aboriginal title lands were not 'Lands reserved for the Indians', and therefore bringing such lands under provincial jurisdiction.