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# Aboriginal Rights, Resource Development, and the Source of the Provincial Duty to Consult in *Haida Nation* and *Taku River*

Kent McNeil\*

The main issues dealt with by the Supreme Court of Canada in its decisions in *Haida Nation v. British Columbia (Minister of Forests)*<sup>1</sup> and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*<sup>2</sup> were the nature and scope of the provincial Crown's duty to consult with First Nations and accommodate their interests before authorizing resource development on lands subject to unestablished Aboriginal title claims. Those issues will not, however, be the focus of this article. Instead, I am going to discuss what, in my opinion, is a major preliminary issue lying largely hidden in both cases, namely the source and extent of provincial jurisdiction to infringe Aboriginal title for the purposes of resource development. In *Haida Nation* and *Taku River*, the Court assumed that British Columbia has authority to infringe Aboriginal title in appropriate circumstances for the purposes of forestry and mining, thereby triggering a duty to consult with the Aboriginal nations concerned. However, although logically that provincial authority to infringe must be present before the duty to consult can arise in these circumstances, its source was not explained or even identified.

A good starting point for discussion of this issue is an argument made by British Columbia in *Haida Nation* that was dismissed by the Supreme Court. The province contended that only the federal government has a duty to consult with First Nations in relation to resource

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<sup>1</sup> [2004] S.C.J. No. 70, 2004 SCC 73 [hereinafter "*Haida Nation*"].

<sup>2</sup> [2004] S.C.J. No. 69, 2004 SCC 74 [hereinafter "*Taku River*"].

development because section 109 of the *Constitution Act, 1867*,<sup>3</sup> provides that “[a]ll Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada ... at the Union ... shall belong to the several Provinces,” and that this provision conferred on British Columbia the exclusive right to use the lands in question. The Province then argued that this right “cannot be limited by the protection for Aboriginal rights found in s. 35 of the *Constitution Act, 1982*” because this “would ‘undermine the balance of federalism’.”<sup>4</sup> Chief Justice McLachlin’s response was succinct and unqualified:

The answer to this argument is that the Provinces took their interest in land subject to “any Interest other than that of the Province in the same” [s.109]. The duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty. It cannot therefore claim that s.35 deprived it of powers it would otherwise have enjoyed. As stated in *St. Catherine’s Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46 (P.C.), lands in the Province are “available to [the Province] as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title” (p.59). The Crown’s argument on this point has been canvassed by this Court in *Delgamuukw* [*infra*, note 7], at para. 175, where Lamer C.J. reiterated the conclusions in *St. Catherine’s Milling*, [*infra*, note 6]. There is therefore no foundation to the Province’s argument on this point.<sup>5</sup>

While McLachlin C.J.’s point that the duty to consult and accommodate is grounded in Crown assertion of sovereignty and therefore pre-dated Confederation is important, it will not be pursued here. Nor will I discuss the connection she drew between this duty and Aboriginal interests in section 109 lands. Instead, my focus will be on her reliance on *St. Catherine’s Milling* and *Delgamuukw*, and the light those decisions may shed on the source of provincial authority to infringe Aboriginal land rights.

As stated by McLachlin C.J., in *St. Catherine’s Milling* the Privy Council decided that section 109 gave the provinces a beneficial interest in lands subject to Aboriginal or Indian title, “available to them as a

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<sup>3</sup> 30 & 31 Vict., c. 3.

<sup>4</sup> *Haida Nation*, *supra*, note 1, at para. 58, quoting from the Crown’s factum, at para. 96.

<sup>5</sup> *Id.*, at para. 59.

source of revenue whenever the estate of the Crown is disencumbered of the Indian title.”<sup>6</sup> A necessary implication of this is that the provinces’ beneficial interest is *not* available to them until the land is disencumbered of the Aboriginal title. This is because, given the Privy Council’s decision that Aboriginal title is an “Interest other than that of the Province” within the meaning of section 109,<sup>7</sup> the provinces’ proprietary interest is limited by a pre-existing proprietary interest. Moreover, because section 91(24) of the *Constitution Act, 1867*, gives the Parliament of Canada exclusive jurisdiction over “Indians, and Lands reserved for the Indians,” the provinces have no authority to remove the encumbrance of Aboriginal title by extinguishing it themselves.<sup>8</sup> For constitutional reasons that predate the enactment of section 35 in 1982, the provinces’ entitlement to natural resources on Aboriginal title lands depends on removal of that encumbrance by the federal government.<sup>9</sup>

In *St. Catherine’s Milling*, the Privy Council declined to define Aboriginal title, beyond describing it as “a personal and usufructuary right,”<sup>10</sup> a description that Judson J. in *Calder v. British Columbia (Attorney General)* regarded as unhelpful in explaining what Aboriginal title means.<sup>11</sup> Not until the *Delgamuukw* decision in 1997 did the Supreme Court provide us with a clear definition of Aboriginal title as “the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aborig-

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<sup>6</sup> *St. Catherine’s Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, at 59 [hereinafter “*St. Catherine’s Milling*”].

<sup>7</sup> *Id.*, at 58; *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010, at para. 175 [hereinafter “*Delgamuukw*”].

<sup>8</sup> This conclusion, which was at least implicit in *St. Catherine’s Milling*, *supra*, note 6, was explicitly affirmed in *Delgamuukw*, *supra*, note 7, at paras. 172-81. See also *Paul v. British Columbia (Forest Appeals Commission)*, [2003] S.C.J. No. 34, [2003] 2 S.C.R. 585, at para. 28 [hereinafter “*Paul*”].

<sup>9</sup> See Hamar Foster, “Aboriginal Title and the Provincial Obligation to Respect It: Is *Delgamuukw v. British Columbia* ‘Invented Law’?” (1998) 56:2 *The Advocate* 221. Prior to the enactment of s. 35 of the *Constitution Act, 1982*, extinguishment could have been accomplished by clear and plain federal legislation as well as by treaty, but due to s. 35, unilateral legislative extinguishment of Aboriginal rights is no longer possible: *R. v. Van der Peet*, [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507, at para. 28 (Lamer C.J.) [hereinafter “*Van der Peet*”]; *Mitchell v. Canada (Minister of National Revenue)*, [2001] S.C.J. No. 33, [2001] 1 S.C.R. 911, at para. 11 (McLachlin C.J.). For detailed discussion see Kent McNeil, “Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion” (2001-2002) 33 *Ottawa L. Rev.* 301.

<sup>10</sup> *St. Catherine’s Milling*, *supra*, note 6, at 54.

<sup>11</sup> [1973] S.C.R. 313, at 328. See also *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at 379-82 (Dickson J.) [hereinafter “*Guerin*”].

inal practices, customs and traditions which are integral to distinctive aboriginal cultures.”<sup>12</sup> The Court clearly regarded this title as encompassing a beneficial right to natural resources such as timber, minerals, oil and gas, although access to those resources might be impeded by an inherent limit that prevents the lands from being used in ways that are irreconcilable with the Aboriginal attachment to the land giving rise to the title.<sup>13</sup>

This definition of Aboriginal title assists us in understanding the nature of the provincial Crown’s underlying title to Aboriginal title lands that was acknowledged in *St. Catherine’s Milling* and affirmed in *Delgamuukw*. Although it was already apparent from *St. Catherine’s Milling* that for constitutional division-of-property and division-of-powers reasons the provinces cannot take advantage of timber resources on lands that continue to be subject to Aboriginal title, we now know for sure from *Delgamuukw* that the beneficial interest in those resources is actually vested in the Aboriginal titleholders rather than in the Crown in right of the provinces. In other words, it is the Aboriginal titleholders, not the provinces, that *own* the natural resources, including timber, on their lands.<sup>14</sup> Thus, the provinces cannot access those resources because, in addition to being prevented from doing so by exclusive federal jurisdiction over Aboriginal title, the provinces do not own the resources. In order to access them, the provinces therefore would first have to either acquire ownership of them (*e.g.*, by a valid surrender of the Aboriginal title in a treaty negotiated with the federal Crown, as was held to have occurred in *St. Catherine’s Milling*), or have the authority to expropriate them from the Aboriginal titleholders (this would require constitutionally-valid legislation).<sup>15</sup> So for as long as Aboriginal title exists, the provinc-

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<sup>12</sup> *Delgamuukw*, *supra*, note 7, at para. 117 (Lamer C.J.).

<sup>13</sup> For critical commentary on the inherent limit, see “The Post-*Delgamuukw* Nature and Content of Aboriginal Title”, in Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) 102, at 116-22 [hereinafter “*Emerging Justice?*”].

<sup>14</sup> The word “own” is, I think, appropriate because the Supreme Court clearly regarded Aboriginal title and the right to natural resources encompassed by it as proprietary: see *Delgamuukw*, *supra*, note 7, at para. 113, and discussion in Kent McNeil, “Aboriginal Title as a Constitutionally Protected Property Right”, in Owen Lippert, ed., *Beyond the Nass Valley: National Implications of the Supreme Court’s Delgamuukw Decision* (Vancouver: Fraser Institute, 2000) 55, at 57-61 (also in *Emerging Justice?*, *supra*, note 13, 292, at 295-301).

<sup>15</sup> The Crown does not have prerogative authority to expropriate property in peacetime, and so needs unequivocal legislative authority to do so: see discussion in McNeil, *supra*, note 9, at 308-11; McNeil, *supra*, note 14, at 56-57 (*Emerging Justice?*, *supra*, note 13, at 293-95).

es' underlying title clearly does not include entitlement to natural resources on the lands that are subject to it.

This conclusion is confirmed by the way Lamer C.J. dealt with the section 109 argument presented by British Columbia in *Delgamuukw*. In response to British Columbia's contention that the underlying title to Aboriginal title lands conferred on the province by section 109 is a "right of ownership" that carries "with it the right to grant fee simples which, by implication, extinguish aboriginal title," he said that this argument "fails to take account of the language of section 109," which subjects provincial ownership to "any Interest other than that of the Province in the same."<sup>16</sup> This prevents the province from using section 109 to extinguish Aboriginal title, a conclusion that is also consistent with exclusive federal jurisdiction over Aboriginal title lands. The broader implication of this is obvious: section 109 not only limits provincial ownership to interests not encompassed by Aboriginal title, but together with section 91(24) prevents the Crown in right of the province from granting interests inconsistent with Aboriginal title. This is straightforward application of a fundamental common law maxim, namely *nemo dat quod non habet* (no one can give what he or she does not have), combined with a division-of-powers restriction on provincial jurisdiction.

In *Delgamuukw*, Lamer C.J. nonetheless said that the provinces can *infringe* Aboriginal title for purposes like forestry and mining development, as long as the infringement can be justified under the *Sparrow* test,<sup>17</sup> as elaborated on in *R. v. Gladstone*.<sup>18</sup> From our discussion so far, it is evident that this authority to infringe cannot be found in section 109 and the provincial Crown's underlying title. That title co-exists with, and is subject to, Aboriginal title. It is a proprietary interest that is limited by another, pre-existing property interest that entails the right of exclusive occupation and use of the land and the natural resources on and under it.<sup>19</sup> So if the provinces have the constitutional authority to infringe Aboriginal title, that authority must be jurisdictional rather than

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<sup>16</sup> *Delgamuukw*, *supra*, note 7, at para. 175.

<sup>17</sup> *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075. This test requires the Crown to prove it has a valid legislative objective for the infringement and has respected the fiduciary obligations it owes to the Aboriginal peoples.

<sup>18</sup> [1996] S.C.J. No. 79, [1996] 2 S.C.R. 723 [hereinafter "*Gladstone*"].

<sup>19</sup> See *Guerin*, *supra*, note, 11, at 379; *Delgamuukw*, *supra*, note 7, at paras. 112-24.

proprietary in nature. But where in the Constitution is this jurisdictional authority to be found?

Unfortunately, the *Delgamuukw* decision did not provide an answer to this question. One might suppose, however, that the principal sources of this provincial jurisdiction are located in section 92(13) ("Property and Civil Rights in the Province") and section 92A (regarding non-renewable natural resources, forestry resources, and electrical energy).<sup>20</sup> As Aboriginal title is a property interest, at first glance it would appear to come within the scope of section 92(13). Natural resources on or under Aboriginal title lands would also appear to come within the general scope of section 92A. But this is not an adequate answer because section 91(24) removes Aboriginal title lands and thus the resources that are part of them from section 92(13) and section 92A jurisdiction by conferring exclusive authority over them on Parliament.<sup>21</sup> This prevents the provinces from enacting valid legislation in relation to "Lands reserved for the Indians," including Aboriginal title lands.<sup>22</sup> Valid provincial legislation of general application (that does not target Aboriginal lands) can nonetheless apply of its own force on lands so reserved,<sup>23</sup> but not if it relates to possession or use of lands.<sup>24</sup> This must mean that provincial jurisdiction to infringe Aboriginal title, if it exists at all, is very limited indeed.<sup>25</sup> It must be restricted to provincial laws that are

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<sup>20</sup> *The Constitution Act, 1867*, 30 & 31 Vict., c. 3, as amended by s. 50 of the *Constitution Act, 1982*, being Sch. B to the *Canada Act 1982*, (U.K.) 1982, c. 11.

<sup>21</sup> Section 91(1A) likewise removes "The Public Debt and Property" from provincial jurisdiction by conferring exclusive authority over them on Parliament: see Kerry Wilkins, "Negative Capacity: Of Provinces and Lands Reserved for the Indians" (2002) 1 *Indigenous L.J.* 57, at 59-60. Note that most natural resources, such as minerals and growing timber, are presumed to be part of the land itself until physically separated from it.

<sup>22</sup> See *R. v. Dick*, [1985] S.C.J. No. 62, [1985] 2 S.C.R. 309, [1985] 4 C.N.L.R. 55 [hereinafter "*Dick*"]; *Derrickson v. Derrickson*, [1986] S.C.J. No. 16, [1986] 1 S.C.R. 285, [1986] 2 C.N.L.R. 45 [hereinafter "*Derrickson*"]; *Delgamuukw*, *supra*, note 7, at paras. 173-76.

<sup>23</sup> See *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031 (labour relations); *R. v. Francis*, [1998] S.C.J. No. 43, [1988] 1 S.C.R. 1025 (traffic laws); *Paul*, *supra*, note 8, at para. 33 (jurisdiction of provincial tribunals).

<sup>24</sup> *Derrickson*, *supra*, note 22; *R. v. Isaac*, [1975] N.S.J. No. 412, 13 N.S.R. (2d) 460 (C.A.); *Corporation of Surrey v. Peace Arch Enterprises*, [1970] B.C.J. No. 538, 74 W.W.R. 380 (C.A.). See discussion in Kent McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61 *Sask. L. Rev.* 431, at 457-65 (also in *Emerging Justice?*, *supra*, note 13, 249, at 272-80).

<sup>25</sup> For more detailed discussion, see Nigel Bankes, "*Delgamuukw*, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights" (1998) 32 *U.B.C.L. Rev.* 317; Kerry Wilkins, "Of Provinces and Section 35 Rights" (1999) 22 *Dal. L.J.* 185; McNeil, *supra*, note 24.

valid under a provincial head of power, but that are not sufficiently related to possession or use of land that they cross over into federal jurisdiction over Aboriginal title. It would therefore appear that the only provincial laws capable of infringing Aboriginal title without violating the constitutional division-of-powers would be provincial laws that are not directly in relation to land and that have only an incidental effect on Aboriginal title.<sup>26</sup>

There is, however, a compelling argument against any provincial jurisdiction to infringe Aboriginal title, even incidentally. The *Delgamuukw* decision itself held that Aboriginal title, along with other Aboriginal rights, is within the core of federal jurisdiction over “Indians, and Lands reserved for the Indians,” and so is protected against extinguishment by provincial laws by the doctrine of interjurisdictional immunity.<sup>27</sup> In reaching this conclusion, Lamer C.J. relied in part on *Dick v. The Queen*,<sup>28</sup> where Beetz J. for a unanimous Court held that provincial laws, even though of general application and otherwise constitutionally valid, cannot apply *ex proprio vigore* (of their own force) to Indians if they impair Indian status or capacity or go to the core of Indianness.<sup>29</sup> In *Delgamuukw*, Lamer C.J. related this core of Indianness to section 35 rights. After referring to Beetz J.’s observation that the core of Indianness encompasses activities “at the centre of what they [Indians] do and what they are,” the Chief Justice said:

But in *Van der Peet*, I described and defined the aboriginal rights that are recognized and affirmed by s.35(1) in a similar fashion, as protecting the occupation of land and the activities which are integral to the distinctive aboriginal culture of the group claiming the right. It follows that aboriginal rights are part of the core of Indianness at the heart of s.91(24). Prior to 1982, as a result, they could not be extinguished by provincial laws of general application.<sup>30</sup>

Although Lamer C.J. limited his holding in this regard to lack of provincial authority to *extinguish* Aboriginal title, his reliance on the *Dick* decision is significant. That case was not about the extinguishment,

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<sup>26</sup> See *Paul*, *supra*, note 8, at paras. 14-16; *Wilkins*, *supra*, note 21.

<sup>27</sup> *Delgamuukw*, *supra*, note 7, at paras. 177-81.

<sup>28</sup> *Supra*, note 22.

<sup>29</sup> See also *Paul*, *supra*, note 8, at paras. 6, 16, 49.

<sup>30</sup> *Delgamuukw*, *supra*, note 7 at para. 181, referring to *Van der Peet*, *supra*, note 8. See also *Paul*, *supra*, note 7, at para. 33.



or indeed even the existence, of an Aboriginal right. Instead, it involved the application to a member of the Alkali Lake Band of Shuswap people of a British Columbia game law restricting hunting to open season. The Court held that if the game law impaired the Indianness of the appellant (which the Court assumed without deciding), then it “could not apply to the appellant *ex proprio vigore*, and, in order to preserve its constitutionality, it would be necessary to read it down to prevent its applying to the appellant in the circumstances of this case.”<sup>31</sup> The Court went on to decide that, on the assumption that the provincial law went to the core of Indianness, it would be referentially incorporated by section 88 of the *Indian Act*<sup>32</sup> and so apply to the appellant as federal law. The *Dick* case is therefore authority for the general principle that any provincial law that impairs Indian status or capacity or that goes to the core of Indianness cannot apply to Indians of its own force because otherwise it would impinge on exclusive federal jurisdiction under section 91(24).<sup>33</sup> This is a division-of-powers principle that predates and thus does not depend on section 35 of the *Constitution Act, 1982*.<sup>34</sup> Nor does its application depend on occupation of the field and federal paramountcy (which were not involved in *Dick*). Rather, it is the direct result of the doctrine of interjurisdictional immunity, which prevents provincial laws from applying so as to affect the core of federal heads of power.

The combined effect of the *Dick* and *Delgamuukw* decisions would thus appear to be as follows. Provincial laws, even laws of general application that are not aimed at or do not single out section 91(24) “Indians,” cannot apply to them if they impair their status or capacity or go to the core of Indianness. To have this unconstitutional impact, the provincial laws in question would not even have to infringe, let alone extinguish, an Aboriginal right.<sup>35</sup> However, given that Aboriginal rights generally, and Aboriginal title in particular, are “part of the core of

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<sup>31</sup> *Dick, supra*, note 22, at 23.

<sup>32</sup> R.S.C. 1970, c. I-6, now R.S.C. 1985, c. I-5.

<sup>33</sup> See also *R. v. Morris*, [2004] B.C.J. No. 400, [2004] 2 C.N.L.R. 219 (C.A.) [hereinafter “*Morris*”], leave to appeal granted by the S.C.C. November 12, 2004.

<sup>34</sup> This was expressly acknowledged by Lamer C.J. in *Delgamuukw*: see the quotation accompanying note 30, compare notes 44, 48-50, below.

<sup>35</sup> See also *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] S.C.J. No. 33, [2002] 2 S.C.R. 146, at paras. 74-78.

Indianness at the heart of section 91(24),<sup>36</sup> any provincial laws that infringe those rights would necessarily go to the core of Indianness and so could not apply of their own force. If those laws are to apply to Indians, they can only do so by referential incorporation into federal law.<sup>37</sup>

How then is one to explain Lamer C.J.'s assertion in *Delgamuukw* that "[t]he aboriginal rights recognized and affirmed by s.35(1), including Aboriginal title, ... may be infringed, both by federal (e.g., *Sparrow* [*supra*, note 17]) and provincial (e.g., *Côté*, [*infra*, note 39]) governments"?<sup>38</sup> This statement certainly suggests that provincial laws can infringe those rights of their own force, not just through referential incorporation into federal law. Looking at *R. v. Côté*,<sup>39</sup> the authority he relied upon for provincial authority to infringe, two things should be noted. First, no actual provincial infringement of an Aboriginal right by provincial law occurred in that case, as the Supreme Court held that the law in question facilitated rather than restricted the Aboriginal right.<sup>40</sup> It was therefore unnecessary for the Court to decide that the provinces have the constitutional authority to infringe Aboriginal rights.<sup>41</sup> More importantly, the Court apparently decided this vital constitutional issue without mentioning the *Dick* decision, without explicit acknowledgement of the relevance of section 91(24), and without discussion of the division-of-powers issue or the applicability of the doctrine of interjurisdictional immunity. Justice Lamer, in a judgment concurred in by the other members of the Court,<sup>42</sup> simply said this:

In *Sparrow*, the Court set out the applicable framework for identifying the infringement of an aboriginal right or treaty right under s.35(1) of

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<sup>36</sup> *Delgamuukw*, *supra*, note 7, at para. 181 (see quotation accompanying note 30 above).

<sup>37</sup> See *R. v. Alphonse*, [1993] B.C.J. No. 1402, [1993] 4 C.N.L.R. 19 (C.A.); *Morris*, *supra*, note 33. Although space does not allow me to go into the matter at this time, it needs to be said that referential incorporation by s. 88 of the *Indian Act* of provincial laws that infringe Aboriginal rights, especially Aboriginal title, is also problematic: see Kerry Wilkins, "Still Crazy After All These Years": Section 88 of the *Indian Act* at Fifty" (2000) 38 Alta. L. Rev. 458; Kent McNeil, "Aboriginal Title and Section 88 of the *Indian Act*" (2000) 34 U.B.C.L. Rev. 159.

<sup>38</sup> *Delgamuukw*, *supra*, note 7, at para. 160. See also *Paul*, *supra*, note 8, at paras. 10, 24-25.

<sup>39</sup> [1996] S.C.J. No. 93, [1996] 3 S.C.R. 139 [hereinafter "*Côté*"].

<sup>40</sup> *Id.*, at para. 80.

<sup>41</sup> See *Haida Nation v. British Columbia (Minister of Forests)*, [2002] B.C.J. No. 1882, [2002] 4 C.N.L.R. 117, at paras. 77-78 (Lambert J.A.), reversed in part by *Haida Nation*, *supra*, note 1, without reference to this aspect of *Côté*.

<sup>42</sup> Justice La Forest and L'Heureux-Dubé J. wrote short concurring judgments, without referring to provincial authority to infringe.

the *Constitution Act, 1982*. It should be noted that the test in *Sparrow* was originally elucidated in the context of a federal regulation which allegedly infringed an aboriginal right. The majority of recent cases which have subsequently invoked the *Sparrow* framework have similarly done so against the backdrop of a federal statute or regulation. See, e.g., *Gladstone* [*supra*, note 18]. But it is quite clear that the *Sparrow* test applies where a provincial law is alleged to have infringed an aboriginal or treaty right in a manner which cannot be justified: *Badger* [*infra*, note 45], at para. 85 (application of *Sparrow* test to provincial statute which violated a 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.<sup>43</sup>

With all due respect, before deciding whether the *Sparrow* justification test applies in the context of provincial legislation, the Court in *Côté* should have addressed the issue of whether the provinces even have the constitutional authority to infringe Aboriginal rights, given section 91(24) and the doctrine of interjurisdictional immunity. Had the Court done so and taken the *Dick* case into consideration, I think the answer would have had to be that the provinces generally do not have this authority.<sup>44</sup> *R. v. Badger*,<sup>45</sup> the case relied upon by Lamer C.J. in this context, does not support any general provincial authority to infringe Aboriginal or treaty rights because it involved the application of the Natural Resources Transfer Agreements,<sup>46</sup> which gave the three Prairie Provinces explicit constitutional authority in relation to Indian hunting, trapping and fishing. That was the context in which provincial infringement of a treaty right to hunt was considered in that case. But given the absence of an equivalent grant of constitutional authority to Quebec (where *Côté* arose) and the other provinces, instead of relying on *Badger*, the Court in *Côté* should have undertaken the kind of division-of-powers analysis engaged in in *Dick*.

The contradictions arising from the Supreme Court's jurisprudence in relation to this matter can be demonstrated by a hypothetical example.

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<sup>43</sup> *Côté*, *supra*, note 39, at para. 74.

<sup>44</sup> As discussed above, this follows from the Court's decision in *Delgamuukw*, *supra*, note 7, that Aboriginal rights are within the core of federal jurisdiction over "Indians, and Lands reserved for the Indians": see text accompanying notes 30-37.

<sup>45</sup> [1996] S.C.J. No. 39, [1996] 1 S.C.R. 771 [hereinafter "*Badger*"].

<sup>46</sup> *Constitution Act, 1930*, 20-21 George V., c. 26 (U.K.), Schs. (1)-(3).

Suppose a First Nation in British Columbia has a special attachment to a specific site that has spiritual significance for them. The province issues a licence to a forestry company authorizing it to log the site. The First Nation proves either a site-specific Aboriginal right in relation to the site or Aboriginal title to the land on which the site is located, and shows how the licence will infringe the right or title. Even though this right or title would be constitutionally protected by section 35(1) of the *Constitution Act, 1982*, according to *Côté* and *Delgamuukw* the province could still justify the infringement if it met the justification test. Alternatively, without even establishing an Aboriginal right or title, the First Nation proves that the site is important enough to them that it comes within the core of their Indianness, or that the logging would impair their status or capacity. Following the unanimous decision of the Supreme Court in the *Dick* case, the provincial law under which the licence had been issued could not apply of its own force in these circumstances because it would impinge upon exclusive federal jurisdiction over “Indians, and Lands reserved for the Indians.” No justification of the provincial law could make it apply so as to affect the First Nation’s Indianness. So, the division-of-powers approach clearly provides greater protection to the site than does section 35(1), even in the absence of proof of an Aboriginal right or title.<sup>47</sup> Moreover, if an Aboriginal right or title is proven, then, according to *Delgamuukw*, that brings the matter within the core of federal jurisdiction, which, according to *Dick*, must exclude the application of provincial laws *ex proprio vigore*. So how can the province have jurisdiction to infringe?

Let us now return to the *Haida Nation* case. Because no Aboriginal title or other Aboriginal right has yet been established by the Haida Nation in relation to the lands in question on Haida Gwaii (the Queen Charlotte Islands), it is premature to say that there is an infringement that the province must justify. The fundamental, unresolved dispute between the Haida Nation and British Columbia is nonetheless over title to the land, including the timber growing on it. Looking again at section

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<sup>47</sup> In *Côté*, *supra*, note 39, at para. 87, Lamer C.J. recognized this in the context of a treaty right and s. 88 of the *Indian Act*, *supra*, note 32, and appeared to be somewhat puzzled by it. See also *R. v. Sundown*, [1990] S.C.J. No. 13, [1999] 1 S.C.R. 393, at para. 48 (Cory J.). In my respectful opinion, the puzzlement arises from a failure to appreciate the fundamental difference between division-of-powers and s. 35(1) protection for Aboriginal and treaty rights. It should not be surprising that there is no room for justifiable infringement in situations where a province is violating exclusive federal jurisdiction.

109 of the *Constitution Act, 1867*, if the Haida Nation does eventually establish its Aboriginal title it will have an interest other than that of the province that will exclude the timber and other natural resources from provincial ownership.<sup>48</sup> In that event, the province will not be able to rely on a *proprietary* right as the basis of its authority to infringe the Aboriginal title. Instead, it will have to rely on *jurisdictional* authority, primarily arising from section 92 and section 92A of the 1867 Act.<sup>49</sup> But we have already seen that, given exclusive federal jurisdiction over Aboriginal title under section 91(24), provincial jurisdiction to infringe that title, if it exists at all (which I seriously doubt), must be very limited indeed.<sup>50</sup>

Let us assume, however, that the province does have jurisdiction to infringe Aboriginal title to some extent by enacting statutes of general application. The British Columbia statute authorizing the province to grant the Tree Farm Licence (TFL) that the Haida contend infringes their Aboriginal title is the *Forest Act*.<sup>51</sup> That Act authorizes the granting of TFLs and other kinds of licences “to harvest Crown timber.”<sup>52</sup> “Crown timber” is defined as “timber on Crown land, or timber reserved to the government.”<sup>53</sup> “Crown land” has the same meaning as in the *Land Act*,<sup>54</sup> i.e., “land, whether or not it is covered by water, or an interest in land, vested in the government.”<sup>55</sup> The province seems to assume that land subject to Aboriginal title comes within this definition of “Crown land.” We know, however, from *St. Catherine’s Milling, Delgamuukw*, and now *Haida Nation* that section 109 of the *Constitution Act, 1867*, subjects provincial ownership to Aboriginal title. We also know from *Delgamuukw* that Aboriginal title includes the right to exclusive possession and that it encompasses timber and other natural resources. Thus, for constitutional reasons “Crown land” that is subject to Aboriginal title must be limited to the provincial Crown’s *underlying* title. It cannot include a right of possession, nor can it include ownership of natural resources such as timber. Accordingly, the *Forest Act* does

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<sup>48</sup> See text accompanying notes 5-16, *supra*.

<sup>49</sup> See text accompanying notes 20-21, *supra*.

<sup>50</sup> See text accompanying notes 20-37, *supra*.

<sup>51</sup> R.S.B.C. 1996, c. 157.

<sup>52</sup> *Id.*, s.12.

<sup>53</sup> *Id.*, s. 1(1).

<sup>54</sup> *Id.*

<sup>55</sup> *Land Act*, R.S.B.C. 1996, c. 245, s. 1.

not contain the authority to grant TFLs in relation to Aboriginal title lands.<sup>56</sup>

For British Columbia to be able to authorize the taking of timber from Aboriginal title lands, it would need statutory authority beyond that provided by the *Forest Act*. What that Act does is provide authority for the granting of licences to harvest *Crown timber on Crown land*. To authorize the harvesting of *Aboriginal timber on Aboriginal title land*, the province would have to enact legislation in the nature of an expropriation statute. The legislation could not be aimed at Aboriginal title land, as that would violate section 91(24) and make the statute *ultra vires*.<sup>57</sup> It would have to be a law of general application, permitting the province to authorize the taking of timber from any lands, whether privately-held or subject to Aboriginal title. One can imagine the political storm such legislation would provoke among private landowners in the province, let alone First Nations. Moreover, if the legislation was used exclusively or even primarily to authorize forestry operations on Aboriginal title lands, a court might hold that, despite being of general application on its face, it was really a colourable attempt to single out Indian lands in a way that violates federal jurisdiction under section 91(24).<sup>58</sup>

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<sup>56</sup> Insofar as s. 109 is concerned, the Aboriginal interest should be no different than any other interest by which provincial ownership of land is limited. Would anyone seriously argue that the province could rely on s. 109 and the *Forest Act*, *supra*, note 51, to authorize the granting of TFLs in relation to privately-held lands, even though the province holds an underlying title to those lands as well?

<sup>57</sup> See *Derrickson*, *supra*, note 22; *Dick*, *supra*, note 22; *Delgamuukw*, *supra*, note 7, at para. 179.

<sup>58</sup> Provincial singling out can be either overt or colourable in this context: *Dick*, *supra*, note 22, at 25, relying on *R. v. Kruger*, [1978] 1 S.C.R. 104; see also *Morris*, *supra*, note 33, at para. 118 (Thackray J.A.). It also needs to be emphasized that the scenario presented in the above paragraph is premised on the assumption (which I do not accept) that the province *can* infringe Aboriginal title if the infringement can be justified. In my opinion one has to question how expropriation legislation of this sort, even if of general application, can apply to Aboriginal title lands without impinging upon the core of exclusive federal jurisdiction that is supposed to be protected by the doctrine of interjurisdictional immunity. Surely the legislation, if used to authorize forestry operations on Aboriginal title lands, would impair the First Nation right of possession that was said by Chouinard J. in *Derrickson*, *supra*, note 22, at 44, to be “manifestly of the very essence of the federal exclusive legislative power under subs. 91(24).” See also *Paul v. Paul*, [1986] S.C.J. No. 19, [1986] 1 S.C.R. 306. Although *Derrickson* and *Paul* both involved Indian reserves rather than Aboriginal title lands, the Aboriginal interest in each is fundamentally similar and both are under exclusive s. 91(24) jurisdiction: *Osoyoos Indian Band v. Oliver (Town)*, [2001] S.C.J. No. 82, [2001] 3 S.C.R. 746, at para. 41; *Delgamuukw*, *supra*, note 7, at paras. 120, 174-76.

In my opinion, the reason British Columbia is able to rely on the *Forest Act* to grant TFLs on Haida Gwaii is that the Aboriginal title of the Haida has not yet been established, and so *for the time being* the province is able to claim that the lands in question are Crown lands within the statutory definition. But if Aboriginal title to those lands is established, they will fall outside the statutory definition and so the provincial authority will disappear. This will mean that the original grant of the TFL and its transfer to Weyerhaeuser Company Limited would have lacked statutory authority and therefore would have been unlawful from the outset. This could render both the province and Weyerhaeuser liable for wrongful intrusion onto the Haida Nation's lands.<sup>59</sup> For this reason, I think it is essential for the province not only to consult with the Haida Nation, as the Supreme Court has decided it must, but also to come to an agreement with them in relation to the forestry resources on Haida Gwaii, prudently with federal participation as a party.<sup>60</sup> Although McLachlin C.J. said that the duty to consult does not include a "duty to agree,"<sup>61</sup> in my opinion that conclusion applies only so long as the Haida's Aboriginal title has not been proven. So if the province wants to avoid liability in the future for unlawful interference with the Haida's title once proven, it had better do more than consult. Given the strength of the Haida's title claim, I think it would be wise for the province to proceed on the assumption that the title will be established, rather than risk the embarrassment and cost of being found in court to have given Weyerhaeuser the unlawful go-ahead to trespass on Haida lands.

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<sup>59</sup> On the availability of an action in trespass to defend possession of Aboriginal title lands, see Kent McNeil, "The Onus of Proof of Aboriginal Title" (1999) 37 Osgoode Hall L.J. 775, at 796-800 (also in *Emerging Justice?*, *supra*, note 13, 136, at 154-58). On liability of provincial officials for trespass on those lands, see Wilkins, *supra*, note 21, at 97-100.

<sup>60</sup> The reason why it would be prudent for the federal government to be a party to any such agreement is that Aboriginal title is inalienable, other than by surrender to the Crown *in right of Canada: Delgamuukw*, *supra*, note 7, at paras. 113, 173-75. On the other hand, I am not aware of any case law holding that Aboriginal peoples cannot, in the absence of federal participation, create third party interests in their Aboriginal title lands, or alienate natural resources on or under those lands to a province, as long as their Aboriginal title is retained: see discussion in Kent McNeil, "Self-Government and the Inalienability of Aboriginal Title" (2002) 47 McGill L.J. 473, esp. at 502-508.

<sup>61</sup> *Haida Nation*, *supra*, note 1, at para. 42.