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ABORIGINAL TITLE AND SECTION 88 OF THE INDIAN ACT*

KENT MCNEIL†

I. INTRODUCTION

The decision of the Supreme Court of Canada in Delgamuukw v. British Columbia1 firmly established that Aboriginal title lands are within exclusive federal jurisdiction because they are encompassed by the words “[l]ands reserved for the Indians” in s. 91(24) of the Constitution Act, 1867.2 Delivering the principal judgment, Lamer C.J.C. went on to say that Aboriginal rights generally, including both Aboriginal title and other rights, are within “the core of Indianness which lies at the heart of s. 91(24),” and so “[p]rovincial governments are prevented from legislating in relation to both types of aboriginal rights.”3 As a result, he concluded that the provinces cannot extinguish Aboriginal title, either directly by specific legislation, or indirectly by legislation of general application. Moreover, he held that the power to extinguish Aboriginal title was not conferred on the provinces by s. 88 of the Indian Act,4 which, with certain exceptions to be considered below, makes provincial laws of general application that “touch on the Indianness at the core of s. 91(24)” apply to

* I owe a debt of gratitude to Chantal Morton for her invaluable research for this article. I would also like to thank Brian Slattery, Bruce Ryder, and Kerry Wilkins for their very helpful comments on a draft.
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3 Delgamuukw, supra note 1 at 1119. La Forest J., for himself and L’Heureux-Dubé J., delivered a concurring judgment, in which he differed somewhat from the Chief Justice on the definition of Aboriginal title. However, on the issue of provincial authority to extinguish Aboriginal title, he agreed with Lamer C.J.C.: ibid. at 1134.
“Indians,” as defined in the Act, by referentially incorporating those laws into federal law.\(^5\)

Chief Justice Lamer nonetheless said that Aboriginal rights, including Aboriginal title, can be infringed by provincial governments,\(^6\) provided that the infringements can be justified by meeting the test laid down in \(R. v. Sparrow.\)\(^7\) But given his conclusion that Aboriginal rights are at the “core of Indianness” and therefore within exclusive federal jurisdiction, what is the basis for this power of infringement?\(^8\) Lamer’s position on this

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\(^{6}\) Delgamuukw, \textit{supra} note 1 at 1107. Note that while Lamer C.J.C. did use the word “governments” in this context, he must have meant the legislative rather than the executive branch of governments, as it is fundamental to the rule of law that the executive branch cannot infringe legal rights (let alone constitutionally protected rights) without unequivocal statutory authority. See K. McNeil, “Racial Discrimination and Unilateral Extinguishment of Native Title” (1996) \textit{1 A.I.L.R.} 181, esp. 185-90; K. McNeil, “Aboriginal Title as a Constitutionally Protected Property Right,” in O. Lippert, ed., \textit{Beyond the Nass Valley: National Implications of the Supreme Court’s Delgamuukw Decision} (Vancouver: The Fraser Institute, 2000) 55.

\(^{7}\) [1990] 1 S.C.R. 1075 [hereinafter \textit{Sparrow}]. This test was created by the Court to justify infringements of Aboriginal rights that are constitutionally protected by s. 35(1) of the \textit{Constitution Act, 1982}, being Schedule B to the \textit{Canada Act 1982} (U.K.), 1982, c. 11. Section 35(1) provides: “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” Briefly, \textit{Sparrow} decided that an infringement can be justified if it is pursuant to a compelling and substantial legislative objective, and respects the Crown’s fiduciary obligations to the Aboriginal people in question. See also \(R. v. Gladstone, [1996] 2 S.C.R. 723\), commented on in K. McNeil, “How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?” (1997) \textit{8:2 Constitutional Forum} 33.

\(^{8}\) Lamer C.J.C. relied on his own judgment in \(R. v. Côté, [1996] 3 S.C.R. 139\) [hereinafter \textit{Côté}]. However, in that case he did not address the issue of how the provincial power of infringement can be reconciled with exclusive federal jurisdiction. Instead, he relied on \(R. v. Badger, [1996] 1 S.C.R. 771\) [hereinafter \textit{Badger}]. However, in \textit{Badger} legislative power in relation to Indian hunting was specifically conferred on the province of Alberta by the \textit{Natural Resources Transfer Agreement}, which was given constitutional force, “notwithstanding anything in the \textit{British North America Act, 1867}” (now the \textit{Constitution Act, 1867}), by s. 1 of the \textit{Constitution Act, 1930}, 20 & 21 Geo. V, c. 26 (U.K.), reproduced in R.S.C. 1985, App. II, No. 26. So \textit{Badger} is not authority for any general provincial authority to infringe Aboriginal and treaty rights. For a more detailed
is all the more puzzling because he clearly stated that this core is protected "from provincial intrusion, through the doctrine of interjurisdictional immunity." As that doctrine prevents any provincial intrusion into the heart of areas of federal jurisdiction, and provincial laws that infringe Aboriginal rights would seem to so intrude, it is difficult to understand how Lamer was able to sanction provincial infringements of those rights.

One possible answer to this conundrum is that Lamer thought that s. 88 of the Indian Act, while not conferring jurisdiction on the provinces to extinguish Aboriginal rights, does allow the provinces to infringe those rights. In his discussion of this section, he said this:

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

In reaching this conclusion, Lamer relied mainly upon *Dick,* where the Supreme Court held that provincial hunting laws of general application that touch on the core of Indianness without infringing treaty rights are referentially incorporated by s. 88. However, as *Dick* did not involve Aboriginal title or even an Aboriginal right to hunt, that judgment did not determine whether referentially incorporated provincial laws can

9 *Delgamuukw,* supra note 1 at 1119.


11 *Delgamuukw,* supra note 1 at 1122 [emphasis added].


infringe Aboriginal rights. Nor did Lamer address this issue directly in Delgamuukw. However, in holding that s. 88 does not authorize provincial extinguishment of Aboriginal rights, he did say that "the explicit reference to treaty rights in s. 88 suggests that the provision was clearly not intended to undermine aboriginal rights."

Moreover, while the longer passage from Delgamuukw quoted in the previous paragraph referred to both “Indians and Indian lands,” I seriously doubt that, by mentioning “Indian lands” in the context of s. 88, Chief Justice Lamer meant to imply that the section referentially incorporates provincial laws that would not otherwise apply to those lands because of s. 91(24). This is especially so because a long-standing body of case law has held the exact opposite. In an earlier article, I found it "inconceivable that the Chief Justice intended to overrule those decisions with such vague language, without reference to them and without any discussion of the compelling arguments against such an interpretation." Since writing that article, however, I have heard enough people express a contrary view of Lamer’s judgment that I think the matter deserves more detailed consideration. The main purpose of the present article is therefore to examine the question of whether s. 88 does indeed authorize provincial infringements of Aboriginal title by referentially incorporating provincial laws in relation to land and making them apply to “[l]ands reserved for the Indians.”

II. SECTION 88 OF THE INDIAN ACT

Section 88 was added to the Indian Act (as s. 87) in 1951. It provides as follows:

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16 The case law is discussed in the text accompanying notes 55-72.

17 McNeil, supra note 8 at 447. See also Bankes, supra note 10 at 334-35. In Stoney Creek Indian Band v. British Columbia, [1999] 1 C.N.L.R. 192 (B.C.S.C.) at 205 [hereinafter Stoney Creek], Lysyk J. also doubted whether “this passing reference [to Indian lands in the context of s. 88] by the Chief Justice was intended to be a considered conclusion that s. 88 extends otherwise inapplicable provincial laws not only to Indians but also to Indian lands.” This decision was reversed on appeal, sub nom. Stoney Creek Indian Band v. Alcan Aluminum Ltd., [2000] 2 C.L.N.R. 345 (B.C.C.A.), without mention of this issue. Leave to appeal to the S.C.C. was refused, [2000] 3 C.L.N.R. iv.

18 By S.C. 1951, c. 29.
Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation, or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

At the time this section was enacted, it was unclear whether Aboriginal title—or indeed any Aboriginal rights—existed at common law in the absence of recognition by the Crown in the Royal Proclamation of 1763, a treaty, or other governmental act. Not until 1973 in Calder v. Attorney-General of British Columbia was it decided, in the words of Hall J. (dissenting on other grounds), that “aboriginal Indian title does not depend on treaty, executive order or legislative enactment.” The pre-Calder lack of judicial acknowledgment of common law Aboriginal rights may explain why s. 88 accorded protection against provincial laws of general application to treaties, but not to Aboriginal rights, as the federal government was probably of the view that no such rights existed. The treaties, on the other hand, were positive agreements between the Crown and the Aboriginal parties, dealing with rights and obligations that the federal government was obliged to respect. It is therefore not surprising

19 In R. v. St. Catherine's Milling and Lumber Company (1888), 14 App. Cas. 46 (P.C.) [hereinafter St. Catherine's Milling], the leading case on Aboriginal land rights at the time, Lord Watson found the Royal Proclamation to be the source of Indian title to land: see Guerin v. Canada, [1984] 2 S.C.R. 335 at 377, Dickson J. [hereinafter Guerin].


21 Ibid. at 390. See also Guerin, supra note 19 at 377 and 379, where Dickson J. quoted these words from Hall’s judgment with approval.

22 See Canada, House of Commons Special Committee appointed to consider Bill No. 79: An Act Respecting Indians, Minutes of Proceedings and Evidence (Ottawa: Queen’s Printer, April 1951) at 167-71, where what is now s. 88 was discussed. The whole focus of the discussion was on the preservation of treaty rights, especially to hunt and fish. Aboriginal rights as such were not mentioned. For further evidence of this focus on treaty rights at the time, see K. Wilkins, “‘Still Crazy After All These Years’: Section 88 of the Indian Act at Fifty” (2000) 38 Alta. L. Rev. 458 at 462. Later, in its infamous White Paper, entitled Statement of the Government of Canada on Indian Policy, 1969 (Ottawa: Indian Affairs and Northern Development, 1969) at 11, the government expressed the view that Aboriginal land claims were “so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy or program that will end injustice to Indians as members of the Canadian community.”

that s. 88 would protect treaty rights against inconsistent provincial laws, while failing to mention Aboriginal rights. Indeed, any reference to Aboriginal rights in s. 88 would have amounted to a legislative acknowledgment of the existence of those rights, which the federal government may well have been anxious to avoid.

After judicial acknowledgment of Aboriginal land rights in Calder, the failure to protect Aboriginal rights from provincial laws in s. 88 appeared to be an anomaly. The point was raised in Kruger, decided in 1977:

It has been urged in argument that Indians having historic hunting rights which they have not surrendered should not be placed in a more invidious position than those who entered into treaties, the terms of which preserved those rights. However receptive one may be to such an argument on compassionate grounds, the plain fact is that s. 88 of the Indian Act, enacted by the Parliament of Canada, provides that "subject to the terms of any treaty" 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 as stated. The terms of the treaty are paramount; in the absence of a treaty provincial laws of general application apply.\(^\text{24}\)

Prior to the enactment of s. 35(1) of the Constitution Act, 1982,\(^\text{25}\) it therefore appears that the parliamentary process of legislative amendment simply did not keep pace with the development of Aboriginal rights law by the Supreme Court.

Since s. 35(1) recognized and affirmed existing Aboriginal and treaty rights, the failure to shield Aboriginal rights in s. 88 became less important, as those rights were now accorded constitutional protection.\(^\text{26}\) But more fundamentally, s. 35(1) placed the constitutional validity of s. 88 in question. Professor Brian Slattery, in an article published prior to the release of the Delgamuukw decision, argued that provincial laws on

\footnote{Chippewas of Sarnia Band v. Attorney General of Canada, [1999] O.J. No. 1406 at paras. 539-93 (Sup. Ct.) [hereinafter Chippewas of Sarnia], currently on appeal to the Ont. C.A.}

\(^\text{24}\) Kruger, supra note 14 at 114-15.

\(^\text{25}\) Supra note 7.

\(^\text{26}\) Ironically, however, if the provinces can infringe Aboriginal and treaty rights as long as they meet the test of justification (see note 7), s. 88 provides more protection to treaty rights than s. 35(1) because the courts have never allowed justification of provincial laws that would infringe treaty rights in the context of s. 88: see Côté, supra note 8 at 191-92, Lamer C.J.C. See also McNeil, supra note 8 at 452, suggesting that this fact should have led the Chief Justice to question the authority of the provinces to infringe Aboriginal and treaty rights in the context of s. 35(1). This matter was referred to, and left unresolved, by Cory J. in his unanimous judgment in R. v. Sundown, [1999] 1 S.C.R. 393 at 418 [hereinafter Sundown].
their own cannot prevail over Aboriginal rights because, unlike Parliament, "the Provinces do not possess the power to legislate in relation to Aboriginal and treaty rights."[27] If this principle is correct, he said,

...[I]t 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.[28]

While Slattery was addressing this issue in the context of a right to self-government, his argument can also be applied to Aboriginal rights generally. Although he did not elaborate on why s. 88 could not meet the Sparrow justification test, one can readily see how he reached this conclusion: the burden of proving a compelling and substantial legislative objective, and respecting the Crown's fiduciary obligations, as required by the test,[29] might well be impossible to meet.[30]

However, Slattery's argument appears to relate only to provincial laws that infringe the rights protected by s. 35(1). Are there provincial laws of general application that could be referentially incorporated by s. 88 without infringing those rights? The answer depends upon whether the "core of Indianness at the heart of s. 91(24)" is limited to matters relating to Aboriginal and treaty rights, or is broader than that. While Chief Justice Lamer did not fully define the extent of the core of federal jurisdiction in Delgamuukw,[31] earlier case law indicates that it does include exclusive jurisdiction over the status and capacity of Indians,

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[28] Ibid. at 285-86 [footnote omitted].


[30] See also McNeil, supra note 8 at 440-41: "How would th[e] honour of the Crown [which is intimately connected with the Crown's fiduciary obligations] be upheld by Parliamentary delegation of authority to the provinces to infringe Aboriginal rights through the mechanism of referential incorporation? Would this not be a dishonourable abdication of the responsibility that was placed primarily on the federal government by s. 91(24) of the Constitution Act, 1867?"

[31] Supra note 1 at 1116-21. But as we have seen, he did decide that all Aboriginal rights are within that core: see text accompanying note 3.
whether or not Aboriginal or treaty rights are involved. The case law therefore suggests that the core of federal jurisdiction under s. 91(24), to which the doctrine of interjurisdictional immunity applies, extends beyond those rights. If so, then there is some room for s. 88 to operate without infringing Aboriginal or treaty rights. In that case, if Slattery is correct (as I think he is) that federal authorization of provincial infringements of those rights is unconstitutional, then s. 88 would not be invalid, but would have to be read down in order for referential incorporation to exclude provincial laws having that effect.

It has nonetheless been held by the British Columbia Court of Appeal in R. v. Alphonse and R. v. Dick that s. 88 does not have to be justified under the Sparrow test, as the section does not itself infringe Aboriginal rights. Instead, it is the provincial laws that are referentially incorporated by the section that are in need of justification if an infringement is shown. But this seems to place the burden of justification on the provinces, when in fact they are not responsible for the application of these referentially incorporated laws to Indians. If the British Columbia Court of Appeal's approach in these cases is correct, then Parliament, through the mechanism of s. 88, has succeeded in casting responsibility onto the provinces without their participation or consent, and has also been able to wash its hands of the matter without justifying this abdication of

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32 See Natural Parents v. Superintendent of Child Welfare, [1976] 2 S.C.R. 751 at 760-63, Laskin C.J.C. [hereinafter Natural Parents], cited with approval in Bell Canada v. Québec (Commission de la santé et de la sécurité du travail), [1988] 1 S.C.R. 749 at 833-36 [hereinafter Bell Canada]. See also Four B Manufacturing Limited v. United Garment Workers of America and Ontario Labour Relations Board, [1980] 1 S.C.R. 1031 at 1047-48 [hereinafter Four B Manufacturing]. In Dick, supra note 5, Beetz J. assumed from the facts that the Indianness at the core of s. 91(24) was impaired by a provincial game law, even though no Aboriginal or treaty rights were involved. On the other hand, it appears from R. v. Francis, [1988] 1 S.C.R. 1025 [hereinafter Francis], that federal jurisdiction extends beyond this core, as La Forest J., for the Court, implicitly accepted the validity of the federal Indian Reserve Traffic Regulations, C.R.C. 1978, c. 959, even though traffic laws do not touch on Indianness. As traffic control generally falls under provincial jurisdiction, there is an area of concurrent jurisdiction where, subject to federal paramountcy, provincial laws of general application apply of their own force to Indians, both on and off reserves.

33 See Wilkins, supra note 10 at 233.


35 In Dick, supra note 5, the Supreme Court held that the only provincial laws that are referentially incorporated by s. 88 are laws of general application that would not otherwise apply to Indians because they touch on Indianness. Provincial laws that are not in relation to Indians, and do not touch on Indianness or lands reserved for the Indians, apply to Indians of their own force. See also Francis, supra note 32 at 1028-29; Delgamuukw, supra note 1 at 1119-20.
responsibility to the Aboriginal peoples whose rights are affected. This state of affairs cannot be right if the constitutional principles of division of powers and federal responsibility for s. 91(24) “Indians” have any meaning in this context.  

These and other problems with the Alphonse/Dick approach to s. 88 have been addressed in greater detail by Kerry Wilkins in a perceptive recent article entitled “Of Provinces and Section 35 Rights.” He points out that decisions and activities that infringe Aboriginal rights, in this instance by means of s. 88, can only be made by the federal government, pursuant to federal objectives, because the provinces are barred by the division of powers from doing so. He continues:

> These federal decisions, activity and objectives, I am arguing, are what need justification under s. 35(1) of the Constitution Act, 1982. In the constitutional sense, the provinces have nothing to do with them. If Canada had chosen instead to enact, one by one, its own measures duplicating, for Indians, the effects of selected existing provincial laws, no one would suggest that any s. 35 inquiry should focus exclusively—or at all—on the inapplicable provincial prototypes. In one respect, s. 88 does exactly that, only by different means.

Moreover, Wilkins points out that, as the reasons for enacting s. 88 and the policy objectives behind the provincial laws incorporated by it are necessarily different, “[a]n inquiry into s. 88’s own justifiability, therefore, must be independent of any possible inquiry into the merits of any of the provincial laws it incorporates.”

Wilkins also relies on a passage from R. v. Adams where Lamer C.J.C. stated that, “[i]n light of the Crown’s unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance.” Without such guidance, Lamer said, “the statute will

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36 E.g. see Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85 at 123 and 126 [hereinafter Mitchell], where La Forest J. referred to “the federal Crown’s plenary responsibility respecting ‘Indian Lands’” and “its obligations to native peoples, be it pursuant to its treaty commitments, or its responsibilities flowing from s. 91(24).” In his concurring judgment at 105 and 108-09, Dickson C.J.C. also spoke of “the constitutional responsibility of Parliament for Indians and Indian lands,” and added: “since 1867, the Crown’s role has been played, as a matter of federal division of powers, by Her Majesty in right of Canada, with the Indian Act representing a confirmation of the Crown’s historic responsibility for the welfare and interests of these peoples.”

37 Wilkins, supra note 10.

38 Ibid. at 229.

39 Ibid. at 230 [emphasis in original].

fail to provide representatives of the Crown with sufficient directives to
fulfil their fiduciary duties, and the statute will be found to represent an
infringement of aboriginal rights under the *Sparrow* test. As Wilkins
observes, there is a close parallel between s. 88 and the kind of
administrative scheme the Chief Justice found unacceptable in *Adams*:

The scheme at issue in *Adams* left the exercise of the appellant’s aboriginal
fishing rights at the mercy of a minister’s discretion; section 88 exposes a
broader range of aboriginal rights to an indefinite, and constantly changing,
array of provincial procedures and standards all of which, upon incorporation
into federal law, operate to govern matters constitutive of Indianness. The
*Adams* scheme contained no specifications or criteria that could have helped
ensure that the minister gave sufficient regard, in the exercise of the
discretion, to the existence and the scope of any aboriginal right; s. 88
contains no specifications that help ensure that any scheme it incorporates will
operate with sufficient regard for aboriginal rights.

Wilkins concludes that s. 88 itself is in need of justification, and
doubts whether that is possible, even if one assumes that the objectives
behind it are compelling and substantial. In his view, s. 88 does not meet
the *Sparrow* requirements of “as little infringement as possible in order to
effect the desired result,” and “sensitivity to and respect for the rights of
aboriginal peoples.” I agree. As he states, s. 88 “makes no allowance
whatever for aboriginal rights, either by according them some statutory
priority (as it did for treaty rights), or by requiring some prior review of
incorporated statutes to ensure some threshold of sensitivity or of
proportionality.”

Wilkins’ arguments also suggest to me that, for fundamental structural
reasons, it may not be possible to apply the *Sparrow* test in order to
justify infringements of Aboriginal rights by laws incorporated by s. 88.
As he points out, the provinces have no constitutional authority to
infringe those rights on their own, and so cannot intend to do so when
they enact laws of general application. So how can the provinces address
the issue of justification of infringements caused by s. 88’s referential
incorporation of those laws? If it is infringement by the incorporated laws
that has to be justified (as *Alphonse* and *Dick* held), how could a province

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41 Ibid. See also R. v. Marshall, [1999] 3 S.C.R. 456 at 504-5, where Binnie J. applied this
section of Lamer’s judgment in *Adams*, supra note 40.
42 Wilkins, supra note 10 at 230-31.
43 Objectives he suggests are “filling gaps in the federal law and harmonizing the legal
regimes to which statutory Indians will be subject from time to time” ibid. at 232.
44 Ibid. at 232, quoting *Sparrow*, supra note 7 at 1119.
45 Wilkins, supra note 10 at 233 [footnotes omitted].
show a compelling and substantial objective, respect for the Crown's fiduciary obligations, consultation, and so on, without revealing an unconstitutional intention to infringe Aboriginal rights? On the other hand, if it is the federal government that has to justify infringement by incorporated provincial laws, how can that government establish a compelling and substantial objective, etc., when Parliament had nothing in fact to do with the enactment of the provincial law in question? It therefore appears that referential incorporation of laws that infringe Aboriginal rights—especially the broad range of laws that s. 88 purports to encompass—is incompatible with the requirements for justification established by *Sparrow*. If this is correct, the ability of s. 88 to incorporate those laws has been destroyed by s. 35(1) and the justification test.

In summary, the constitutional validity of s. 88 really depends on whether it incorporates any provincial laws that do not infringe Aboriginal rights. If it does, as the pre-*Delgamuukw* jurisprudence suggests, then it is still valid, but should be read down to limit its application to the incorporation of those laws. However, if the only laws incorporated by it are laws that infringe Aboriginal rights, for the reasons outlined above it should be struck down because it violates s. 35(1). This approach would eliminate the discrepancy in the treatment of Aboriginal and treaty rights under s. 88, the historical justification for which disappeared when Aboriginal rights were acknowledged by the Supreme Court.  

It could be argued that, after judicial acknowledgment of these rights and enactment of the *Constitution Act, 1982*, s. 88 offends the equality provision in s. 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*] by distinguishing between treaty Indians and other Aboriginal peoples. See *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, holding that s. 77(1) of the *Indian Act*, R.S.C. 1985, c. I-5, requiring Indian band members to be "ordinarily resident" on a reserve to be able to vote in band council elections, violates s. 15(1); *R. v. Morin and Daigneault*, [1996] 3 C.N.L.R. 157 (Sask. Prov. Ct.), holding that the *Saskatchewan Fishery Regulations*, made pursuant to the *Fisheries Act*, R.S.C. 1985, c. F-14, violate s. 15(1) because they require Mètis to purchase fishing licences which Indians receive at no cost (in affirming this decision on other grounds,*sub nom. R. v. Morin*, [1998] 1 C.N.L.R. 182 (Sask. Q.B.), Laing J. said at 205 that "the trial judge should not have based his decision on the *Charter* when the same was not part of the argument made before him without first giving counsel the right to address the argument," and that "resort to the *Charter* was unnecessary" in the circumstances). Compare *Lovelace v. Ontario*, [2000] 4 C.N.L.R. 145 (S.C.C.); *Perry v. Ontario*, [1998] 2 C.N.L.R. 79 (Ont. C.A.), leave to appeal to S.C.C. refused 18 Dec. 1997, [1998] 1 C.N.L.R. iv (S.C.C.). See also *Alphonse, supra* note 15 at 443-45, Lambert J.A., where he relied on the discriminatory treatment of non-treaty Indians by s. 88 to conclude, without reference to s. 15(1), that provincial game laws that infringe Aboriginal rights are not laws of general application for the purposes of s. 88; compare
with the "plain policy" of Canada's Constitution, whereby, "in order to ensure uniformity of administration, ... Indian affairs generally [were placed] under the legislative control of one central authority." As a result, "the government vested with primary constitutional responsibility for securing the welfare of Canada's aboriginal peoples" would no longer be able to use s. 88 to avoid its fiduciary obligation to respect Aboriginal rights.

The Supreme Court has not yet ruled on the constitutional impeachability of s. 88. But what if, despite what I think are compelling arguments to the contrary, the Court adopts the Alphonse/Dick approach and upholds the section's referential incorporation of provincial laws that infringe Aboriginal rights, as long as the infringement can be justified? Is the incorporation limited to applying provincial laws of general application to "Indians," or are those laws made applicable to "lands reserved for the Indians" as well? The rest of the article will focus on this issue.

III. CASE LAW ON THE APPLICATION OF SECTION 88 TO "LANDS RESERVED FOR THE INDIANS"

Before determining whether s. 88, if it is constitutionally valid and does not have to be read down, makes provincial laws in relation to land apply to "lands reserved for the Indians" (s. 91(24) lands), we need to know if any of those laws can apply to those lands of their own force. On this issue, the courts have generally held that provincial laws in relation to land, and in particular, laws that relate to the possession or use of land, cannot apply proprio vigore to s. 91(24) lands. However, provincial

Macfarlane J.A. at 417-20. Further discussion of this issue is beyond the scope of the present article.

47 St. Catherine's Milling, supra note 19 at 59.
48 Delgamuukw, supra note 1 at 1118, Lamer C.J.C.
49 For a more detailed discussion, see McNeil, supra note 8 at 457-62.
laws that are primarily (or, in constitutional jargon, in "pith and substance") in relation to some other provincial head of power can affect s. 91(24) lands incidentally. Prior to a recent decision of the Quebec Court of Appeal, judicial disagreement in this context was mainly over whether a particular law should be characterized as a law in relation to land or in relation to some other matter.  

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51 See Francis, supra note 32; Rempel Brothers Concrete Ltd. v. Chilliwack (District) (1994), 88 B.C.L.R. 2d 209 (C.A.); Delgamuukw, supra note 1 at 1122, Lamer C.J.C. Note that while the cases on the application of provincial laws to s. 91(24) lands have usually dealt with the issue in the context of Indian reserves, since Delgamuukw the rules laid down in those cases are generally applicable to Aboriginal title lands as well (except where the decisions were based on other constitutional provisions such as the Natural Resources Transfer Agreements, supra note 8, or on federal legislation, such as the Indian Act, supra note 4). Lamer C.J.C. held not only that those lands are as much under exclusive federal jurisdiction as Indian reserves, but also that the Aboriginal interest in both kinds of s. 91(24) lands is the same. See Delgamuukw, supra note 1 at 1085 and 1116-18.  

52 Oka, supra note 50, where it was held that possession and "Indian" use of s. 91(24) lands are within the core of exclusive federal jurisdiction, but "general" use (in that case, building an apartment block) that does not affect Indianness or Indian status is not. This holding is in direct conflict with Peace Arch, supra note 50, with which the Quebec Court of Appeal disagreed. Compare also the cases cited in note 53.  

53 For example, in R. v. Fiddler, [1994] 1 C.N.L.R. 121 (Sask. Q.B.), it was held that the Prairie and Forest Fires Act, 1982, S.S. 1982-83, c. P-22.1, applies proprio vigore to an Indian who starts a fire on an Indian reserve in contravention of the Act, as starting a fire does not relate to Indianness or amount to a use of the land. In Noble J.'s words at 127, the provision in question "is clearly a safety law." However, in R. v. Sinclair, [1978] 6 W.W.R. 37 (Man. Prov. Ct.), the opposite conclusion was reached with respect to equivalent Manitoba fire-prevention legislation. Similarly, in Re Park Mobile Homes Sales Ltd. and Le Greely (1978), 85 D.L.R. 3d 618 (B.C.C.A.) at 620 [hereinafter Park Mobile Homes], Farris C.J.B.C., for the Court, held that a provision of the Landlord and Tenant Act, 1974 (B.C.), c. 45, restricting the right of a landlord to raise rent for residential premises, applies to rental of a mobile home pad on an Indian reserve because "an increase in rent does not affect Indian lands or the use of Indian lands"; whereas in Millbrook Indian Band v. Northern Counties Residential Tenancies Board (1978), 84 D.L.R. 3d 174 (N.S.S.C.) [hereinafter Millbrook], affirmed on other grounds, sub nom. Re Attorney-General of Nova Scotia and Millbrook Indian Band (1978), 93 D.L.R. 3d 230 (N.S.S.C. App. Div.), Morrison J. held at 181 that the Residential Tenancies Act, 1970 (N.S.), c. 13, "basically is legislation dealing with the management, use and control of land," and so does not apply on Indian reserves. For discussion of the land use characterization issue, see P. Hughes, "Indians and Lands Reserved for the Indians: Off-Limits to the Provinces?" (1983) 21 Osgoode Hall L.J. 82 at 97-103.
If, as the weight of authority indicates, provincial laws of general application with respect to land cannot apply of their own force to s. 91(24) lands, are those laws referentially incorporated into federal law by s. 88? A long-standing body of case law has held that they are not. In Isaac, for example, the Appeal Division of the Nova Scotia Supreme Court held that provincial game laws affect the use of land, and so cannot apply of their own force on Indian reserves. MacKeigan C.J.N.S. put it this way:

To shoot a rabbit, deer or grouse on land especially Indian reserve land, is as much a use of that land as to cut a tree on that land, or to mine minerals, extract oil from the ground, or farm that land, or, as in the Peace Arch case

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55 In addition to the cases discussed in the text, see R. v. Johns (1962), 39 W.W.R. 49 (Sask. C.A.) at 53; Palm Dairies Ltd. v. The Queen (1978), 91 D.L.R. (3d) 665 at 670 (F.C.T.D.) [hereinafter Palm Dairies]; Park Mobile Homes, supra note 53 at 619; Millbrook, supra note 53 at 181-3; The Queen v. Smith (1980), 113 D.L.R. (3d) 522 at 571 (F.C.A.), reversed without mention of s. 88, [1983] S.C.R. 554; Reference re Stony Plain Indian Reserve No. 135 (1981), 130 D.L.R. (3d) 636 at 653-55 (Alta. C.A.) [hereinafter Stony Plain]; Stoney Creek, supra note 17 at 201-05; Chipewyas of Sarnia, supra note 23 at paras. 491-95. In other cases, provincial laws in relation to land have been found to be inapplicable to Indian reserves without reference to s. 88: see e.g. Peace Arch, supra note 50 (either it did not occur to anyone to raise s. 88, or the section was thought to be inapplicable). Moreover, academic commentary generally supports the interpretation that s. 88 does not make provincial laws in relation to land apply to s. 91(24) lands: see e.g. K. Lysyk, "The Unique Constitutional Position of the Canadian Indian" (1967) 45 Can. Bar Rev. 513 at 518, 552; Hughes, supra note 53 at 97; B. Slattery, "Understanding Aboriginal Rights" (1978) 66 Can. Bar Rev. 727 at 779-81; Little Bear, supra note 12 at 187; R.A. Reiter, The Law of First Nations (Edmonton: Juris Analytica, 1996) at 201. See also Hon. Mr. Justice D. Lambert, "Van der Peet and Delgamuukw: Ten Unresolved Issues" (1998) 32 U.B.C. L. Rev. 249 at 266.

56 Supra note 50.
[supra note 50], erect a building on that land—all of which are activities unquestionably exclusively for the federal government to regulate.57

Moreover, provincial game laws are not referentially incorporated into federal law by s. 88 where Indian hunting occurs on reserve lands because, in the words of MacKeigan,

[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.58

The Isaac decision is consistent with dicta in Cardinal v. Attorney General of Alberta,59 decided by the Supreme Court two years earlier. That case also involved the application of provincial game laws on an Indian reserve. The Court held that those laws apply to Indians on reserves in Alberta by virtue of s. 12 of the Natural Resources Transfer Agreement,60 subject to exceptions contained therein. After referring to

57 Ibid. at 469. See also R. v. Paul and Copage (1977), 35 A.P.R. 313 (N.S.S.C. App. Div.); R. v. Julian (1978), 40 A.P.R. 156 (N.S.S.C. App. Div.). Compare R. v. Smith, [1942] 3 D.L.R. 764 (Ont. C.A.), deciding that provisions of the Game and Fisheries Act, R.S.O. 1937, c. 353, applied to hunting on the Petawawa Military Camp Reserve, title to which is in the Crown in right of Canada. Robertson C.J.O., for the Court, said at 766: “The Game and Fisheries Act—in any event such part of it as is relevant here—is not concerned with land. Its purpose is the protection of wild game and of fish, and its prohibitions are directed against persons within the Province, and their conduct.” However, Robertson C.J.O. pointed out on the same page that the accused officer, “in doing the acts complained of, was not performing any military duty, nor otherwise acting in the service of the Crown, nor with its authority or permission.” Smith was followed in R. v. Hart, R. v. Stewart (1979), 94 D.L.R. (3d) 461 (N.B.S.C. App. Div.) [hereinafter Hart], and cited with approval by Beetz J. in Construction Montcalm Inc. v. The Minimum Wage Commission, [1979] 1 S.C.R. 754 at 778 [hereinafter Construction Montcalm]. However, given the importance of hunting for Aboriginal peoples, and the integral part it generally plays in their cultural connections with the land, cases involving the application of provincial game laws on federal lands like military camps are clearly distinguishable from cases like Isaac, supra note 50. For further discussion, see K. McNeil, Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada (Saskatoon: University of Saskatchewan Native Law Centre, 1983) at 14-17. See also the text accompanying note 66.

58 Isaac, supra note 50 at 474. In Delgamuukw, supra note 1 at 1089, Lamer C.J.C. appears to have accepted that hunting by Aboriginal people is a use of land, as he suggested that occupation of land for the purpose of proving Aboriginal title could be “established with reference to the use of the land as a hunting ground” [emphasis added]; see also at 1101.

59 Supra note 50.

60 Schedule (2) to the Constitution Act, 1930, supra note 8. Section 12 provides:
two earlier decisions holding that provincial game laws do not apply to Indians on reserves. Martland J., for the majority, wrote:

In my opinion, the meaning of s. 12 is that Canada, clothed as it was with legislative jurisdiction over "Indians, and Lands reserved for the Indians," in order to achieve the purpose of the section, agreed to the imposition of Provincial controls over hunting and fishing, which, previously, the Province might not have had power to impose.

Martland then relied on the express words of s. 12 that the game laws of the Province shall apply "to the Indians within the boundaries thereof" to conclude that "this must contemplate their application to all Indians within the Province, without restriction as to where, within the Province, they might be." Having reached this conclusion, Martland found it unnecessary to consider the effect of s. 88 of the Indian Act.

Laskin J. (Hall and Spence JJ. concurring) dissented. Referring to s. 91(24) of the Constitution Act, 1867, he wrote: "Apart entirely from the exclusive power vested in the Parliament of Canada to legislate in relation to Indians, its exclusive power in relation also to Indian Reserves puts such tracts of land, albeit they are physically in a Province, beyond provincial competence to regulate their use or to control resources thereon." He went on to observe that the "present case concerns the regulation and administration of the resources of land comprised in a reserve, and I can conceive of nothing more integral to that land as such." So Laskin, as MacKeigan C.J.N.S. held in Isaac and Martland J.

In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.


62 Cardinal, supra note 50 at 708 [emphasis added].

63 Ibid.

64 Ibid. In Harrt, supra note 57, the Court relied on Cardinal, supra note 50, to conclude that provincial game laws apply on federal military bases, without mentioning the fact that Martland J. relied specifically on the Natural Resources Transfer Agreement in reaching his conclusion that the provincial game law in question applied on Indian reserves in Alberta. In my respectful opinion, the Court in Harrt misapplied Cardinal.

65 Cardinal, supra note 50 at 715.

66 Ibid. at 717. See also Chouinard J.'s statement in Derrickson, supra note 50 at 296, where he said for a unanimous Court that the "right to possession of lands on an Indian
suggested might be the case, was of the view that provincial game laws could not apply on reserves of their own force. Laskin then turned to s. 12 of the *Natural Resources Transfer Agreement*, and concluded that it did not have the effect of making those laws apply on reserves (this was the basis for his dissent). Having reached that conclusion, Laskin (unlike Martland J.) had to consider whether s. 88 of the *Indian Act* had that effect. He found that it did not, for two reasons:

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.

Laskin’s first reason—that s. 88 “deals only with Indians, not with Reserves”—has in fact been the main argument for not using the section to apply provincial laws relating to land on reserves. The argument is usually linked to s. 91(24). In *Derrickson*, Chouinard J., in a unanimous judgment, put it this way:

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.

That case involved the application of provisions of the British Columbia *Family Relations Act* relating to the division of property upon the breakdown of a marriage on a reserve. Chouinard J. held that those provisions could not apply of their own force to reserve lands because

reserve is manifestly of the very essence of the federal exclusive legislative power under s. 91(24).” In *Delgamuukw*, supra note 1 at 1083 (and elsewhere in his judgment), Lamer C.J.C. linked use and possession of s. 91(24) lands by describing Aboriginal title (which he equated with the Indian interest in reserves) as “the right to exclusive use and occupation of the land.” Moreover, in *Paul*, supra note 50, the Court refused to distinguish between occupation and possession in the context of exclusive federal jurisdiction over reserve lands.

See quotation accompanying note 62. Martland J. referred to but did not overrule *Jim and Rodgers*, supra note 61, both of which held that exclusive federal jurisdiction under s. 91(24) prevents provincial game laws from applying to Indians on reserves.


*Derrickson*, supra note 50 at 298. Note that the interpretation that s. 91(24) contains two distinct heads of power was accepted by the Supreme Court in *Four B Manufacturing*, supra note 32 at 1049-50.

R.S.B.C. 1979, c. 121.
possession of those lands is a matter of exclusive federal jurisdiction under s. 91(24). He then had to address the question of whether s. 88 referentially incorporated those provisions, which led him to ask, "Does s. 88 of the Indian Act Apply to Lands Reserved for the Indians?"

Unfortunately, Chouinard J. was able to avoid answering this question because he found a direct conflict between the relevant provisions of the Family Relations Act and the Indian Act. Since both acts deal with possession of lands in ways that are not compatible, and the doctrine of federal paramountcy applies in the event of operational conflict between federal and provincial laws, the provisions of the Indian Act prevail where reserve lands are concerned. This is especially so because s. 88 itself excludes the application of provincial laws "that are inconsistent with this Act." As a result, we still do not have a definitive ruling from the Supreme Court on the issue of whether s. 88, assuming its constitutionally has not been affected by the enactment of s. 35(1) of the Constitution Act, 1982, makes provincial laws of general application apply to reserve lands. Also left open is the question of whether the section makes those laws apply to other s. 91(24) lands, in particular Aboriginal title lands.

IV. ASSESSING THE ARGUMENTS FOR AND AGAINST THE APPLICATION OF SECTION 88 TO SECTION 91(24) LANDS

In Derrickson, Chouinard J. quoted the following argument that favoured the referential incorporation of provincial laws relating to land by s. 88, presented on behalf of the intervening Attorney General of Ontario:

The purpose and effect of section 88 is to limit the applicability to Indians of provincial laws of general application by enacting that such laws are "subject to the terms of any treaty" and subject to the expanded doctrine of federal paramountcy set out in the section. Pursuant to its legislative authority under section 91(24) of the Constitution Act, 1867, 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.

71 See note 66.

72 Derrickson, supra note 50 at 297.

73 Ibid. at 299 [emphasis in original]. See also P.J. Monahan and A. Petter, "Developments in Constitutional Law: The 1985-86 Term" (1987) 9 Supreme Court L. Rev. 69 at 169-70, for a similar argument.
The first part of this argument is simply wrong, given the decision in *Dick*,† handed down just one week before *Derrickson* was argued before the Court. In the former case, the Court decided that the effect of s. 88 is to referentially incorporate provincial laws of general application that would not otherwise apply to Indians because they touch on the core of Indianness that is under the exclusive jurisdiction conferred on Parliament by s. 91(24).‡ So, contrary to the Attorney General's argument, the purpose and effect of s. 88 was not to limit, but to indirectly expand, provincial jurisdiction through the mechanism of referential incorporation.¶

The second part of the Attorney General's argument deserves more attention. As I understand it, its thrust is that Indians are made subject to provincial laws of general application, subject to the exceptions in s. 88, whether or not their activities are in relation to land or some other matter. It was therefore unnecessary for s. 88 to refer to lands reserved for the Indians as well as to Indians in order for provincial laws relating to land to be made applicable to Indians on reserves. While this argument may appear attractive at first glance, closer examination reveals serious weaknesses.

First, the term "Indians," as used in s. 88, refers only to those persons who fall within the definition of that term in the *Indian Act*, namely persons registered or entitled to be registered as Indians, or (for more limited purposes) those who are entered or entitled to be entered on a Band List.¶¶ Persons entitled to be registered are defined by complex rules principally set out in ss. 6 and 7 (as amended). As pointed out by Professor Douglas Sanders, if the argument of the Attorney General of Ontario in *Derrickson* is correct, the result would be that provincial laws in relation to land would apply to Indians falling within the *Indian Act* statutory definition, but would not apply to other persons holding or using s. 91(24) lands.¶¶ This cannot be correct, as it leads to the absurd result that non-Indians holding or using those lands are protected against

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† *Supra* note 5.

‡ See also *Delgamuukw*, *supra* note 1 at 1121-22.

¶¶ *See also Natural Parents*, *supra* note 32 at 763, Laskin C.J.C., quoted with approval in *Dick*, *supra* note 5 at 327, Beetz J., and *Bell Canada*, *supra* note 32 at 836. However, to be fair to counsel for the Attorney General one must realize that they would not have had time to change their factum after the *Dick* decision was handed down.

¶¶ *Indian Act*, *supra* note 4, ss. 2(1), 4.1. See *Alphonse*, *supra* note 15 at 420, Macfarlane J.A., at 443-45, Lambert J.A.

provincial laws by s. 91(24) while Indian Act Indians, as a consequence of s. 88, are not. Put another way, the Attorney General’s argument would have us believe that s. 88 transforms provincial laws in relation to land (regardless of who holds or uses it, which is necessary for those laws to be of general application) into personal laws applicable only to Indian Act Indians where s. 91(24) lands are concerned. Surely Parliament

79 Note that the case law on whether provincial laws relating to land apply of their own force to persons on reserves who are not within the statutory definition of Indian is inconsistent and confusing. Compare R. v. Morley, [1932] 2 W.W.R. 193 (B.C.C.A.) (provincial game laws apply to a non-Indian hunting on a reserve), and Western Industrial Contractors Ltd. v. Sarcee Developments Ltd. (1979), 98 D.L.R. (3d) 424 (Alta. C.A.) [hereinafter Western Industrial] (provincial builders’ lien legislation applies to a leasehold held by a corporation on a reserve but not to an Indian band’s reversionary interest), with Peace Arch, supra note 50 (municipal zoning laws and building codes and provincial health laws that relate to the use of land do not apply to non-Indian lessees of reserve land), and Palm Dairies, supra note 55 (provincial builders’ lien legislation does not apply to a leasehold held by a non-Indian on a reserve). In Cardinal, supra note 50 at 719, Laskin J. (dissenting) said that “it appears to me that the decision in Surrey v. Peace Arch Enterprises undermines the majority judgment of the British Columbia Court of Appeal in Rex v. Morley.” However, Martland J., for the majority in Cardinal, said at 704 that “the situation was different” in those two cases. While this issue is too complex to be dealt with adequately here, it seems to me that, s. 88 aside, distinctions in the application of provincial laws to reserve lands based on whether the land holder or user is an Indian or not are suspect, given exclusive federal jurisdiction over “[l]ands reserved for the Indians.” As Beetz J. said in another context in Four B Manufacturing, supra note 32 at 1049-50, s. 91(24) assigns jurisdiction to Parliament over two distinct subject matters, Indians and Lands reserved for the Indians, not Indians on Lands reserved for the Indians. 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. [emphasis in original]

It would seem to follow from this that federal jurisdiction over “[l]ands reserved for the Indians” is neither reinforced because the person using or holding the land is an Indian, nor weakened because that person is a non-Indian. The apparently anomalous decision in Western Industrial can be explained by applying real property principles to separate the leasehold and reversion into distinct estates, and then excluding the leasehold from the scope of s. 91 (24) on the basis that, unlike the reversion, it is not land reserved for the Indians. However, even when rationalized in this way, Western Industrial is still inconsistent with Peace Arch and Palm Dairies. It is also difficult to reconcile with Spooner Oils, Delta, Canadian Occidental, International Aviation, and Greater Toronto Airports, supra note 54, all of which held that provincial laws affecting use of land do not apply to lessees of lands that are owned by the Crown in right of Canada. See also Stony Plain, supra note 55 at 652-53; McNeil, supra note 8 at 459 note 131.

80 See Kruger, supra note 14 at 110, Dickson J.: for a law to be of general application, it must “extend uniformly throughout the territory” and ‘must not be ‘in relation to’ one class of citizens in object and purpose.”
cannot have intended the section to have this remarkable—and
discriminatory—effect.\textsuperscript{82}

Secondly, we have seen that the main argument against applying s. 88
to s. 91(24) lands is that the latter section contains two heads of power,
not one, and that s. 88 would have mentioned "[l]ands reserved for the
Indians" as well as "Indians" if it was intended to make provincial laws
applicable in both fields of federal jurisdiction. We have seen that the
Attorney General of Ontario's response to this was that "[t]here 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."\textsuperscript{83} But in fact there is ample reason to do
so. It has to be kept in mind that what we are discussing here is, in effect,
a very serious extension of provincial authority into exclusive federal
jurisdiction by referential incorporation of both existing and future
provincial laws.\textsuperscript{84} Given the impact of this on Indians as defined in the
\textit{Indian Act}, to whom the federal government has fiduciary obligations and

\textsuperscript{81} Thus, if the Minister of Indian Affairs authorized a non-Indian to occupy or use reserve
land, as the Minister is empowered to do by s. 28(2) of the \textit{Indian Act} (see text
119), that person would not be subject to provincial laws in relation to land but his or
her Indian neighbour would be. See also \textit{Stoney Creek, supra} note 17 at 205, where
Lysyk J. pointed out that there is "a difference in kind between laws relating to Indians
as a class of persons and laws relating to their lands. As reflected in the cases, the
former category embraces (although it is not confined to) regulation of their activities
on or off a reserve. The latter category, in contrast, has to do with the right to exclusive
use and benefit of the land itself" [emphasis added]. This passage was adopted and
applied by Campbell J. in \textit{Chippewas of Sarnia, supra} note 23 at para. 493.

\textsuperscript{82} Furthermore, if this part of the Attorney General's argument were applied to s. 91(24)
itself, the inclusion of "[l]ands reserved for the Indians" would seem to have been
unnecessary, as federal jurisdiction over "Indians" would have authorized Parliament to
enact legislation in relation to Indian land holding and use without an express conferral
of jurisdiction over Indian lands as such. Slattery,\textit{supra} note 55, in his rejection of the
Ontario Attorney General's argument at 780-81, made a similar point:

\ldots lands held by Indians as ordinary citizens are subject to the general laws of the
province, so that they must conform for example to local building and health
requirements. But it does not follow that section 88 makes provincial laws applicable
to the special category of lands reserved for the Indians. That conclusion would
follow only if such lands did not constitute a distinct constitutional subject-matter,
but were simply subsumed under "Indians." As it is, Parliament's power to legislate
for Indian lands does not flow from its jurisdiction over Indians. So Parliament's
decision to make provincial laws of general application applicable to Indians leaves
the subject-matter of Indian lands untouched. [emphasis added, footnotes omitted]

\textsuperscript{83} \textit{Derrickson, supra} note 50 at 299 [emphasis added]. See also Wilkins,\textit{supra} note 22 at
483-97.

\textsuperscript{84} See \textit{Little Bear, supra} note 12 at 183-87; Ryder,\textit{supra} note 12 at 375-76.
constitutional responsibilities,\textsuperscript{85} one would expect Parliament to express itself clearly if it intended to authorize the intrusion of provincial laws into \textit{both} heads of s. 91(24) power. By mentioning only one, surely Parliament intended to exclude the other, as \textit{expressio unius est exclusio alterius}.\textsuperscript{86}

Interpreting s. 88 to exclude s. 91(24) land from the reach of referentially incorporated provincial laws "also accords with the principle that statutes relating to Indians should be construed liberally and doubtful expressions resolved in their favour."\textsuperscript{87} The application of provincial laws in relation to land to s. 91(24) lands would probably have a generally negative impact on the Indian nations for whom those lands are reserved, particularly where self-government is concerned.\textsuperscript{88} So if s. 88 contains

\textsuperscript{85} See Guerin, supra note 19; Sparrow, supra note 7; Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), [1995] 4 S.C.R. 344 [hereinafter Blueberry River]; Delgamuukw, supra note 1. See also notes 36, 48, and the accompanying text.

\textsuperscript{86} This maxim of statutory interpretation, which translates as mention of one excludes another, is referred to in Ruth Sullivan, \textit{Driedger on the Construction of Statutes}, 2nd ed. (Toronto: Butterworths, 1994) at 168, as a canon of "implied exclusion." The author describes its application as follows:

An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. \textit{The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature.} [emphasis added]


\textsuperscript{87} Slattery, supra note 55 at 780. \textit{E.g.} see R. v. Nowegijick, [1983] 1 S.C.R. 29 at 36; Simon, supra note 13 at 402; Sparrow, supra note 7 at 1107-08; Mitchell, supra note 36 at 142-43, La Forest J., and at 98-100, Dickson C.J.C. Note that this principle of statutory interpretation is supported by the more general rule that legislation is to be construed, if at all possible, so as not to impair accrued rights or existing status: see Spooner Oils, supra note 54 at 638; Attorney-General for Canada v. Hallet & Carey Ld., [1952] A.C. 427 at 450 (P.C.). For more detailed discussion, see McNeil, supra note 8 at 438-40.

\textsuperscript{88} See Little Bear, supra note 12 at 187; Slattery, supra note 27 at 285 (see the passage quoted in the text accompanying note 28). Compare Wilkins, supra note 22 at 491-92. While one can envisage provincial legislation that might be generally beneficial to persons defined as Indians by the \textit{Indian Act}, such as a statute offering financial assistance for the improvement of homes on condition that the improvements are of a certain nature and meet provincial standards, it is questionable whether such a statute (assuming that it is in relation to land, and therefore not applicable of its own force to homes on s. 91(24) lands) could be referentially incorporated by federal legislation, as
ambiguity in this regard (which I do not think it does), that ambiguity should be resolved so that the section does not make provincial laws in relation to land apply to s. 91(24) lands.

Other arguments in support of this position are based on the exclusions contained in s. 88 with respect to the application of provincial laws to Indians. Other arguments in support of this position are based on the exclusions contained in s. 88 with respect to the application of provincial laws to Indians.89 First of all, the application of those laws is subject to “the terms of any treaty.” This exception has been applied by the Supreme Court to exclude the application of provincial game laws to treaty rights to engage in hunting,90 which we have seen has been judicially regarded as an Aboriginal use of land.91 More relevant still in the present context is the Sioui92 case, which involved treaty rights to practise customs and religious rites within a certain territory in the province of Quebec. The accused were Hurons whom Lamer J., delivering the judgment of the Supreme Court, described as “Indians within the meaning of the Indian Act.”93 They had been camping, cutting trees, and making fires in Jacques-Cartier Park, and were charged with violating provisions of the Regulation respecting the Parc de la Jacques-Cartier.94 Lamer held that the Regulation did not apply to them because they had been practising treaty rights that were protected from provincial laws by s. 88. Given the nature of the activities the accused had been engaged in when they were charged, those rights obviously involved use of the land.


89 For detailed discussion of the exclusions, see Wilkins, supra note 22 at 472-501.

90 See R. v. White and Bob (1964), 50 D.L.R. (2d) 613 (B.C.C.A.), aff’d (1965), 52 D.L.R. (2d) 481n (S.C.C.); Simon, supra note 13; Sundown, supra note 26 at 418. See also Côté, supra note 8, involving fishing rights.

91 See notes 57-58, 65-66, and the accompanying text.

92 Supra note 13.

93 Ibid. at 1031.

inconsistent provincial laws. The importance of this to the argument that s. 88 does not make provincial laws apply to s. 91(24) lands is that, in the treaty areas of Canada, Indian reserves were usually created by or pursuant to the terms of a treaty. Treaty 6, signed in 1876 and covering a large area now within the provinces of Saskatchewan and Alberta, can be used as an example. It provides: "And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada." Where reserves were created pursuant to the terms of a treaty like this, the Indian right of use and possession of lands within the reserves is a treaty right, just as the practice of customs and religious rites within the territory frequented by the Hurons was held to be a treaty right in Sioui. This means that provincial laws that regulate or otherwise interfere with that right of use and possession would be inconsistent with the terms of the treaty, in the same way as the provincial Regulation in Sioui was inconsistent with the free exercise of the customs and religious rites of the Hurons. As a result, to the extent that provincial laws of general application in relation to land would interfere with the use and possession of lands on reserves created by or pursuant to a treaty, they cannot be referentially incorporated by s. 88.

If provincial laws in relation to land were made applicable to reserve lands by s. 88, an anomalous situation would therefore result. Because the section makes the application of provincial laws incorporated by it subject to the terms of treaties, reserves created by or pursuant to a treaty would enjoy a large measure of protection against provincial laws, whereas reserves created without a treaty would not. In British Columbia, for example, this would mean that reserves created pursuant to Treaty 8 in the north-eastern part of the province would have greater immunity from provincial laws than reserves elsewhere that were not based on treaty. Surely Parliament did not intend to make reserve lands within the same province subject to different legal regimes in this way when it enacted what is now s. 88 in 1951.

Section 88 contains other exceptions to the application of provincial laws as well. First of all, it provides that federal statutes generally

95 Treaty 6, in A. Morris, The Treaties of Canada with the Indians of Manitoba and the North-West Territories (Toronto: Belfords, Clarke & Co., 1880) 351 at 352-53. Note that, in the case of Treaty 6, the provision for reserves "to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada" provides additional support for the argument I am making, as it can be regarded as an undertaking to maintain federal control. However, as an equivalent provision was not included in all the treaties, it cannot be relied upon generally for this purpose.
continue to be paramount. But more importantly for our purposes, it also provides that provincial laws apply “except to the extent that those laws are inconsistent with this Act or any order, rule, regulation, or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.” This not only maintains paramountcy in the event of direct conflict with the Indian Act and orders, etc., made under it, but also means that the Act and those orders, etc., can exclude provincial laws simply by occupying the field. In R. v. Peters, the Yukon Territory Court of Appeal accordingly held that a provision in the Yukon Liquor Ordinance prohibiting consumption of alcohol by a minor did not apply to an Indian because the Indian Act’s liquor provisions (since repealed) occupied the field. Macfarlane J.A., for a unanimous Court, said this:

It is true that the Indian Act does not make specific provision for the offence with which the respondent was charged, namely, consuming liquor, being under the age of 21 years. It may be that in considering whether a provincial or territorial law is inconsistent with the Indian Act it would be necessary to compare the respective enactments in specific detail. I am of the opinion, however, that the second exception “the extent that such laws make provision for any matter for which provision is made by or under this Act” should be given a broad and liberal interpretation in order to give effect to the intention of parliament which has clearly made provision, by the Indian Act, for the matter of the use and possession of intoxicants by Indians. The relevant provision of the Yukon Liquor Ordinance, being within the meaning of the second exception stated in sec. 87 [now s. 88], is accordingly not applicable to Indians.

If the liquor provisions of the Indian Act relating to “the use and possession of intoxicants by Indians” occupied the field sufficiently to exclude provincial and territorial liquor laws, that Act’s provisions and regulations relating to use and possession of land might do the same thing where provincial land laws are concerned. We therefore need to take a

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96 Indian Act, supra note 4, s. 88.
99 Peters, supra note 97 at 730 [emphasis added]. See also infra note 121; R. v. Shade (1952), 4 W.W.R. (N.S.) 430 (Alta. Dist. Ct.); R. v. Pawis, [1972] 2 O.R. 516 (Dist. Ct.); compare R. v. Bear (1968), 63 W.W.R. 754 (Sask. Dist. Ct.) (s. 88 was not referred to); Re Williams Estate (1960), 32 W.W.R. 686 (B.C.S.C.). For discussion, see Lysyk, supra note 55 at 545-49; Hughes, supra note 53 at 93-97. Note that Macfarlane J.’s “broad and liberal interpretation” approach to s. 88 has since been applied by the Supreme Court on many occasions in the context of interpretation of statutory provisions relating to Indians: see note 87 and the accompanying text.
closer look at the Indian Act and its regulations to determine to what extent the field has been occupied where reserve lands are concerned.\footnote{Where a particular reserve is concerned, it would also be necessary to look at regulations, orders, rules and by-laws which apply specifically to that reserve, but this kind of detailed examination is beyond the scope of this article.}

Sections 18 to 41 of the Act deal specifically with reserve lands, providing for such matters as beneficial use (s. 18), surveys and subdivisions (s. 19), possession (ss. 20-21 and 24-27), improvements (ss. 22-23), non-band member occupation and use (s. 28), exemption from seizure (s. 29), trespass (ss. 30-31), disposition of agricultural produce (ss. 32-33), roads and bridges (s. 34), expropriation (s. 35), special reserves (s. 36), and surrenders (ss. 37-41).\footnote{Other provisions relate to reserve lands as well: e.g. ss. 42-50 (testate and intestate succession), s. 53 (management of and transactions involving surrendered and designated lands), s. 58 (improvement and cultivation of lands), s. 60 (grant of right to control and manage reserve lands to bands), s. 71 (operation of farms), and s. 89 (prohibition of charge, seizure, mortgage etc. of reserve lands except in favour of Indians or bands).} Some of these sections deserve special attention. Section 18(1) provides:

Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.\footnote{\textit{Indian Act}, supra note 4, s. 18(1).}

Subsection 2 of s. 18 goes on to empower the Minister of Indian Affairs to authorize the use of reserve lands for various purposes, such as Indian schools, burial grounds, and health projects, "or, with the consent of the council of the band, for any other purpose for the general welfare of the band."\footnote{\textit{Ibid.}, s. 18(2).} Section 20(1) stipulates: "No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allocated to him by the council of the band."\footnote{\textit{Ibid.}, s. 20(1).} Section 28 provides:

(1) Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.
SECTION 88 OF THE INDIAN ACT

(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.  

So the Indian Act makes extensive provision for the use and possession of reserve lands. Moreover, all the sections referred to above were either already in the Indian Act when it was revised in 1951, or were added at that time along with what is now s. 88.  

It is highly unlikely that Parliament intended provincial laws in relation to the use and possession of land to be made applicable to reserve lands by s. 88, when other sections of the Act made specific provision for those matters. This interpretation is supported by s. 35(1), which provides:

Where by an Act of the Parliament or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.

This section specifically makes provincial expropriation laws apply to reserve lands, subject to the consent of the Governor in Council. So where Parliament intended to referentially incorporate provincial laws in relation to land, it did not hesitate to do so expressly.

The key section respecting use of reserve lands is s. 18.  

Significantly, it was added to the Indian Act in 1951 at the same time as the present s. 88.  

In Guerin, Wilson J. said this about s. 18:

While not all these sections were exactly the same in 1951, most of the modifications made since have been relatively minor, and do not affect the point being made here.

Indian Act, supra note 4, s. 35(1) [emphasis added]. Note that any expropriation of reserve lands that had been set apart by or pursuant to a treaty, or that are subject to Aboriginal title, would involve infringement of treaty or Aboriginal rights that are protected by s. 35(1) of the Constitution Act, 1982. Accordingly, for the infringement to be valid it would have to be justified under the Sparrow test: see note 7. Also, it is questionable whether referential incorporation of provincial expropriation laws by s. 35(1) of the Indian Act can ever be justified where an infringement would take place, given the problems involved in applying the justification test in the context of referential incorporation: see discussion of this issue in relation to s. 88 in notes 34-49 and the accompanying text. Moreover, if expropriation amounts to extinguishment of Aboriginal or treaty rights, it cannot be justified: see R. v. Van der Peet, [1996] 2 S.C.R. 507 at 538, Lamer C.J.C.

Section 18(1) is quoted in the text accompanying note 102.

Indian Act, S.C. 1951, c. 29, s. 18(1).
I think that when s. 18 mandates that reserves be held by the Crown for the use and benefit of the Bands for which they are set apart, this is more than just an administrative direction to the Crown. I think it is the acknowledgment of a historic reality, namely that Indian Bands have a beneficial interest in their reserves and that the Crown has a responsibility to protect that interest and make sure that any purpose to which reserve land is put will not interfere with it. 111

Wilson J. went on to make this responsibility legally enforceable by holding that "the Crown has a fiduciary obligation to the Indian Bands with respect to the uses to which reserve land may be put." 112 Section 18, she said, "is a statutory acknowledgement of that obligation." 113 Included in it is "a fiduciary obligation to protect and preserve the Bands' interests from invasion or destruction." 114 If one purpose of s. 18 was to acknowledge the historic reality that the Crown (which from the context is obviously the Crown in right of Canada) has a legally enforceable responsibility to protect the interests of the Indian Bands in their reserve lands, by enacting s. 88 at the same time Parliament can hardly have intended to undermine that protection by making reserve lands subject to provincial laws that could infringe those interests. This is consistent with Chief Justice Lamer's statement in Delgamuukw that "the explicit reference to treaty rights in s. 88 suggests that the provision was clearly not intended to undermine aboriginal rights." 115

Moreover, in Delgamuukw Lamer also relied on s. 18 to support his conclusion that "[t]he nature of the Indian interest in reserve land is very

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110 Supra note 19.

111 Ibid. at 349 [emphasis added]. See also Roberts, supra note 50 at 335-36, 340.

112 Guerin, supra note 19 at 349.

113 Ibid.

114 Ibid. at 350. Note that Ritchie and McIntyre JJ. participated in Wilson J.'s judgment. Dickson J., delivering the judgment of Beetz, Chouinard, Lamer JJ. and himself, reached the same result as Wilson. Regarding s. 18, Dickson said at 383-84, "Through the confirmation in the Indian Act of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests lie. This is the effect of s. 18(1) of the Act." Like Wilson J., Dickson J. went on to hold that the exercise of this discretion is subject to a fiduciary obligation. The decision in Guerin that the Crown's fiduciary obligation respecting reserve lands pre-dates s. 18 was affirmed in Blueberry River, supra note 85, where the Supreme Court found that the Crown had breached this obligation in the context of a surrender of reserve lands in the 1940s, which was prior to the enactment of s. 18.

115 Delgamuukw, supra note 1 at 1122-23: see note 15 and the accompanying text.
For him, the section clearly provides for any use of reserve land that is for the "general welfare" and "present-day needs of aboriginal communities." The ministerial discretion conferred by s. 18 over such a broad range of uses might well be inconsistent with provincial laws regulating and controlling land use, as those laws would interfere with the exercise of that discretion. Regarding possession of reserve land, in Derrickson the Supreme Court found a direct conflict between provisions of the British Columbia Family Relations Act relating to the division of real property and many of the sections of the Indian Act referred to above. Specifically, Chouinard J. said that provisions in the Family Relations Act "for orders dealing with ownership, right of possession, transfer of title, partition or sale of property, severance of joint tenancy are, in my view, in 'actual conflict' with the above provisions of the Indian Act." Moreover, in Paul Chouinard, for the Court, reached the same conclusion in regard to a section of the Family Relations Act providing for an order for exclusive occupancy of a matrimonial home.

We have seen, however, that actual conflict is not necessary for provincial laws to be displaced by the Indian Act. Due to the closing words of s. 88, occupation of the field is sufficient.

\[116\text{Ibid. at 1085.}\]
\[117\text{Ibid. at 1086.}\]
\[118\text{Supra note 50.}\]
\[119\text{Supra note 70.}\]
\[120\text{Derrickson, supra note 50 at 302. Chouinard referred to ss. 18, 20, 24, 25, 28, 29, 37, 42-50, 53, 81, and 89.}\]
\[121\text{Supra note 50.}\]
\[122\text{See notes 96-100 and the accompanying text. See also Dick, supra note 5 at 327-28, where Beetz J. accepted that those words entail federal paramountcy by occupation of the field. In Derrickson, supra note 50 at 300, Chouinard J. quoted, with apparent approval, the following passage from P. Hogg, Constitutional Law of Canada, 2nd ed. (Toronto: Carswell, 1985) at 561-62, where the closing words of s. 88 are commented on:}\]

This language in its context seems to contemplate that a provincial law which makes provision for any matter for which provision is made by (or under) the Indian Act must yield to the provisions of the Indian Act. The doctrine of paramountcy, on the other hand, at least as it has been interpreted recently, applies only where there is an express contradiction between a federal and a provincial law. It does not apply where the federal and provincial laws, while not in direct conflict, are merely occupying the same field, or in other words making provision for the same matters. It seems probable therefore that the closing words of s. 88 go further than the paramountcy doctrine and will render inapplicable to Indians some provincial laws which would have been applicable under the general law. [Footnotes omitted]
can be occupied where provision is made under as well as by the Act—for example, by regulations. By ss. 57 and 73(1), the Governor in Council is authorized to make regulations for various purposes, some of which involve reserve land and its use. Among these purposes are the granting of licences for timber cutting, disposition of surrendered mines and minerals, protection of fur-bearing animals, fish, and other game, destruction of noxious weeds, inspection of premises and the destruction, alteration or renovation thereof, and the construction and maintenance of boundary fences. Section 73(3) also gives the Governor in Council the general power to “make orders and regulations to carry out the purposes and provisions of this Act.”

This regulation-making power has been used to make the Indian Mining Regulations, which by s. 3 are made to apply to surrendered mines and minerals underlying reserve lands, excluding reserves in British Columbia. In addition to providing for matters such as exploration and development permits, mineral leases, and royalties, these Regulations referentially incorporate certain provincial laws: “4. Every permittee and every lessee shall comply with the laws of the province in which his permit area or lease area is situated where such laws relate to exploration for, or development, production, treatment and marketing of minerals and do not conflict with these Regulations.”

Note that Hogg has retained this passage almost word for word in the current loose-leaf edition of his book at 27.3(c). Compare Monahan and Pettersupra note 73 at 170-72. However, in Dick, supra note 5 at 327-28, Beetz J. expressed the opinion that the Indian Act could confer extended federal paramountcy over provincial laws by occupation of the field only to the extent that provincial laws could not apply to Indians of their own force. That was a major reason why he concluded that s. 88 must have the effect of referentially incorporating provincial laws that would not so apply. See alsoNatural Parents, supra note 32 at 763-64, Laskin C.J.C. CompareBank of Montreal v. Hall, [1990] 1 S.C.R. 121 at 151-55. For critical commentary on this aspect of Dick, see Ryder, supra note 12 at 356 note 207, and 372 note 273.

See also s. 81(1), which empowers band councils to make by-laws, not inconsistent with the Act or regulations made under it, for, among other things, the following matters in relation to reserve lands: preventing trespass by domestic animals, construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works, zoning and building regulation, survey and allotment of reserve lands among band members, setting apart of lands for common use, control of noxious weeds, construction and regulation of public wells and other water supplies, protection and management of fur-bearing animals, fish and game, and removal and punishment of trespassers. Also, s. 83(1) authorizes band councils, with the approval of the Minister, to make by-laws for taxation for local purposes of land or interests in land. While the exercise of these by-law making powers is specific to each band, and therefore beyond the scope of this article, it should be pointed out that when band by-laws occupy the field, they no doubt exclude the application of provincial laws as effectively as regulations.


Ibid, s. 4.
Regulations deal with the cutting of timber on Indian reserves and surrendered lands. Once again, there is provision for incorporation of provincial laws: "25. Every licensee shall exercise the rights conferred by the licence in accordance with the laws of the province in which the licensee is operating under the licence regarding disposal of slash, prevention of fire hazard and the conduct of timber operations." Where oil and gas are concerned, Parliament has enacted separate legislation in the form of the Indian Oil and Gas Act. Among other things, this statute authorizes the Governor in Council to make regulations respecting leases, licences, permits and royalties in relation to exploitation of oil and gas on "Indian lands," which are defined in part in s. 2 as "lands reserved for the Indians, including any interests therein, surrendered in accordance with the Indian Act." Pursuant to the Indian Oil and Gas Act, the Governor in Council has made what are currently the Indian Oil and Gas Regulations, 1995, containing comprehensive rules regarding exploitation of oil and gas on reserves. Like the Indian Mining Regulations and the Indian Timber Regulations, these Regulations provide for referential incorporation of some provincial laws. For example, s. 4 provides that, unless otherwise agreed by the Minister, it is a condition of every oil and gas permit, lease, etc., that persons engaged in activities related to the exploitation of oil or gas on Indian reserves must 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."

126 C.R.C. 1978, c. 961, amended SOR/93-244, SOR/94-690, SOR/95-531.
127 Ibid, s. 25.
128 R.S.C. 1985, c. I-7, originally enacted S.C. 1974-75-76, c. 15, apparently to deal with uncertainty over whether s. 57(c) of the Indian Act, R.S.C. 1970, c. I-6, authorizing the Governor in Council to make regulations "providing for the disposition of surrendered mines and minerals underlying lands in a reserve," included the power to make regulations respecting oil and gas under reserve lands (see the Indian Oil and Gas Act, s. 3). In Delgamuukw, supra note 1 at 1086-87, Lamer C.J.C. relied on this Act to support his conclusion that oil and gas, and minerals generally, are encompassed in the Indian interest in reserves, and therefore in the Aboriginal interest in Aboriginal title lands as well.
129 The words "lands reserved for Indians" in this definition might be interpreted broadly to mean the same thing as those words in s. 91 (24) of the Constitution Act, 1867 (see notes 1-2 and the accompanying text), were it not for the fact that only Indian reserves can be surrendered in accordance with the Indian Act.
130 SOR/94-753.
131 Ibid., s. 4. See also ss. 9(2) and 11.
When these regulations relating to the development of natural resources on reserves are combined with the Indian Act's extensive provisions respecting the use and possession of reserve lands, it is apparent that the field has been very largely occupied by federal law where those lands are concerned, leaving little or no room for incorporation of provincial land laws by s. 88. In contexts where Parliament or the Governor in Council thought it appropriate to incorporate provincial laws in relation to land or natural resources, we have seen that the Act and regulations made under it expressly provide for that. These considerations alone should be sufficient to lay to rest any contention that Parliament implicitly intended s. 88 to render provincial laws applicable to reserve lands as well as to Indians, as there would be no reason to referentially incorporate provincial laws in relation to matters that are so completely provided for by the Indian Act itself. Taken together with the long-standing case law and the other arguments discussed above, this makes the conclusion that s. 88 does not make provincial laws in relation to land apply on reserves virtually inescapable.

However, provisions in the Indian Act and regulations made thereunder relating to the use and possession of land do not apply to Aboriginal title lands that are located outside reserves. We therefore still have to consider whether s. 88 could have the effect of making provincial laws in relation to land apply to those lands.

V. ABORIGINAL TITLE AND SECTION 88

The Indian Act was enacted by Parliament pursuant to the constitutional jurisdiction conferred on it by s. 91(24) of the Constitution Act, 1867. However, Parliament clearly did not exercise the full extent of its jurisdiction over “Indians, and Lands reserved for the Indians,” when it passed this statute. In two respects that are particularly relevant to our discussion, Parliament refrained from fully exercising its s. 91(24) powers.

First, the definition of “Indian” in the Indian Act does not include all the Aboriginal persons who come within the meaning of the term “Indians” in s. 91(24). This omission was revealed by a reference to the Supreme Court of Canada by the federal government in 1938 to determine whether the Inuit of northern Quebec are within federal jurisdiction over “Indians.”

132 In its ensuing judgment in Reference re: British North

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132 Interestingly, the federal government argued that the Inuit are not “Indians,” while the Quebec government argued that they are. Evidently both governments wanted to avoid jurisdiction where the Inuit are concerned, an intriguing reversal of their usual positions where constitutional powers are at stake.
America Act, 1867 (U.K.), s. 91.\textsuperscript{133} The Court held that Inuit are indeed "Indians" for the purposes of s. 91(24).\textsuperscript{134} However, as there is no obligation on Parliament to legislate to the full extent of its powers, it did not have to include the Inuit in the \textit{Indian Act}, and in fact chose to expressly exclude them by providing in s. 4(1) that "[a] reference in this Act to an Indian does not include any person of the race of aborigines commonly referred to as Inuit."\textsuperscript{135} This exclusion of the Inuit from the Act would create an anomalous situation if the reference to "Indians" in s. 88 were used to make provincial laws in relation to land apply to Aboriginal title lands held by \textit{Indian Act} Indians. As the Inuit are not within the Act's definition of "Indian," they are outside the scope of s. 88.\textsuperscript{136} This means that their Aboriginal title lands must be outside the scope of s. 88 as well.\textsuperscript{137} So if s. 88 renders provincial land laws applicable to the Aboriginal title lands of \textit{Indian Act} Indians, the Aboriginal title lands of those Indians would be subject to provincial land laws of general application, whereas any Aboriginal title lands of the Inuit within the provinces would not. This makes no sense.

The second respect in which Parliament has not fully exercised its s. 91(24) powers is in regard to Aboriginal title lands themselves. The provisions of the \textit{Indian Act} relating to the use and possession of lands are generally limited in their application to reserves, and to a lesser extent to surrendered reserve lands. "Reserve" is defined in part in s. 2(1) as "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."\textsuperscript{138} Ever since the decision of the Privy Council in the \textit{St. Catherine's Milling} case in 1888, it has nonetheless been known that Parliament has exclusive jurisdiction over unsurrendered Indian lands that were reserved for Indian use by the Royal Proclamation of 1763, even though not included in \textit{Indian Act} reserves.\textsuperscript{139} Can it have been intended, when what is now s. 88

\begin{footnotesize}
\textsuperscript{133} Supra note 5.

\textsuperscript{134} Also within s. 91(24) but outside the \textit{Indian Act} are so-called "non-status Indians" (Indians who either were not accorded status by being included in the Act's definition of "Indian," or who lost their status). Whether the M\textit{étis} are also "Indians" for the purposes of s. 91(24) remains an open question: see note 5.

\textsuperscript{135} \textit{Indian Act}, supra note 4, s. 4(1). A version of this section was added to the Act when it was revised in 1951, possibly as a response to the decision in \textit{Reference re: British North America Act, 1867 (U.K.)}, s. 91, supra note 5.

\textsuperscript{136} See note 77 and the accompanying text.

\textsuperscript{137} See note 78 and the accompanying text.

\textsuperscript{138} \textit{Indian Act}, supra note 4, s. 2 (1).

\textsuperscript{139} In \textit{St. Catherine's Milling}, supra note 19 at 59, Lord Watson said that the words "Lands reserved for the Indians" in s. 91(24) "include all lands reserved, upon any terms or
was added to the Act in 1951, that the section would extend the application of provincial laws to those lands? This intention seems highly unlikely, given that the scope of the Act is generally limited to Indians and reserves as defined therein. Just as s. 88 does not make the provincial laws incorporated by it apply to the Inuit, it cannot have been intended to make provincial land laws apply to Indian lands that are not within reserves. If s. 88 were interpreted otherwise, that would extend the reach of the section far beyond the geographical scope of the rest of the Act, insofar as the lands of Indian Act Indians are concerned. As that would not be in keeping with the general scheme of the Act, surely it was not intended.\(^{140}\)

However, in our earlier discussion we concluded that Parliament in 1951 was probably of the view that, apart from treaty, there were no legally enforceable Aboriginal land rights outside of reserves.\(^{141}\) If this was the opinion of the legislators, the argument that they did not intend to make provincial laws apply to Aboriginal title lands is much stronger, as they could not have had the intention to make those laws apply to an entity that for them was non-existent.

These considerations fortify the arguments based on principles of statutory interpretation made earlier in this article, arguments that apply as much in relation to Aboriginal title lands as to reserves. As we have seen, the *expressio unius* maxim and the principle that legislation relating to the Aboriginal peoples has to be construed liberally, and ambiguities resolved in their favour, support the conclusion that s. 88 was not intended to make provincial laws apply to s. 91(24) lands.\(^{142}\) Moreover, since the *Delgamuukw* decision held that Aboriginal title lands are as much under exclusive federal jurisdiction as are reserves,\(^{143}\) the case law holding that provincial land laws do not apply to reserves of their own force, and are not made to apply thereto by s. 88, is generally applicable to Aboriginal title lands as well.\(^{144}\)

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\(^{140}\) See notes 86-88 and the accompanying text.

\(^{141}\) As discussed above, this would explain why only treaty rights were protected from the application of provincial laws by s. 88: see notes 19-23 and the accompanying text.

\(^{142}\) Delgamuukw, supra note 1 at 1116-18.

\(^{143}\) See notes 49-72 and the accompanying text.
It is therefore concluded that s. 88, even if its constitutionality has not been impaired by s. 35(1) of the *Constitution Act, 1982*, does not have the effect of making provincial laws in relation to land apply to any "[l]ands reserved for the Indians," including Aboriginal title lands. Accordingly, s. 88 does not authorize provincial infringement of Aboriginal title by referential incorporation of provincial land laws into federal law. Given exclusive federal jurisdiction over Aboriginal title, this must mean that the provinces have no power to infringe that title, as provincial infringement would involve encroachment on the core of federal jurisdiction over "[l]ands reserved for the Indians," which is protected by the doctrine of interjurisdictional immunity.

The implications of this conclusion for a province like British Columbia with large outstanding land claims are obviously enormous. As a matter of constitutional law, it means that the provincial government lacks both the executive and legislative power to authorize or engage in any use or development of Aboriginal title lands. Due to s. 91(24) and well-established principles relating to the division of powers, the province actually has much less authority over Aboriginal title lands than it has over privately owned lands, which are subject to provincial control and legislatively authorized expropriation. Moreover, even the province's authority to regulate use of Aboriginal title lands by the Aboriginal titleholders themselves is severely limited. Provincial laws can still affect Aboriginal title lands incidentally, but only if those laws are characterized as being in relation to some valid head of provincial power other than land.

The *Delgamuukw* decision has obviously shaken the constitutional structure of Canada insofar as jurisdiction over Aboriginal title lands is concerned. But while this aspect of the decision will no doubt have profound doctrinal and practical effects, it would be wrong to regard it as

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145 See notes 26-48 and the accompanying text, where the constitutional validity of s. 88 is discussed.

146 See notes 1-10 and the accompanying text, especially the articles cited in notes 8 and 10.

147 Note, however, that the location and extent of those lands remains uncertain. Even *Delgamuukw, supra* note 1, did not decide whether the Gitksan (spelled Gitksan in the judgments) and Wet'suwet'en have Aboriginal title to any lands, as that issue was remitted to trial to be determined on the basis of the rules the Supreme Court laid down for proof of that title. For further discussion, see K. McNeil, *Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got It Right?* (Toronto: Robarts Centre for Canadian Studies, York University, 1998).

148 See notes 49-53 and the accompanying text.
some kind of "judicial revolution." In fact, the decision did not really change anything constitutionally—instead, what it did was clarify some constitutional issues that have been around for a long time, but conveniently ignored, especially by the provinces. Ever since the St. Catherine’s Milling decision in 1888, it has been apparent that exclusive federal jurisdiction over "[l]ands reserved for the Indians" might well include jurisdiction over Aboriginal title lands. So in acting as though it had constitutional authority over Aboriginal title lands in British Columbia, the province has skated on thin constitutional ice for over a century. In reality, it appears that the province has been violating Aboriginal title in an unconstitutional and therefore illegal fashion ever since it joined Canada in 1871. What is truly disturbing is not that the province can no longer do so, but that it has been able to get away with it for so many years.


150 Supra note 19.

151 See note 139 and the accompanying text. In fact, in Delgamuukw, supra note 1 at 1116-17, Lamer C.J.C. regarded this issue as already decided by St. Catherine’s Milling, supra note 19. For detailed scholarly treatment of this issue almost twenty years ago, see R. D.J. Pugh, “Are Northern Lands Reserved for the Indians?” (1982) 60 Can. Bar Rev. 36. See also Lysyk, supra note 55 at 516, suggesting in 1967 that, if the Royal Proclamation of 1763 applies in British Columbia (a question that is still unresolved by the Supreme Court, though of much less importance since the decisions in Calder, supra note 20, and Delgamuukw), there could be “a broader ambit of federal authority in relation to ‘lands reserved for the Indians’ than is generally conceded.”


153 Unfortunately, this is not the only instance of long-term unconstitutional behaviour by a province. Manitoba suppressed the constitutional language rights of the French minority in that province for over ninety years before being called to task by the Supreme Court: see Reference Re Manitoba Language Rights, [1983] 1 S.C.R. 721.

154 There may, however, be a large compensation bill to pay for past violations. This complex issue, which was raised but left unresolved in Delgamuukw, supra note 1, cannot be pursued here.