Of Provinces and s.35 Rights

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It is now well established that federal law and regulatory activity may interfere with the exercise of aboriginal peoples' existing treaty and aboriginal rights, despite s. 35(1) of the Constitution Act, 1982, whenever the federal government can justify the interference. It is not yet clear, though, what power, if any, Canada's provinces have to regulate, even in justified ways, such rights and their exercise. This article argues that the provinces, as a general rule, have no such authority. Except in certain very specific and isolated circumstances, they have no power, even apart from s. 35, to regulate the exercise of s. 35 rights, because such rights lie within the core of exclusive federal authority under s. 91(24) of the Constitution Act, 1867. Nothing in the Constitution Act, 1982 modifies that original incapacity. Section 88 of the federal Indian Act, which sometimes gives limited federal effect to certain provincial laws, itself stands in need of justification when, because of it, such laws do constrain the exercise of such rights. The better view is that s. 88's own impact on such rights cannot be justified.

De nos jours il est bien reconnu que, malgré l'art 35 de la Loi constitutionnelle de 1982, les lois et règlements fédéraux peuvent s'ingérer dans l'exercice par les autochtones de leurs droits ancestraux et issus de traité si le gouvernement fédéral peut justifier cette intrusion. Néanmoins, il n'est pas encore évident quelle autorité peut être exercée par les provinces canadiennes pour réglementer, à juste titre, de tels droits et pratiques. L'auteur prétend que les provinces, de façon générale, n'ont aucune autorité à cet égard. Elles n'ont de tel droit que dans certaines situations bien particulières; de plus, elles n'ont pas l'autorité de réglementer l'exercice des droits identifiés dans l'art. 35 car ces droits se trouvent au coeur de l'autorité fédérale exclusive identifiée dans l'art. 91(24) de la Loi constitutionnelle de 1867. Il n'y a rien dans la Loi constitutionnelle de 1982 qui modifie cette incapacité. L'art. 88 de la Loi sur les Indiens, qui rend valide, de façon limitée, certaines lois provinciales qui affectent les autochtones, a lui-même besoin d'être justifié quand il a pour effet de contraindre l'exercice des droits protégés par l'art. 35. Le poids de l'opinion conclut que l'effet de l'art. 88 sur de tels droits ne saurait être justifié.

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Introduction

Section 35(1) of the Constitution Act, 1982\(^1\) gives constitutional recognition and protection to the “existing aboriginal and treaty rights of the aboriginal peoples of Canada.” In Sparrow,\(^2\) the first decision in which it considered this provision, the Supreme Court of Canada prescribed the relationship between s. 35 rights and federal authority. When federal regulatory activity “affects the exercise of aboriginal rights,” the Court said, it “will nonetheless be valid, if it meets the test for justifying an interference with

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a right recognized and affirmed under s. 35(1)." Subsequent decisions elaborating on the justification inquiry have confirmed that government action, like the legislation or regulations that authorize it, stands in need of justification when it interferes with such rights. Treaty rights stand in the same relation to federal authority, and are subject to the same standards of justification, as aboriginal rights.

But what about the relationship between s. 35 rights and Canada’s provinces? Are the provinces, like the federal government, in a position to interfere with the exercise of s. 35 rights whenever they can justify doing so?

There is at least one important difference between the federal and the provincial orders of government in respect of s. 35 rights. In *Delgamuukw*, the Supreme Court of Canada made it abundantly clear that the provinces do not have, and have not had since Confederation, authority to extinguish aboriginal rights. This difference, though of obvious importance in dealing with measures that date from before s. 35 took effect, will likely have decreasing significance as years pass; it now seems almost certain that s. 35 itself has precluded unilateral extinguishment of s. 35 rights, even by the federal government, since taking effect in 1982. The more interesting question today is whether the provinces may restrict or regulate the use of such rights by means of measures that they can justify.

It is tempting to suppose that they may, both for reasons of practicality and for reasons of constitutional symmetry. At least twice the Supreme Court has intimated its support for such a supposition. My own view is that this supposition, despite its apparent initial appeal, has no defensible doctrinal foundation. I will argue that the provinces are in a different, and much less advantageous position than the federal government in respect of s. 35 rights. My argument is that the provinces do not, as a general rule,
have the option of justifying interferences with s. 35 rights because they have no power whatever—except in certain very specific and isolated circumstances—to interfere with the exercise of such rights. Simply put, there is no tenable constitutional basis on which the provinces might assert such authority.

The purpose of this article is to substantiate these conclusions in greater detail. To do so, we shall have to situate s. 35 in a broader context, charting its connections with the division of powers prescribed in the Constitution Act, 1867\(^{11}\) and with s. 88 of the Indian Act.\(^{12}\)

I. Section 35's Application to Provincial Activity

It was in 1996 that the Supreme Court first addressed s. 35’s application to provincial measures generally.\(^{13}\) In Côté, the court acknowledged that the justification test developed first in Sparrow\(^{14}\) “was originally elucidated in the context of a federal regulation which allegedly infringed an aboriginal right” and that the “majority of recent cases which have subsequently invoked the Sparrow framework have similarly done so against the backdrop of a federal statute or regulation.” Even so, the Court said, it is quite clear that the Sparrow test applies where a provincial law is alleged to have infringed an aboriginal or treaty right in a manner which cannot be justified: Badger, supra, at para. 85 (application of Sparrow test to provincial statute which violated a treaty right). The text and purpose of s. 35(1) do not distinguish between federal and provincial laws which restrict aboriginal and treaty rights, and they should both be subject to the same standard of constitutional scrutiny.\(^{15}\)

Considered strictly on its own terms, this proposition seems unimpeachable. Section 35(1), as construed so far, articulates the kind and degree of constitutional protection that existing treaty and aboriginal rights are to have from government measures that would otherwise

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10. See infra notes 111-127 and the accompanying text.
13. A few months earlier, in Badger, supra note 6, the Court had applied s. 35 to provincial legislation in the very special circumstances arising from the operation of Alberta’s Natural Resources Transfer Agreement (“NRTA”) and the “Government of the country” clause included in Treaty 8. See infra notes 114-123, 142-149 and the accompanying text.
14. See supra notes 2-4 and the accompanying text.
15. Côté, supra note 9 at 185.
restrict them. Nothing in the text or operation of s. 35(1) suggests that such rights are meant to receive any greater or lesser protection from the federal than from the provincial measures that govern them. Where the issue is justification of an infringement of these rights, it makes good sense to have a single coherent general approach to the task of determining, case by case, when it is the right itself, and when the measure constraining it, that should prevail.

So understood, however, this observation tells us nothing useful about the provinces' power to interfere with s. 35 rights; all it does is confirm that the regime prescribed in Sparrow applies to any provincial measures that constrain the exercise of such rights. It is here that we must be extremely careful. The justification inquiry does not properly even begin until one has identified a government measure that can and does interfere with the exercise of an existing aboriginal or treaty right; till then, s. 35(1) has no work to do, because there is nothing that stands in need of any justification. Such rights do not need to look to s. 35(1) for protection from measures that, for other reasons, can have no enforceable legal effect on their exercise. But government measures cannot have any such effect unless the governments undertaking them already have the power, apart from s. 35, to interfere with such rights. Any such power depends on their antecedent constitutional authority.

In this sense, as the British Columbia Court of Appeal has said, the s. 35 inquiry "stands as a separate and subsequent review, which is

16. As far as I know, no court has yet considered the extent, if any, to which s. 35(1) protects such rights from interference resulting from wholly private activity. It is worth remembering, though (as Patrick Macklem reminded me), that s. 35 rights are not necessarily in the same position as the rights guaranteed in the Canadian Charter of Rights and Freedoms. Charter rights, because of s. 32 of the Charter, are enforceable only against the federal, provincial and territorial legislatures and governments and against certain other entities exercising powers derived from them; see, e.g., R. W. D. S. U. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 at 597-601; Eldridge v. B.C. (A.G.), [1997] 3 S.C.R. 624 at 654-666. Section 35 rights, on the other hand, are not subject to the constraints that s. 32 imposes because s. 35 is not part of the Charter. It remains to be seen whether the courts will read a "government action" constraint, as well as a justification constraint, into s. 35(1).

17. Compare, e.g., Sparrow, supra note 2, at 1110:

While [s. 35] does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).

For an argument in support of this view, see K. J. Tyler, "The Division of Powers and Aboriginal Water Rights Issues" in National Symposium on Water Law, Canadian Bar Association, Environmental Law Section (April 1999) at 72-73.
properly done after division of powers issues have been resolved."¹⁸ Like the *Charter of Rights*, s. 35(1) "assumes the existence of legislative powers"; as a result, "in reviewing the validity of a law, the first question is whether the law is within the law-making power of the enacting body."¹⁹ If it is not, no subsequent question of its compliance with s. 35 (or with the *Charter*) can arise.

There is, of course, no reason—at least for purposes of Canadian law—to doubt the federal government’s constitutional authority to enact laws or implement measures that regulate the exercise of s. 35 rights. Section 91(24) of the *Constitution Act, 1867* confers on the federal order full and exclusive authority to make laws in relation to "Indians, and Lands reserved for the Indians," and the Supreme Court has made it quite clear that s. 35 does not displace that authority.²⁰ The question here is whether the provinces have such power, as well.

It is possible, of course, to read the passage cited above from *Côté*²¹ as a straightforward affirmation that provinces do have antecedent power to regulate the use of s. 35 rights. About a year later, in *Delgamuukw*, the Supreme Court appears to have interpreted it in that way.²² In due course, we shall have to consider this interpretation in some detail.²³ To do so thoughtfully, however, we need first to reacquaint ourselves with the doctrinal context within which the issue of provincial capacity arises. In particular, we need to understand fully what it means that the constitution has assigned authority over “Indians, and Lands reserved for the Indians” exclusively to the federal order of government.

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¹⁹. See P. W. Hogg, *Constitutional Law of Canada*, 4th ed., abridged (Toronto: Carswell, 1997) at 339 [hereinafter Hogg, *Constitutional Law*]. Hogg’s discussion here deals only with the *Charter* and the division of powers; it applies, however, with equal force, by analogy, to the relationship between the division of powers and s. 35.

²⁰. “Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1) . . .”: *Sparrow*, supra note 2, at 1109. Compare *ibid.* at 1110, quoted supra at note 17.

²¹. See supra note 15 and the accompanying text.

²². See *Delgamuukw*, supra note 4, at 1107.

²³. See infra notes 131-166 and the accompanying text.
II. Section 35 Rights and the Division of Powers

The subjects “in relation to” which the provinces have authority to make laws or to exercise the prerogatives of the Crown are those enumerated in sections 92, 92A, 93 and 95 of the Constitution Act, 1867. All subjects not assigned exclusively to the provinces belong exclusively to the federal order of government. And all matters coming within the classes of subjects assigned exclusively to federal authority are, as such, outside provincial capacity, even if they also happen to fit within another class of subjects assigned exclusively to the provinces.

24. The Constitution Act, 1867 distributes prerogative as well as legislative authority: it vested in each order of government “such of these powers . . . as were necessary for the due performance of its constitutional functions . . .”: Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick, [1892] A.C. 437 (P.C.) at 442. By contrast, the federal and each provincial Crown has, as a general rule, all the powers of a natural person to enter into contracts. Because a contract results from voluntary agreement among the parties, not from unilateral imposition of rights or obligations, “[t]here is . . . no reason to confine the power to contract within the limits of the power to legislate, and the courts have not done so”: see P. W. Hogg, Liability of the Crown, 2d ed. (Toronto: Carswell, 1989) at 163-166. But see infra note 58.


26. Section 91 of the Constitution Act, 1867 assigns 29 classes of subjects exclusively to the Parliament of Canada and says, at the end of that list: “And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.”


Though this is the general proposition, courts recognized early that a few enumerated heads of federal power are drawn so broadly that, taken full strength, they would leave little or no room for the exercise of other, related heads of exclusive provincial authority. If the federal government’s plenary powers of taxation (Constitution Act, 1867, s. 91(3)) or over “Marriage and Divorce” (s. 91(26)), for instance, were treated as superseding exceptions to provincial authority, they could eclipse completely the narrower provincial authority to levy direct taxes (s. 92(2)) or to regulate “The Solemnization of Marriage in the Province” (s. 92(12)). Federal authority to regulate “Trade and Commerce” (s. 91(2)) is similarly broad. In these few instances, the courts have construed the narrower provincial powers as exceptions from the broader enumerated federal powers. See, e.g., Citizens Insurance Co. of Canada v. Parsons (1882), 7 App. Cas. 96 (P.C.) at 108-109; In re Marriage Legislation in Canada, [1912] A.C. 880 (P.C.). These are illustrations of the more general judicial practice of “mutual modification”: construing the enumerated heads of provincial and federal authority in such a way as to ensure that each of them has some meaningful range within which to operate. See, in addition to the authorities just cited, Reference Re Waters and Water-Powers, [1929] S.C.R. 200 at 216-217 [hereinafter Water Powers Reference] and the sources cited there.

Another way in which the courts have sought to preserve flexibility, and considerable room for overlap, in the exercise of federal and provincial authority is by characterizing very similar federal and provincial measures as dealing with different, and equally valid, “matters.”
“Indians, and Lands reserved for the Indians” are two of the classes of subjects that the constitution has assigned exclusively to the federal order.²⁸ By doing so, the constitution has subtracted them from the classes of subjects remitted to provincial authority, even though, again, almost everything that is related either to “Indians” or to “lands reserved” can also fairly be said to relate to “Property and Civil Rights in the Province,”²⁹ or to some other head of exclusive provincial authority.³⁰ To understand what powers the provinces have to control the use of s. 35 rights, therefore, we need to begin by understanding the powers that s. 91(24) of the Constitution Act, 1867 withholds from them.

1. Section 35 Rights and Federal Authority

a. The Structure of Federal Authority

We have seen that s. 91(24) gives the federal order certain exclusive powers and that it confers the power to regulate the exercise of s. 35 rights.³¹ It does not follow automatically from these propositions that the provinces do not have at least some power of their own to do so. Like the other heads of federal authority listed in s. 91 of the Constitution Act, 1867, s. 91(24) serves two different purposes: it acts as a shield to insulate certain matters altogether from provincial interference, and it acts as a springboard to authorize a broader range of federal activity. These two functions need to be kept conceptually distinct.³²

Section 91(24) operates as a shield because it assigns authority in relation to “Indians, and Lands reserved for the Indians” exclusively to the federal government. This authority—again, like the other heads of power listed in s. 91—has a “basic, minimum and unassailable content”,³³ within it are certain matters that Canada may regulate or determine unilaterally and that the provinces may not. In this capacity, s. 91(24) precludes provincial activity in relation to these “core” matters whether or not the federal government exercises—ever—all, or any, of its

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²⁸ Constitution Act, 1867, s. 91(24).
²⁹ Constitution Act, 1867, s. 92(13).
³⁰ “This legislative authority [in s. 91(24)] is obviously intended to be exercised over matters that are, as regards persons other than Indians, within the exclusive authority of the Provinces”: R. v. Drybones, [1970] S.C.R. 282 at 303, Pigeon J. (dissenting).
³¹ See supra note 20 and the accompanying text.
³² See Water Powers Reference, supra note 27 at 213.
authority in relation to them. As long ago as 1899, the Privy Council confirmed that “[t]he abstinence of the Dominion Parliament from legislating to the full limit of its powers could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91 of the Act of 1867.” The fact that Canada may not have chosen, for example, to provide in legislation for a certain class of people who qualify as “Indians” or for certain territory that qualifies as “lands reserved” does not mean either that it may not do so or that the provinces may. The answers to these capacity questions depend on a proper understanding of the integral features of these federal powers themselves.

There is an important difference, however, between this “core” of exclusive federal authority and the full extent of the power that s. 91(24) confers on the federal government. Section 91(24) does not restrict the range of permissible federal regulation to matters wholly within its shielded core; it can also authorize (as springboard) a wider range of federal activity, even when such activity has effects on matters legitimately within provincial authority, and even when the federal government


38. There is always room for dispute about whether federal measures aimed specifically at Indians or at Indian lands, but lying outside the core of exclusive federal authority, are valid exercises of federal power. As Kenneth Lysyk has observed, Clearly an inquiry into the true nature and character of legislation for the purpose of characterizing it in terms of constitutional distribution of legislative authority will not be concluded by the fact that the enactment is limited in its application to a class of persons mentioned in the British North America Act. The pith and substance of the legislation may indeed be found to relate to the class of persons legislated for; but,
could not engage in such measures in respect of Canadians generally.\(^3\) It does not, therefore, always preclude provincial activity when it authorizes federal activity.\(^4\) The fact, for example, that Canada may validly regulate dispositions of an Indian's assets on death,\(^4\) or highway traffic on reserve,\(^4\) does not necessarily mean that the provinces too may not do so.\(^4\)

alternatively, an examination of the enactment may disclose, to the court which ultimately decides the issue, that the statute relates to the activity or subject matter which it purports to regulate, despite the fact that it is made applicable to a limited class of persons.

K. M. Lysyk, “The Unique Constitutional Position of the Canadian Indian” (1967) 45 Can. Bar Rev. 513 at 533-534 [hereinafter Lysyk, “Unique Position”]. Compare K.M. Lysyk, “Constitutional Developments Relating to Indians and Indian Lands: An Overview” [1978] L.S.U.C. Special Lectures 201 (Lysyk, “Constitutional Developments”) at 221. The test for determining whether any given federal measure is a valid exercise of s. 91(24) powers is (here, as elsewhere) whether its primary subject matter (or “pith and substance,” if you insist) is “sufficiently integrated” with matters clearly coming within the core of exclusive federal authority to warrant characterizing it as “in relation to” that head of power. The degree of integration (or “fit”) required depends, in turn, on two things: the strength of the argument for describing the matter as one reserved exclusively to the provinces, and the “gravitational force” of the relevant federal head of power. Narrower, more specialized heads of federal power, such as those conferred by s. 91(24), have, as a rule, more potent cores, capable of anchoring a wider range of more distant measures, than broader, more diffuse powers, such as the general power to regulate trade and commerce (s. 91(2)): see General Motors of Canada v. City National Leasing, [1989] 1 S.C.R. 641 at 671 and generally ibid. at 663-672. Compare supra note 27.

In part for that reason, perhaps, the courts have been quite generous about upholding federal measures having to do with Indians or with lands reserved for the Indians. Kenneth Lysyk predicted in 1978 that courts would be slow to reach the conclusion that any federal legislation addressing Indians or Indian lands is *ultra vires*, at least in the absence of some suggestion of colourability: Lysyk, “Constitutional Developments,” *ibid.* at 221. And Douglas Sanders was able to say in 1988, that “[t]here are no examples of federal Indian legislation being declared unconstitutional:” Sanders, “The Constitution, the Provinces,” *supra* note 34 at 156. The one undeniable constraint on the scope of Canada’s “springboard” authority under s. 91(24) is that Canada may not seek to appropriate provincial Crown lands for Indians’ use, e.g., as reserves: see Ontario Mining Co. v. Seybold, [1903] A.C. 73 (P.C.) at 79-82 [hereinafter Seybold]; Water Powers Reference, note 27 at 211, 214; *R. v. Smith*, [1983] 1 S.C.R. 554 at 571-572, 575-577 [hereinafter Smith]. See *infra* note 58.


43. In *Francis 88*, *ibid.,* for example, the Supreme Court acknowledged the validity of Canada’s Indian Reserve Traffic Regulations, C.R.C. 1978, c. 959, but upheld a conviction for a violation on reserve of a provincial highway traffic statute. Compare *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, where the Court upheld virtually identical provisions regulating insider trading in both the *Canada Business Corporations Act* and the Ontario *Securities Act*. 
A good way to understand and distinguish these two different functions in operation is by trying to work through the confusion that sometimes surrounds such central terms as "Indians" and "reserve." The Indian Act gives "Indian" a very particular meaning for the purposes of that statute, but the class of individuals prescribed in that definition is in some respects narrower, and in others probably broader, than the class of those who come within the core of exclusive federal authority over "Indians." We know, for example, that Inuit are "Indians" for purposes of s. 91(24), even though the Indian Act specifically excludes them from its reach; as a result, the provinces have no power to legislate in relation to them as such. At the same time, most non-native women who happened, before 1985, to marry men that the Indian Act defined as "Indian" still qualify as Indians as defined in the Indian Act, but probably do not come within exclusive federal authority pursuant to s. 91(24). So it is too with "reserves" and "Indian lands." We have known for over a century that "the words actually used [in s. 91(24)] are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation," not just those lands that are known, or defined in the Indian Act, as "reserves." We now know that they also encompass "lands held pursuant to aboriginal title," whether or not not such lands have ever been "set apart by Her Majesty for the use and benefit of a band." In these respects, the class of lands that the Indian Act regards as reserves is narrower than the class of lands that s. 91(24) itself assigns to the core of federal authority. On the other hand, the Indian Act applies, as well, to all lands "set apart for the use and benefit of a band" — even, one must assume, those lands that

44. See Indian Act, ss. 2(1) ("Indian"), 5-7. See also s. 4.1, which deems references to "Indians" in the Act to include, for most but not all purposes, individuals whose names are entered, and are entitled to be entered, on band lists. On band lists, see ss. 2(1) ("Band List"), 7-14.2.
45. See Lysyk, "Unique Position," supra note 38 at 515.
46. On Indians and s. 91(24) generally, see Clem Chartier, "'Indian': An Analysis of the Term As Used in S. 91(24) of the British North America Act, 1867" (1978-79) 43 Sask. L. Rev. 37.
48. See Indian Act, s. 4(1).
49. Ibid., ss. 6(1)(a), 7 (as am. by R.S.C. 1985 (1st Supp.), c. 32, s. 4), incorporating R.S.C. 1985, c. I-5, s. 11(1)(f).
51. Delgamuukw, supra note 4 at 1117.
52. See Indian Act, s. 2(1) ("reserve") for the current statutory definition of "reserve," which includes these words.
private persons may choose on their own to hold in trust for bands—whether or not such lands also happen to qualify as “Lands reserved for the Indians.” To reduce confusion here, I will use “s. 91(24) Indians” to refer to those peoples who come within exclusive federal authority pursuant to s. 91(24) and “statutory Indians” to those who qualify as Indians pursuant to provisions of the Indian Act. So too, I will save the word “reserves” for those lands that satisfy the tests for “reserves” in the Indian Act, and use “lands reserved,” “Indian lands” or “s. 91(24) lands” to refer generically to the lands that s. 91(24) shields from provincial authority.

For present purposes, therefore, it will make a significant difference whether s. 35 rights are part of the “core” that s. 91(24) shields from provincial interference, or merely matters that have sufficient connection with that core to come within the range of the “springboard” jurisdiction that s. 91(24) confers on Canada. If they are “springboard” matters, then the provinces too will often have power to regulate their exercise—subject, of course, to the constraints of s. 35—as long as the measures they implement do not conflict with valid and relevant federal initiatives.

If, on the other hand, they form part of the “basic, minimum and unassailable content” of s. 91(24), then, as discussed in more detail below, the provinces have no such power in ordinary circumstances, at least according to the standard division of powers doctrine.

As the next section demonstrates, the s. 35 rights of s. 91(24) Indians are indeed integral to federal authority over “Indians, and Lands reserved for the Indians.”

53. See ibid., s. 36 (“Where lands have been set apart for the use and benefit of a band and legal title thereto is not vested in Her Majesty, this Act applies as though the lands were a reserve within the meaning of this Act”).
54. “[N]otwithstanding s. 91(24), provincial laws of general application apply proprio vigore to Indians and Indian lands”: Delgamuukw, supra note 4 at 1120.
55. See supra notes 14-17 and the accompanying text.
56. Federal authority over the subjects listed in s. 91 of the Constitution Act, 1867 is not only exclusive; it also operates “notwithstanding anything in this Act”: Constitution Act, 1867, s. 91, opening words. As a result, the realization of valid federal objectives takes precedence—is “paramount”—over the realization of competing provincial objectives, even when the provincial objectives are in every other respect valid and appropriate: see, e.g., Tennant v. Union Bank of Canada, [1894] A.C. 31 (P.C.) at 45; Ontario (A.G.) v. Canada (A.G.), [1894] A.C. 189 (P.C.) at 201. For a different, but compatible view of the origins of paramountcy doctrine, see Reference Re Provincial Court Judges, [1997] 3 S.C.R. 3 at 71 (paramountcy doctrine “follows from the desire of the confederating provinces [expressed in the preamble to the Constitution Act, 1867] “to be federally united into One Dominion’”). See generally Hogg, Constitutional Law, supra note 19 at 384-385, esp. n. 10.
b. Section 35 Rights and Core Federal Authority

i. Section 91(24) Lands

As mentioned above, "Lands reserved for the Indians" include "all lands reserved, upon any terms and conditions, for Indian occupation," whether or not (one must assume) those lands are currently occupied by (s. 91(24)) Indians. This description must include all lands that s. 91(24) Indians have received or retained pursuant to treaty; in Delgamuukw, the Supreme Court removed any doubt that it also includes all "lands held pursuant to aboriginal title."57 Canada’s constitutional authority over any such lands throughout most of the country terminates forthwith upon the extinguishment or absolute surrender of the aboriginal interest in them.58 As long as some aboriginal possessory interest, even a mere reversionary

57. See supra notes 50-51 and the accompanying text.
58. According to Smith, supra note 38 at 564.

[the lands ‘reserved’ for the benefit of Indians, on being released by the Indians for whose benefit the lands had been set aside, cease thereby in law to be within the legislative reach of Parliament under the Constitution. . . . The effect of a complete release, therefore, would be the withdrawal of these lands from Indian use within the contemplation of s. 91(24) of the Constitution Act.

See also ibid. at 569, 578; Seybold, supra note 38 at 82. This is so because the federal authority over such lands is legislative and administrative only; s. 91(24) gives Canada no proprietary interest in Indian lands: St. Catherine’s Milling, supra note 50 at 59-60; Seybold, ibid. at 82, Smith, ibid. at 564. When most of Canada’s provinces joined Confederation, the underlying title to the Indian lands within their borders was vested in the Crown in right of that province, subject only to the Indian interest: Constitution Act, 1867, s. 109; St. Catherine’s Milling, ibid. at 54-60. Because the provincial interest in such lands is only proprietary, and is subject to the aboriginal interest while that interest remains, only the federal government has constitutional authority to extinguish, or to accept surrender of, the aboriginal interest: Delgamuukw, supra note 4 at 1117-1118. Once the aboriginal interest in particular lands is extinguished or surrendered absolutely, however, the proprietary interest of the province in such lands becomes complete; the federal government no longer has any power of its own to deal with them: St. Catherine’s Milling, ibid. at 54-55, 58, 60; Smith, ibid. at 562.

One consequence was that Canada, once it accepted an absolute surrender of particular lands in exchange for a promise to deal with those lands in a particular way, had no independent capacity to carry out its promise. (Smith is a clear and recent example.) One might have thought that this predicament would prompt more inquiry about the validity of those surrenders, given the misrepresentations of federal capacity on which they may well have been based.

Reciprocal legislation in Ontario (see S.C. 1924, c. 48; S.O. 1924, c. 15), New Brunswick, Nova Scotia and British Columbia now authorizes Canada to deal with surrendered reserve lands in accordance with the terms of the surrenders and confirms retroactively, subject to some qualifications, the grants of surrendered Indian lands that Canada had purported to make in fulfilment of such terms. For discussion of the New Brunswick arrangement, see Smith, ibid. at 578-580.

The situation is different in the three Prairie provinces. Initially, the Crown in right of Canada held underlying title to all the lands and resources in those provinces, including of course the s. 91(24) lands. That changed in 1930, when the federal government signed NRTAs with each of those provinces, transferring underlying title to them. The Constitution Act, 1930,
interest, survives in the relevant lands, they remain “lands reserved” and subject to federal legislative and administrative authority. We need to know what powers in respect of those lands, while they remain s. 91(24) lands, are exclusive to Canada.

From Delgamuukw we know that the federal order has exclusive authority, at a minimum, to legislate or to use state power in relation to aboriginal title as such or in relation to any other aboriginal rights that are tied to land. There is every reason to conclude that the same is true of federal authority over s. 91(24) lands held pursuant to treaty and over other treaty rights that pertain to particular lands. All indications are that the exclusive core of federal power over lands reserved is extremely broad, and may even be plenary. In Derrickson, for example, the Supreme Court concluded that “[t]he right to possession of lands on an Indian reserve is manifestly of the very essence of the federal exclusive legislative power under s. 91(24).” In reaching that conclusion, it endorsed Kenneth Lysyk’s observation that “the matters contained within exclusive federal authority over Indian reserve lands [presumably] include regulation of the manner of land-holding, disposition of interests in reserve lands and how reserve lands may be used (e.g., zoning

20-21 Geo. V., c. 26 (U.K.) [hereinafter Constitution Act, 1930] gives these agreements constitutional effect. Each of those agreements, however, specifically retains under federal ownership “[a]ll lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed” and incorporates by reference, with appropriate regional changes, the provisions of Canada’s 1924 agreement with Ontario for the disposition of surrendered reserve lands: see ss. 10-11 of the Saskatchewan and Alberta NRTAs, ss. 11-12 of the Manitoba NRTA, and Reference Re Stony Plain Indian Reserve No. 135 (1981), 130 D.L.R. (3d) 636 at 645-650 (Alta. C.A) [hereinafter Re Stony Plain]. For discussion of these various arrangements, see Sanders, “The Constitution, the Provinces,” supra note 34 at 159.


60. See Delgamuukw, supra note 4 at 1118-19. These determinations were essential to the Court’s conclusion that provinces have no independent power to extinguish aboriginal title or other aboriginal rights. For this reason, they surely must take precedence over the Court’s incidental reference, earlier in the same judgment (ibid. at 1113) to “provinces enact[ing] hunting and fishing regulations in relation to aboriginal lands.” This reference, offered only as an illustration of the justification requirements for aboriginal title infringements, clearly cannot stand together with its later conclusions about the core of federal authority over s. 91(24) lands.

61. For a different view, see Oka (Municipality) c. Simon, [1999] 2 C.N.L.R. 205 at 221-224 (Que. C.A.) [hereinafter Oka]; Tyler, supra note 17 at 5-9. Both Tyler and the Court in Oka, ibid. acknowledge, however, that aboriginal title, as such, comes within the core of exclusive federal authority.

Of Provinces and Section 35 Rights

regulations)." Lysyk, for his part, had derived this list "[b]y analogy" from a list of provincial powers in relation to land that the Supreme Court had held in an earlier case were "not contested." The implication is that Canada has exclusive authority to act in relation to Indian lands in the same ways, and in relation to all the same matters, available to the provinces in relation to other lands within provincial boundaries. If this is so, then the provinces have no power of their own to act in relation to any such matters as they pertain to any Indian lands.

Other authority supports the breadth of this inference. In St. Catherine’s Milling, the Privy Council, having just confirmed the natural breadth of the words “Lands reserved” in s. 91(24), observed that “[i]t appears to be the plain policy of the [1867] Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority.” Almost a century later, in Smith, the Supreme Court of Canada characterized the aboriginal interest in s. 91(24) lands as a “right... to enjoy the use of the land under federal legislative regulation.” This description makes sense only if the federal regulation is understood to be exclusive; it would be hard for anyone to characterize exposure to an additional level of regulation as any kind of “right.” It appears, therefore, that the power to govern the use or disposition of aboriginal title, or of other s. 35 rights that relate to specific land, resides exclusively with the federal order of government.

ii. Section 91(24) Indians

The preceding discussion suggests that the core of exclusive federal authority over s. 91(24) lands is virtually coextensive with the full extent of that power. If that is so, it is a contingent fact about that particular head

63. Ibid. at 295, citing Lysyk, “Constitutional Developments,” supra note 38 at 227 n. 49.
65. It is true that Derrickson, supra note 62, dealt exclusively with possessory interests in a reserve, not with aboriginal interests in Indian lands generally. For present purposes, though, this makes no difference, because the aboriginal interest is the same in reserve lands and in s. 91(24) lands: see Guerin v. The Queen, [1984] 2 S.C.R. 335 at 379, citing Quebec (A.G.) v. Canada (A.G.), [1921] 1 A.C. 401 (P.C.) at 410-411.
66. For recent authority to this effect, see Stoney Creek Indian Band v. The Queen, [1999] 1 C.N.L.R. 192 (B.C.S.C.) at 213 [hereinafter Stoney Creek] ("inadmissible interference with a right tied to or encompassed within the right to exclusive possession, use, benefit and full enjoyment of reserve lands"); Chippewas of Sarnia Band v. Canada (A.G.) (30 April 1999) (Ont. S.C.J.) [unreported] at 146-147 (para. 477) [hereinafter Chippewas of Sarnia].
67. St. Catherine’s Milling, supra note 50 at 59.
68. Smith, supra note 38 at 564.
69. To the best of my knowledge, Brian Slattery recognized this first. See Slattery, “Understanding,” supra note 50 at 773-777.
of federal authority. This is not the pattern for heads of federal power generally; we should not expect the same result when considering federal authority over s. 91(24) Indians. As the Supreme Court observed in *Four B*, "the conferring upon Parliament of exclusive legislative competence to make laws relating to certain classes of persons does not mean that the totality of these persons' rights and duties comes under primary federal competence to the exclusion of provincial laws of general application." *Four B* confirmed that Canada does not have exclusive power to regulate the labour relations of corporations owned by Indians operating on reserve and employing Indians. We know, as well, that the power to regulate highway traffic on reserve is not exclusive to the federal order of government, and that the power to regulate Indians' hunting and trapping, on or off reserve, may not be, either.

The "basic, minimum and unassailable content" of the federal order's authority over "Indians" —that part of its authority that is exclusively federal—appears to be the power to deal with them, and to deal with matters unique to and characteristic of them (or with some subgroup of them) as such. This power is sometimes described in the

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70. See, e.g., *supra* notes 37-43 and the accompanying text.
72. See *Francis 88*, *supra* note 42.
73. See *Cardinal v. Alberta (A.G.)*, [1974] 2 S.C.R. 695 [hereinafter *Cardinal*] (Indian hunting on reserve); *R. v. Kruger & Manuel*, [1978] 1 S.C.R. 104 [hereinafter *Kruger & Manuel*] (Indian hunting off reserve). One must now treat these cases with some caution. Neither involved a claim of aboriginal or treaty right, and *Cardinal*, in particular, was decided mainly on the basis of s. 12 of the Alberta NRTA (*supra* note 58), which specifically provides that "the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof," subject to certain exceptions and limitations: see *Cardinal*, *ibid.* at 698-699. Pursuant to s. 1 of the *Constitution Act, 1930*, this provision, and the equivalent provisions in the NRTAs with Saskatchewan and Manitoba, operate "notwithstanding anything in the British North America Act, 1867,...," including, of course, s. 91(24). *Cardinal*, therefore, is hardly a sound basis on which to ascertain the dimensions of the core of exclusive federal power over s. 91(24) Indians.

See also *R. v. Dick*, [1985] 2 S.C.R. 309 at 320-321 [hereinafter *Dick 85*], where the Supreme Court, despite *Cardinal*, assumed, without deciding, that restrictions on hunting, at least in relation to the members of one specific Indian band, were matters that came within the core of exclusive federal authority, and *St. Catherine's Milling*, *supra* note 50 at 60, where the Privy Council observed that Canada "still possesses exclusive power to regulate the Indians' privilege of hunting and fishing" in the Treaty 3 area despite the fact that Ontario alone acquired the beneficial interest in those lands upon their surrender to the Crown.

74. See *supra* note 33 and the accompanying text.
75. See *R. v. Martin* (1917), 41 O.L.R. 79 (C.A.) at 83, quoted with approval in *Cardinal*, *supra* note 73 at 706.
cases as the power to regulate “Indians qua Indians” or matters related to “Indianness.”

In Delgamuukw, the Supreme Court affirmed that this “core of Indianness encompasses the whole range of aboriginal rights that are protected by s. 35(1)” of the Constitution Act, 1982. As the court itself has acknowledged, this conclusion follows necessarily from its earlier determination in Van der Peet that such rights derive exclusively from “practices, customs and traditions that are integral to distinctive aboriginal cultures that occupied North America prior to the arrival of Europeans.”

Aboriginal rights, by their very nature, are a kind of rights that only aboriginal peoples, as such, can have.

It seems equally clear, as a matter of constitutional law, that the exercise and disposition of Indian treaty rights are subject exclusively to federal legislative authority. In Simon, the court observed with approval that “[i]t has been held to be within the exclusive power of Parliament under s. 91(24) of the Constitution Act, 1867, to derogate from rights recognized in a treaty agreement made with the Indians.”

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76. See, e.g., Cardinal, ibid. at 706; Kruger & Manuel, supra note 73 at 110; Four B, supra note 71 at 1048; Dick 85, supra note 73 at 320, 325, 326, 328.
77. See, e.g., Delgamuukw, supra note 4 at 1119; Natural Parents, supra note 35 at 760-761, Laskin C.J.C. (for the plurality), quoted with approval in Bell 88, supra note 33 at 835.
78. Delgamuukw, ibid. at 1119. “Those rights,” the court added (ibid.), “include rights in relation to land; that part of the core derives from s. 91(24)’s reference to ‘Lands reserved for the Indians.’ But those rights also encompass practices, customs and traditions which are not tied to land as well; that part of the core can be traced to federal jurisdiction over ‘Indians.’”
79. Ibid. at 1121.
80. Van der Peet, supra note 8 at 549. See generally ibid. at 548-549. Compare Bankes, supra note 18 at 332-333.
81. According to s. 88 of the Indian Act, provincial laws of general application are “[s]ubject to the terms of any treaty.” This provision itself protects the rights set out in Indian treaties from the impact of any provincial laws to which s. 88 applies: see, e.g., R. v. George, [1966] S.C.R. 267 at 281 [hereinafter George]; Kruger & Manuel, supra note 73 at 114-115; R. v. Simon, [1985] 2 S.C.R. 387 at 410-414 [hereinafter Simon]; Quebec (A.G.) v. Sioux, [1990] 1 S.C.R. 1025 at 1065 [hereinafter Sioux]. Such protection lasts, however, only while s. 88 is in force. (It first took effect in 1951.)
82. It follows that I disagree on this point with Patrick Macklem, who said, albeit with regret, in 1991, that “[t]reaty rights can be asserted against valid provincial laws not because they constrict the exercise of legislative authority but because Parliament has stated in s. 88 of the Indian Act that provincial laws of general application shall not infringe treaty guarantees”: Macklem, supra note 37 at 436. See also ibid. at 438, 442.
83. Simon, supra note 81 at 411. Compare Badger, supra note 6 at 809, where the Supreme Court said, in a case focused on treaty rights, that “the regulation of Indian hunting rights would ordinarily come within the jurisdiction of the Federal government and not the Province.” See also R. v. White and Bob (1964), 50 D.L.R. (2d) 613 (B.C.C.A.) at 618, Davey J.A. (for the plurality), aff’d on related grounds [1965] S.C.R. vi, 52 D.L.R. (2d) 491, approved in Kruger & Manuel, supra note 73 at 113, Dick 85, supra note 73 at 324 and Simon, ibid. at 411; Hogg, Constitutional Law, supra note 19 at 566 esp. n. 54.
doctrinal standpoint, this conclusion makes compelling sense. Indian treaties are arrangements negotiated and concluded with communities of s. 91(24) Indians, acting as such, because of the distinctive legal interests—and, at least in the early days, the autonomy—such communities, uniquely, have possessed. The power to conclude such treaties is exclusive to Canada because only the federal government has authority to extinguish (or accept surrender of) such interests, or otherwise to govern or regulate their exercise. To suppose that the rights set out in treaties, and offered as consideration for the surrender of some such interests, become (for the first time) routinely subject to constraint by provincial law is to create substantial disincentives for both parties to participate in the treaty-making process: for the aboriginal parties, because any rights they received in exchange would be, as such, more vulnerable to external interference than those they were being asked to give up, and for the federal government, because it would lose the exclusive power to control the use of such rights and would therefore be unable to guarantee, as a matter of course, the integrity of the arrangements it was offering. Implementation of the arrangements validly made in these treaties demands the kind of “uniformity of administration” that, as the Privy

84. Sioui, supra note 81 at 1049-1056, esp. at 1056.
85. This does not mean, however, that the federal government automatically has the constitutional authority to fulfill all the obligations it may choose to undertake when it enters into an Indian treaty; see, e.g., supra note 58. Neither does it preclude the federal government from making statutory provision for provincial involvement in the treaty-making process. In at least one instance, Parliament has done exactly that. In 1891, the federal and Ontario legislatures enacted reciprocal legislation authorizing Canada and Ontario to sign an agreement settling questions arising from Treaty 3: see An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands, S.C. 1891, c. 5; An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indian Lands, S.O. 1891, c. 3 [hereinafter statutory agreement statutes]. (The agreement these statutes authorized was executed in 1894.) According to s. 6 of this statutory agreement, “any future treaties with the Indians in respect of territory in Ontario to which they have not hitherto surrendered their claim aforesaid, shall be deemed to require the concurrence of the government of Ontario.” Such arrangements, however, though to the best of my knowledge still in force, do not alter the fact that the provinces have no independent constitutional capacity to conclude or participate in treaties with s. 91(24) Indians.
86. See Delgamuukw, supra note 4 at 1117-1118. Delgamuukw speaks exclusively of aboriginal interests in land, but the argument applies equally to all the aboriginal rights belonging to s. 91(24) Indians. Compare Slattery, “Understanding,” supra note 50 at 763-764.
87. Supra notes 78-80 and the accompanying text.
88. Imagine, in particular, the predicament of those treaty peoples—the signatories of Treaties 3, 5 and 8 are examples—whose rights, and whose populations, extend into more than one province. In the worst case, their identical entitlements under a single treaty would be subject, on this hypothesis, to incompatible regulatory regimes in neighbouring provinces.
Council recognized in *St. Catherine’s Milling*, requires “the legislative control of one central authority.”

2. **Section 35 Rights and Provincial Authority**

The above analysis demonstrates that the management, regulation and disposition of s. 35 rights are not just matters that happen to come within the reach of federal power pursuant to s. 91(24) of the *Constitution Act, 1867*, but matters integral to that authority. They are, in other words, matters the constitution withholds from provincial jurisdiction and reserves exclusively to the federal order of government. Section 91(24), therefore, prevents provincial measures from controlling s. 35 rights not only when such measures interfere with federal law, but absolutely. It does so in two ways: it insulates such rights from the application of provincial measures that in every other way are fully legitimate (the question of application), and it precludes the provinces from making it their business to control the use of such rights (the question of validity). It will be most convenient to consider these two restrictions in reverse order.

### a. The Question of Validity

To say of a regulatory measure that it is *invalid* is to say that it is beyond the constitutional authority of (*ultra vires*) the enacting legislature or government (federal or provincial). Invalid measures or provisions have no legal effect whatever; once recognized as invalid, they cannot be enforced against, or relied upon by, anyone.  

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89. *Supra* note 67 and the accompanying text. The situation is different, of course, when a treaty itself makes allowance for the operation of provincial law. See *infra* notes 120-123 and the accompanying text.

90. These limits apply with equal force to municipal authorities (because such municipalities have had since Confederation only the powers provincial legislatures have conferred upon them pursuant to s. 92(8) of the *Constitution Act, 1867*: [*Ontario* (A.G.) *v. Canada* (A.G.), [1896] A.C. 348 (P.C.) at 364 [hereinafter *Local Prohibition*]; [*East York* (Borough) *v. Ontario* (1997), 36 O.R. (3d) 733 (C.A.) at 738] and to all other entities purporting to exercise delegated provincial authority, because “a provincial Legislature cannot delegate any power which it does not possess” (*Local Prohibition*, *ibid.*).

91. Compare *Bankes*, *supra* note 18 at 326, who uses a similar taxonomy.

92. “[I]t may quite readily be deduced that anything done under colour of an *ultra vires* statute has no more effect than if the statute had not existed”: *Air Canada* *v. B.C.*, [1989] 1 S.C.R. 1161 at 1195. As the court goes on to say, however, courts sometimes do give limited effect to unconstitutional statutes in extraordinary circumstances, for reasons of public policy: *ibid.* at 1195-1196, 1203-1207 (retention of taxes collected under unconstitutional statutes). See also *Reference re Manitoba Language Rights*, [1988] 1 S.C.R. 234 (temporary suspension, to preserve the rule of law, of declaration that *all* Manitoba statutes *ultra vires*).
To be a valid exercise of provincial authority, a measure “must be within the authority of s. 92 [of the Constitution Act, 1867] and must not be in relation to a subject-matter assigned exclusively to the Canadian Parliament under s. 91.” The first of these two requirements is easy to satisfy, given the breadth of some of the classes of subjects that s. 92 assigns to the provinces; almost all of a province’s legislation and executive activity is likely to qualify, as long as it is focused within the province’s territorial boundaries. The issue almost always concerns the second requirement: whether the measure’s primary focus is on matters that, from a constitutional standpoint, are exclusively of federal concern. If s. 35 rights are indeed among the matters integral to (at the core of) federal authority under s. 91(24), then any provincial measure found to have been designed to govern them or their exercise will, by this second test, be invalid. Setting out to regulate or to make provision for such rights—or for any other matters that help define federal jurisdiction—is something that provinces have no power to do. Strictly speaking, a province’s authority in respect of such matters is no greater than that of an ordinary person.

93. Cardinal, supra note 73 at 703. This is so, again, because the matters at the core of the powers conferred by s. 91 exclusively on Canada are, generally speaking, subtracted from the core powers assigned to the provinces in s. 92. See the closing words of s. 91, quoted supra note 26, and generally supra notes 24-30 and the accompanying text.

94. Sections 92(13) and 92(16), for instance, authorize provincial activity in relation to “Property and Civil Rights in the Province” and “Generally [to] all Matters of a merely local or private Nature in the Province,” respectively.

95. Supra notes 57-89 and the accompanying text.

96. This is the primary reason why the Supreme Court concluded in Delgamuukw that provinces have no power to extinguish aboriginal rights. Because, as the court said, “the only laws with the sufficiently clear and plain intention to extinguish aboriginal rights would be laws in relation to Indians and Indian lands, . . . a provincial law could never, proprio vigore, extinguish aboriginal rights, because the intention to do so would take the law outside provincial jurisdiction”: Delgamuukw, supra note 4 at 1120-1121.

97. Although some others disagree (see, e.g., A. Pratt, “Federalism in the Era of Aboriginal Self-Government” in D. C. Hawkes, ed., Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles (Ottawa: Carleton University Press, 1989) 19 at 52-53; B. Slattery, “First Nations and the Constitution: A Question of Trust” (1992) 71 Can. Bar Rev. 261 at 284 n. 75 [hereinafter Slattery, “Question of Trust”]) I believe there is good reason to doubt that provinces have authority even to seek to insulate such core matters from the effects of other provincial activity: to declare in legislation, for instance, that provincial hunting rules shall not restrict the exercise of aboriginal rights that belong to s. 91(24) Indians. All such provisions assume that provinces have the power to determine what impact their own legislation will have on matters integral to exclusive federal authority.

This issue arose specifically in Natural Parents, supra note 35, in respect of s. 10(4a) of the B.C. Adoption Act, which said that s. 10’s provisions did not affect “[t]he status, rights, privileges, disabilities, and limitations of an adopted Indian person acquired as an Indian under the Indian Act (Canada) or under any other Act or law”: see ibid. at 757. According to Beetz J., who wrote (at 787) for himself and for two other judges, s. 10(4a) was
It is important here to be careful not to overestimate the extent of provincial incapacity. Everyone agrees that provincial measures can be valid despite having quite a substantial impact on s. 35 rights, on s. 91(24) Indians, or on lands reserved and the interests in them. As long as the primary focus of a measure or provision is really on matters legitimately within provincial capacity, the provision will be valid no matter how substantial its impact on s. 91(24) lands or Indians. The task for the courts in such situations is to determine whether the measure, despite its effects on Indians, s. 35 rights or lands reserved, is a genuine use of powers conferred upon the provinces, or whether those effects give them sufficient reason to conclude that the measure displays an intention to exercise exclusively federal powers. Even when the provincial measure turns out to be valid, however, the courts must consider what application, if any, it has to core federal matters such as s. 35 rights.

clearly ultra vires. This may be paradoxical since s. (4a) appears to have been dictated by the intent not to invade federal jurisdiction. But what was said is what matters, not what was meant. Whether 'the status, rights, privileges, disabilities and limitations of an adopted Indian person acquired as an Indian under the Indian Act' are affected or not affected by adoption is, as a matter of legislative policy, exclusively for Parliament to decide, or, as a question of interpretation in a proper case, for the courts to rule upon.

How Indian status is affected, by adoption or otherwise, is a matter coming within the class of subjects mentioned in s. 91.24 of the British North America Act, 1867. The other six judges agreed that s. 10(4a) was invalid—or, at a minimum, “constitutionally suspect” —to the extent that it purported to bring about any change in the law: *ibid.* at 764, Laskin C.J.C.; at 775, Martland J.; at 777, Ritchie J. Compare *R. v. Sutherland*, [1980] 2 S.C.R. 451 at 456-457 (“A provincial legislature may not pass laws to determine the scope of the protection afforded to [Indian hunting rights] by the [Manitoba] Natural Resources Transfer Agreement. If the laws have the effect of altering the agreement, they are constitutionally invalid; if not, they are mere surplusage.”)

Len Rotman, who agrees in a recent article that “[t]his type of activity ... prima facie amounts to legislation in respect to Indians qua Indians” and that “[p]rior to the existence of the Constitution Act, 1982, there is little doubt that such provincial activity would have been declared ultra vires, and thereby rendered void,” suggests nonetheless that “a province may [now] exempt Aboriginal peoples from certain provincial laws or regulations” because of ss. 35(1) and 52(1) of the Constitution Act, 1982: see L. I. Rotman, “Provincial Fiduciary Obligations to First Nations: The Nexus Between Government Power and Responsibility” (1994) 32 Osgoode Hall L.J. 735 at 782. This can be true, it seems to me, only if we understand ss. 35(1) and 52(1) as conferring on provinces powers in respect of “core” federal matters that they did not have before 1982. I know of no basis in law for that supposition: see *infra* notes 158-163 and the accompanying text.

My own view is that such provisions are unnecessary, because the provinces have no power of their own to regulate, even through more general measures, matters at the core of federal authority under s. 91(24). See especially *infra* notes 99-110 and the accompanying text. 98. See, e.g., Kruger & Manuel, supra note 73 at 111; Hogg, Constitutional Law, supra note 19 at 344.
b. *The Question of Application: Interjurisdictional Immunity*

As the preceding discussion shows, provinces may not make it their business to regulate or make provision for s. 35 rights or for other matters in classes of subjects reserved exclusively to federal authority. When they make such matters the primary focus of their initiatives, those initiatives are wholly without legal effect. Sometimes, however, valid provincial measures—measures whose primary concern is not with matters within the core of exclusive federal authority—have the *effect* of regulating, determining or disposing of matters "which form an integral part of the exclusive federal jurisdiction over [some] thing or person,"\(^99\) even though such effects may not be "the very result contemplated by the Legislature and pursued by it as a matter of policy."\(^100\) Such measures, though valid and enforceable throughout the rest of their range, have no enforceable application to persons, places or things—such as s. 91(24) lands, or s. 35 rights—shielded within the core of the enumerated heads of federal authority.\(^101\) This result is sometimes called "constitutional inapplicability" or the doctrine of "interjurisdictional immunity."

Restrictions on the application of otherwise valid provincial measures follow necessarily from the fact that federal authority over certain matters is exclusive and remains so whether or not the federal government chooses ever to use it.\(^102\) Subjects within exclusive federal authority, again, are subtracted from the powers conferred on the provinces.\(^103\) For this reason, it makes no difference, at least for some purposes, whether a province sets out to exercise powers or deal with matters reserved exclusively to the federal order. Whatever its intention may be, it simply cannot deal with such matters, and provincial measures that do so can have, to that extent, no legal effect. Provincial activity cannot have

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100. See *Dick 85,* supra note 73 at 322.

101. *Ibid.* at 325-326; *Bell 88,* supra note 33 at 826; *Ordon Estate,* supra note 33 at 62-63, 65. For this purpose, one need not prove that the relevant measure impairs the legal status or capacities—e.g., the s. 35 rights—of s. 91(24) Indians, or that it has an equivalent impact on s. 91(24) lands. No mandatory provincial measure can govern "core" matters, whether or not it happens to meet the more stringent "impairment" test: see *Bell 88,* *ibid.* at 855-856, 857, 860; compare *Bankes,* supra note 18 at 318-319, 333, 337-338. Provincial measures, however, whose application *would* impair, even indirectly, the legal status of s. 35 rights (or any other exclusively federal matter or subject) will be denied that legal effect, even if such measures do not purport to apply directly to them: see *Irwin Toy Ltd. v. Québec (A.G.),* [1989] 1 S.C.R. 927 at 954-959; *Manitoba (A.G.) v. Canada (A.G.)*, [1929] A.C. 260 (P.C.). Thanks to Lisa DeMarco for calling this latter point to my attention.


103. *Supra* notes 24-30, 93-96 and the accompanying text.
enforceable legal consequences that a province is not entitled or empowered to intend. 104 "[J]ust as the legislature cannot do indirectly what it cannot do directly, it cannot by using general words effect a result which would be beyond its powers if brought about by precise words." 105

Seen in this context, the doctrine of interjurisdictional immunity gives courts a way of preserving as much as possible of a provincial measure despite the fact that the measure, if given full scope, would regulate or dispose of matters that lie beyond the reach of provincial authority. It reflects our law's underlying assumption that the dominant intention of each of our legislative bodies is "to confine itself to its own sphere and . . . that general words in a statute are not intended to extend its operation beyond the territorial [or, one must assume, the substantive] authority of the Legislature." 106 Confronted with a measure that would make mandatory provision for some matters that lie outside, as well as some within, the enacting body's authority, the courts will as a general rule "read down" the measure to confine its application exclusively to permissible matters. 107

The difference, therefore, between a provincial measure that is invalid on account of s. 91(24) and one that is merely inapplicable to s. 91(24)

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104. See, supra e.g., Madden v. Fort Sheppard Railway, [1899] A.C. 626 (P.C.) at 628.
105. McKay v. The Queen, [1965] S.C.R. 798 at 806. See also Natural Parents, supra note 35 at 761, Laskin C.J.C. (for the plurality) ("Nothing... accretes to provincial legislative power by the generalization of the language of provincial legislation if it does not constitutionally belong there"), quoted with approval in Bell 88, supra note 33 at 835.
107. When otherwise valid provincial legislation, given the generality of its terms, extends beyond the matter over which the legislature had jurisdiction and over a matter of federal exclusive jurisdiction, it must, in order to preserve its constitutionality, be read down and given the limited meaning which will confine it within the limits of the provincial jurisdiction:


In principle, this is no less true of federal than of provincial legislation. Because, however, the federal powers enumerated in s. 91 of the Constitution Act, 1867 are, as a rule, powers subtracted from provincial authority, it is much more unusual to find, and much more difficult to imagine, circumstances in which federal legislation is, or ought to be, read down to accommodate a core of provincial authority. One case where this seems to have happened is C.N.R. v. Clark, [1988] 2 S.C.R. 680 (Railway Act limitation period read down so as to govern statutory causes of action only, not actions brought against railways under the common law). It is a little more common to see federal legislation read down when that legislation is based on authority elsewhere in the constitution, e.g., s. 101 of the Constitution Act, 1867 (establishment of courts for the better administration of the laws of Canada). For some examples and further discussion, see B. Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 308 at 357-358 esp. n. 213.
Indians or to Indian lands is that, in the former instance, the measure's design and mandatory impacts invite the conclusion, despite the standard presumption of constitutional behaviour, that its primary focus is on exclusively federal matters; in the latter instance, they do not. The invalid measure is invalid because it is really "in relation to" Indians or Indian lands; the other one is not invalid because it is not so aimed. The practical difference this distinction makes, surprisingly enough, is almost exclusively to determine what enforceable impact, if any, the measure can have on matters unrelated to s. 35 rights, or more generally, to s. 91(24) lands or Indians. Neither kind of measure, as such, can govern any of those.

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108. See, e.g., Kruger & Manuel, supra note 73, at 112 ("The presumption is for the validity of a legislative enactment ... "); compare Nowegijick v. The Queen, [1983] 1 S.C.R. 29 at 36 [hereinafter Nowegijick].

109. Consider in this context the following well-known and influential passage from Martland J.'s majority judgment in Cardinal, supra note 73 at 703:

In my opinion, the test as to the application of Provincial legislation within a Reserve is the same as with respect to its application within the Province and that is that it must be within the authority of s. 92 and must not be in relation to a subject matter assigned exclusively to the Canadian Parliament under s. 91. Two of those subjects are Indians and Indian Reserves, but if Provincial legislation within the limits of s. 92 is not construed as being legislation in relation to those classes of subjects (or any other subject under s. 91), it is applicable anywhere in the Province, including Indian Reserves, even though Indians or Indian Reserves might be affected by it [emphasis added].

Although the Supreme Court itself has cited this passage with approval (see, e.g., Construction Montcalm v. Quebec (Minimum Wage Commission), [1979] 1 S.C.R. 754 at 778), and some lower courts have used it as a touchstone in determining whether certain provincial laws could apply to Indians or on reserve (see, e.g., Re Park Mobile Home Sales Ltd. and Le Greely (1978), 85 D.L.R. (3d) 618 (B.C.C.A.) [hereinafter Park Mobile], Sarcee, supra note 59 at 436, Morrow J.A.; R. v. Twayoungmen (1979), 101 D.L.R. (3d) 598 (Alta. C.A.) at 601; Rempel Brothers, Concrete Ltd. v. Chilliwack (1994), 88 B.C.L.R. (2d) 209 (C.A.), in my view it errs by confusing and conflating the question of validity with the question of application. Taken full strength, it would mean that all valid provincial legislation applies to Indians and (at least) to reserve lands; only legislation "in relation to" one or the other—and therefore, by usual reckonings, invalid—would fail to apply. In subsequent decisions, however, the Supreme Court has affirmed, repeatedly and unanimously, that provincial laws can fail, despite their validity, to govern Indians or lands reserved for the Indians: see Derrickson, supra note 62 at 296, quoted supra note 107; Paul v. Paul, [1986] 1 S.C.R. 306; Dick 85, supra note 73 at 321-322, 325-327; Delgamaawkw, supra note 4 at 1121-1122. For somewhat similar criticisms of Cardinal, ibid., see Bankes, supra note 18 at 338-343.

110. Another important difference, as we'll see in more detail below, arises in respect of s. 88 of the Indian Act. Section 88 incorporates by reference, as federal law, certain provincial measures that on their own are constitutionally inapplicable to Indians. It does not and cannot, however, give federal effect to invalid provincial measures, because the determination of invalidity leaves nothing behind to incorporate. See infra notes 182-183 and the accompanying text.
3. **Summary**

The aim of this lengthy review has been to clarify the relationship—as it exists before and apart from s. 35 of the *Constitution Act, 1982*—between provincial authority and the rights that s. 35 protects. From it emerge two key propositions. The first is that s. 35 rights are, by their very nature, matters integral to the federal order’s exclusive jurisdiction over “Indians, and Lands reserved for the Indians.” The second is that the provinces therefore have no authority of their own to govern, define or dispose of such rights through mandatory measures. The second of these two propositions is a logically necessary consequence of the first, given the structure of the Canadian constitutional order as articulated and construed for over a century by the Privy Council and the Supreme Court of Canada. If this is so, it means that resort to s. 35’s justification procedure is not an option in respect of provincial measures that interfere with the use of s. 35 rights, because the rest of the constitution precludes them from having any such effect.

This, in my view, is the general state of things. There are, however, a few possible exceptions:

1) **Aboriginal peoples other than s. 91(24) Indians**

The reason why provinces, generally speaking, have no power to interfere with the use of s. 35 rights is because such rights are integral to the federal order’s exclusive authority over s. 91(24) Indians and lands. The federal order, however, does not have exclusive constitutional authority, as a general rule, over peoples or individuals who are not s. 91(24) Indians. If any such peoples prove nonetheless to have s. 35 rights, it is at a minimum arguable that provincial measures, generally speaking, would govern their exercise of such rights. If, for example, Métis turn out, as such, to have aboriginal rights despite not being s. 91(24) Indians, it is reasonable to suppose that the provinces will be able to regulate the exercise of such rights, subject to the justification requirements built into s. 35.

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111. But see *Delgamuukw, supra* note 4 at 1119: “The core of Indianness encompasses the whole range of aboriginal rights that are protected by s. 35(1)” (emphasis added).

112. For recent authority to this effect, see *R. v. Powley*, [1999] 1 C.N.L.R. 153 (Ont. Prov. Div.).

2) **Special constitutional authority**

The usual limitations on provincial powers cease to govern when the constitution itself expressly confers special powers on certain provinces. One potential source of such powers is the *Constitution Act, 1930*, which gives the force of law, “notwithstanding anything in the Constitution Act, 1867, or any Act amending the same, . . .” to the Natural Resources Transfer Agreements (NRTAs) signed in that year with the three Prairie provinces. According to those agreements, Indians within the boundaries of those provinces are now in some respects subject to “the laws respecting game in force [there] from time to time.”

There is some room for controversy about what impact this arrangement has on provincial jurisdiction; at times, the Supreme Court of Canada has said that it “does not expand provincial authority but contracts it.” It seems clear from the *Badger* decision, however, that it does give Prairie provinces some specific authority to regulate, through game legislation, some activities protected by treaty right, and that such regulation will stand in need of justification, in accordance with *Sparrow*, when it constrains such rights.

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115. For some background, see supra note 58. The *Constitution Act, 1930* also gives effect to Canada’s NRTA with British Columbia, but that agreement is irrelevant for present purposes.

116. See s. 12 of the Alberta and Saskatchewan NRTAs; s. 13 of the Manitoba NRTA. According to this same provision, however, the 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.”


118. See *Badger*, supra note 6 at 820 (“The effect of para. 12 of the [Alberta] NRTA is to place the Provincial government in exactly the same position which the Federal Crown formerly occupied”); 809-810. See also *Sundown*, supra note 6 at 413; *Horseman*, ibid. at 935-936. In principle, these powers would also reach any aboriginal (as well as treaty) rights of hunting, fishing or trapping in those provinces; all such rights within those provinces, however, happen already to be protected by treaties. For further discussion, see McNeil, “Rethinking Jurisdiction,” supra note 18 at 450-453.

119. See *Badger*, ibid. at 811-816; 820-822; *Sundown*, ibid. at 413, 417. As Kent McNeil points out, however, it had never been suggested by the Court prior to *Badger* that provincial infringements of the rights that are constitutionally guaranteed by [this provision in the NRTAs] could be justified. . . . The irony of *Badger* is that constitutional entrenchment of aboriginal and treaty rights by s. 35(1) . . . has actually resulted in a reduction of the protection accorded to Indian hunting, trapping, and fishing rights by para. 12 of the [Alberta] NRTA:

3) Treaty provisions incorporating provincial regulatory measures

Another exception arises where a treaty itself makes allowance for the operation of provincial law. Many of the numbered treaties made since Confederation, for instance, specify that the hunting and fishing rights they preserve or confer are to be subject "to such regulations as may from time to time be made by the Government of the country." The Supreme Court has said that the "Government of the country" clause in Treaty 8 contemplates the application of provincial, as well as federal, game conservation laws to the treaty Indians. Where this is so, the relevant provincial legislation operates not as an external constraint on the use of the treaty right, but as an internal limit on the right's protected scope, incorporated by reference into the treaty itself. The treaty, in other words, defines the right in a way that leaves room for the provincial measure's application. For that reason, other things being equal, the

120. See, e.g., the text of Treaties 4 and 7 as set out in A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke, 1880) at 333, 369 respectively. Treaties 3, 5 and 6 use the phrase "her Government of her Dominion of Canada" in place of "the Government of the country": see *ibid.* at 323, 346, 353, respectively.

121. See *Badger,* supra note 6 at 809-810. Compare *Sundown,* supra note 6 at 413 (Treaty 6). This is so, the court says, because

[i]n the West, a wide range of legislation aimed at conserving game had been enacted by the government beginning as early as the 1880s. Acts and regulations pertaining to conservation measures continued to be passed throughout the entire period during which the numbered treaties were concluded. ... [citing examples] ... In light of these conservation laws prior to signing the Treaty, the Indians would have understood that, by the terms of the Treaty, the government would be permitted to pass regulations with respect to conservation. ... It follows that by the terms of both the Treaty and [s. 12 of] the [Alberta] NRTA, provincial game laws would be applicable to Indians so long as they were aimed at conserving the supply of game:

*Badger,* *ibid.* There is at least one obvious problem with this line of argument. Treaty 8, as the court acknowledges (*ibid.* at 790), was made, and presumably came into force, on June 21, 1899; the province of Alberta, where most of the territory surrendered in Treaty 8 is located, and where the relevant activity in *Badger* took place, did not even come into existence until 1905: see *Alberta Act,* 4 & 5 Edw. VII, c. 3. (This surely accounts for the awkward fact that all the examples the court provided (in text omitted from the quotation above) of conservation legislation contemporaneous with the treaty are federal laws.) I struggle to understand how one can comfortably assume that the Indians signing Treaty 8 would have understood and expected that the harvesting rights they secured in the treaty would be routinely subject to laws enacted by a separate order of government that was not yet even in place at the time they made the treaty.

122. This may well be true too where Canada delegates to a province authority it acquired or retained pursuant to treaty. See, e.g., s. 1 of the federal-provincial agreement to deal with certain Treaty 3 matters (attached as the schedule to the statutory agreement statutes, *supra* note 85). It provided expressly for Ontario to have the power, reserved in Treaty 3 to "her Government of her Dominion of Canada," to take up lands for settlement and other purposes, and thereby to reduce the range of lands available under Treaty 3 for unregulated Indian hunting and fishing. Such an arrangement today, of course, would itself require justification in accordance with s. 35(1) of the *Constitution Act, 1982.*
provincial measure will apply to the relevant conduct pursuant to the treaty because it does not purport to be exercising powers of derogation that are exclusive to the federal order. In Badger, the Supreme Court suggests that the provincial measure ought in these circumstances to be subject to justification.¹²³

4) Affirmative treaty promises
There are two kinds of treaty rights: rights that protect certain kinds of aboriginal activity, such as subsistence hunting and fishing, from interference by legislatures or governments, and rights to enforce affirmative promises that the Crown has made—to make annual payments, for instance, or set aside lands and create reserves—to the aboriginal signatories. Where a province itself participates and makes affirmative promises (of money or land, say) in a treaty involving federal and aboriginal parties, it will, of course, have an obligation to keep its own promises¹²⁴ and, at a minimum, to justify, in accordance with s. 35, any failure to do so. It is possible that the same will now be true in situations where the federal government makes promises in a treaty that it cannot, for constitutional reasons, fulfill unilaterally. In Treaty 3, for example, Canada was unable to keep its promise to create reserves for the Saulteaux Ojibway after they surrendered the aboriginal interest in their lands, because, upon the surrender, those lands belonged absolutely to Ontario: Canada no longer had authority to manage their disposition.¹²⁵ In the unlikely event that such a circumstance arose again,¹²⁶ the province might

¹²³. Badger, supra note 6 at 811-816, 820-822. This conclusion too may deserve some further thought. If these treaties indeed provide that certain rights are to be defined in relation to the law of the province from time to time, then (by definition) provincial law cannot infringe such rights, because conduct in breach of provincial law cannot come within the protected scope of these rights. In circumstances such as these, where infringement itself is impossible, the task of justification is irrelevant.

The effect of this argument is, of course, to render any treaty rights governed by “Government of the country” clauses almost entirely subject to the whims of mainstream governments, both federal and provincial. That result is sufficiently disadvantageous to the aboriginal parties to these treaties to make one doubt the possibility that they gave it their free and informed consent. There is, however, no other obvious way of using these clauses to subordinate treaty rights to provincial law. And if, despite everything, this arrangement really is the one the treating parties intended to implement, then it seems more appropriate to enforce it than to use the extremely general language of s. 35 as a pretext for altering it.

¹²⁴. Assuming, of course, that it had the constitutional authority to carry out the promises it had made.

¹²⁵. See, e.g., St. Catherine’s Milling, supra note 50; Seybold, supra note 38, and, for discussion, supra note 38.

¹²⁶. The federal government has now made reciprocal arrangements with most, if not all, the provinces (I have no information about Quebec) to avoid this contingency. See supra note 58.
be called upon, pursuant to s. 35, to justify any failure to cooperate in setting aside the reserves.\footnote{127}{But see, e.g., Canada (A.G.) v. Ontario (A.G.), [1910] A.C. 637 (P.C.), esp. at 644-646 (despite receiving windfall under Treaty 3, Ontario not legally responsible for fulfilling treaty obligations Canada undertook, for its own reasons, unilaterally); \textit{Mitchell v. Peguis Indian Band}, [1990] 2 S.C.R. 85 at 143 [hereinafter \textit{Mitchell}] ("provincial Crowns bear no responsibility to provide for the welfare and protection of native peoples").}

Even at their broadest and strongest, these exceptions are extremely narrow and specialized; they focus exclusively on specific aboriginal peoples, specific provinces and kinds of activity, and specific treaties and those subject to them. Even considered as a group, they do not defeat or dilute the conclusion that the provinces, generally speaking, can have no recourse to justification in respect of s. 35 rights.\footnote{128}{See, e.g., \textit{Badger}, supra note 6 at 809.} Ordinary division of powers principles, as we have seen, will almost always neutralize, before and apart from the operation of s. 35 itself, any restrictive regulatory impacts provincial measures might have had on such rights.\footnote{129}{For similar conclusions, see Bankes, supra note 18 at 318-320.}

Or so one would have been entitled to think, at least until recently. As mentioned earlier,\footnote{130}{See supra notes 9, 21-22 and the accompanying text.} the Supreme Court in \textit{Delgamuukw}, and perhaps also in \textit{Côté}, appears to have suggested otherwise. It is now time to review these suggestions and to decide how much weight one ought to give them.

III. Arguments for Provincial Capacity

1. \textit{Independent Capacity: Delgamuukw, Côté and Badger}

In \textit{Côté}, again, the Supreme Court declared, quite sensibly, that provincial measures infringing s. 35 rights are subject to the same standards of justification—those first set out in \textit{Sparrow}\footnote{131}{See quotation accompanying supra note 15 and generally, supra notes 14-17 and the accompanying text.}—that govern federal measures.\footnote{132}{See supra note 2. See generally supra notes 2-6 and the accompanying text.} The \textit{Côté} decision, however, stops short of saying that provinces, generally speaking, may infringe s. 35 rights.\footnote{133}{See supra notes 17-19 and the accompanying text.} It was only later, in \textit{Delgamuukw}, that the Court took that further step. While explicating for the first time the test of justification for infringements of aboriginal title, the Court observed, as if in passing, that the "aboriginal rights recognized and affirmed by s. 35(1), including aboriginal title,
may be infringed, both by the federal (e.g., Sparrow) and provincial (e.g., Côté) governments."134

To date, this is all the Supreme Court has said about general provincial capacity to infringe s. 35 rights; it has offered neither elaboration nor argument in support of this assertion. Even so, there is some reason to suppose that the Court meant what it said; all the objectives the Delgamuukw Court identified as compelling enough to anchor justification of aboriginal title infringements—"the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims"135—involves objectives that typically come within provincial authority.136

What are we to make of this? If the provinces now have the power routinely to constrain the use of treaty and aboriginal rights, subject only to the justification requirements the court derived from s. 35(1), where and how did they get that authority?137

This is not a question the Supreme Court itself had to address, either in Côté or in Delgamuukw. In Côté, the Court concluded that the relevant provincial measure did not constrain materially the exercise of the relevant aboriginal or treaty rights;138 in Delgamuukw, the appeal did not concern specific provincial legislation or activity and the Court made no finding on the merits of the claim of aboriginal title.139 Perhaps this is why the Court's account of provincial infringement powers is so cursory. As a result, we can only guess what the Court itself might say in response to it. Our only option, for now at least, is to see what sense we can make of what the Court has said.

When the Court concluded in Delgamuukw that provincial governments may interfere with the use of aboriginal rights, it relied—exclusively and

134. Delgamuukw, supra note 4 at 1107. "However," the court adds ibid., "s. 35(1) requires that those infringements satisfy the test of justification."
135. Ibid. at 1111.
136. Kent McNeil, to the best of my knowledge, was the first to recognize this in print. See McNeil, "Rethinking Jurisdiction," supra note 18 at 454. See also Delgamuukw, ibid. at 1113, discussed supra note 60.
137. This question figures prominently in Kent McNeil's recent work on these issues. See McNeil, "Rethinking Jurisdiction," ibid. at 448-453; K. McNeil, Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got It Right?, (North York: Robarts Centre for Canadian Studies, York University, 1998) at 26-27 [hereinafter McNeil, Defining Aboriginal Title].
139. See Delgamuukw, supra note 4 at 1063, 1079, 1123.
without further comment—on its earlier decision in *Côté*. Again, though, the *Côté* decision does not say how—or, strictly speaking, even whether—provincial measures are able to infringe s. 35 rights; all it says is that *Sparrow* standards apply if and when such measures manage to do so. The Supreme Court anchors that conclusion exclusively, and without explanation or further comment, on the earlier *Badger* decision's "application of *Sparrow* test to provincial statute which violated a treaty right." And indeed, *Badger* does apply the *Sparrow* test to a provincial statute that violated a treaty right. As the Court itself took pains to emphasize, however, *Badger* is a highly unusual case. The Supreme Court's description of the provinces' usual predicament is virtually identical to the conclusions set out above on provincial capacity:

Pursuant to the provisions of s. 88 of the *Indian Act*, provincial laws of general application will apply to Indians. This is so except where they conflict with aboriginal or treaty rights, *in which case the latter must prevail*: [citing authority]. In any event, the regulation of Indian hunting rights would ordinarily come within the jurisdiction of the Federal government and not the Province.

What makes the provincial measure at issue in *Badger* an exception to this general proposition, the Court said, is the combined operation of the "Government of the country" clause included in Treaty 8 and paragraph 12 of the Alberta NRTA: two of the four specific exceptions to the usual rules on division of powers. "Both the Treaty and the NRTA," the Court concluded, "specifically provided that the [treaty] right would be subject to [provincial] regulation pertaining to conservation." Because these two extraordinary provisions were in play, it was "unnecessary" for the Court "to consider s. 88 of the *Indian Act* and the general application of...

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140. See supra note 134 and the accompanying text. The reference to the *Côté* decision (supra note 9) is nowhere more specific than this, but almost certainly has in mind the passage (ibid. at 185) quoted in the text supra note 15. This is Kent McNeil's view, as well: see McNeil, "Rethinking Jurisdiction," supra note 18 at 448-450.

141. *Côté*, ibid. at 185, quoted supra note 15 in accompanying text.

142. See *Badger*, supra note 6 at 809-816.

143. Ibid. at 809. Emphasis added.

144. See supra notes 120-123 and the accompanying text.

145. Paragraph 12, and its counterpart provisions in the NRTAs with Saskatchewan (s.12) and Manitoba (s.13), confers on these provinces special constitutional authority, despite anything in the *Constitution Act, 1867*, to regulate, through game legislation, Indian hunting and fishing. See supra notes 114-119 and the accompanying text.

146. *Badger*, supra note 6 at 809. See also, more recently, *Sundown*, supra note 6 at 24, where the court reaffirmed this conclusion.
provincial regulations to Indians”;¹⁴⁷ that general issue “does not arise in this case.”¹⁴⁸

By its own description, therefore, the Badger decision establishes provincial capacity to interfere with the use of s. 35 rights only pursuant to a “Government of the country” clause or an NRTA, and only in the limited circumstances to which those instruments pertain. It cannot be considered authority for the conclusion that provinces, generally speaking, may infringe s. 35 rights.¹⁴⁹ If anything, it strongly suggests the contrary. If we want to find a doctrinal foundation for the suggestion in Delgamuukw that s. 35 rights, as such, are open to provincial infringement, we are going to have to look elsewhere for it. There are three possible ways of seeking to integrate that proposition into existing constitutional law.

First, one might suppose that the Supreme Court intended by this suggestion to invite reconsideration of the whole notion of interjurisdictional immunity. The principal reason, as noted above, for concluding that provinces, generally speaking, have no power of their own to regulate the scope or exercise of s. 35 rights is that such rights come within the defining core of authority reserved exclusively to the federal order of government by s. 91(24) of the Constitution Act, 1867. If the courts were now to conclude that core federal matters were no longer exclusive—were, from a provincial standpoint, open for business, so to speak—then provincial measures could constrain the exercise of such rights, as long as they did not interfere with the operation of federal law and as long as the province could justify, as s. 35 requires, the specific constraints it imposed.

For better or worse, this approach is almost certainly no longer available. The principle of interjurisdictional immunity is not a peculiarity unique to federal authority over Indian lands and s. 91(24) Indians;¹⁵⁰ it is a pervasive and fundamental feature of the architecture of Canadian federalism,¹⁵¹ as even some of its harshest critics now, albeit reluctantly

¹⁴⁷  Ibid. at 810.
¹⁴⁸  Ibid. at 809.
¹⁴⁹  Compare McNeil, “Rethinking Jurisdiction,” supra note 18 at 448-453, which reaches the same conclusion.
¹⁵⁰  But see Ryder, supra note 107 who comes very close to arguing (e.g., at 362-364) that it should be.
¹⁵¹  See supra notes 99-110 and the accompanying text.
acknowledge. In 1988, the Supreme Court of Canada considered in detail the criticisms advanced against the principle, and reaffirmed it unanimously. Given this history, it would be difficult even in optimal circumstances to sustain the supposition that the Court intended these unnecessary and almost casual observations in *Delgamuukw* to undermine such firmly established doctrine.

The decisive impediment to it, however, is the fact that *Delgamuukw* itself is firm authority in support of the principle of interjurisdictional immunity. It was in *Delgamuukw* that the Supreme Court determined conclusively that aboriginal rights are among the matters at the core of exclusive federal authority; in that same decision, the Court affirmed that “s. 91(24) protects a core of federal jurisdiction even from provincial laws of general application, through the doctrine of interjurisdictional immunity.” Not only is this the proposition on which the Supreme Court based its conclusion that the provinces have no power, even through valid general measures, to extinguish aboriginal rights; it is the precedent that the Court has derived from *Delgamuukw* in its subsequent jurisprudence on interjurisdictional immunity.

A second possibility is that the *Constitution Act, 1982*, and perhaps s. 35(1) itself, somehow equipped the provinces with additional authority—new jurisdiction beyond that conferred in the initial division of powers—to regulate the exercise of existing aboriginal and treaty rights. As the *Badger* decision makes clear, this sort of thing has happened before; the

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152. I have been persuaded by Beetz J. [in *Bell 88*, supra note 33] and Professor Elliot that some degree of interjurisdictional immunity is entailed by the Constitution of Canada’s dual lists of exclusive powers. Otherwise, what would be incompetent to a legislative body in a narrowly framed law would be permitted if the law were framed more broadly. That cannot be right. However, I still think that the vital part test casts the immunity too widely. The old sterilization or impairment test would be more appropriate in my view:

Hogg, *Constitutional Law*, supra note 19 at 364 n. 129.

153. See *Bell 88*, supra note 33 esp. at 837-845.

154. *Delgamuukw*, supra note 4 at 1119.


156. *Ibid.* at 1121, 1134, and generally at 1115-1123.

157. The principle that each head of federal power possesses an essential core which the provinces are not permitted to regulate indirectly was recently restated by Lamer C.J. in *Delgamuukw*, supra, at para. 181, in the context of the federal power over Indians and lands reserved for Indians. Speaking for the majority of the Court, Lamer C.J. stated that s. 91(24) of the *Constitution Act, 1867*, protects a ‘core of federal jurisdiction’ over Indians and lands reserved for Indians even from provincial laws of general application, through the operation of the doctrine of interjurisdictional immunity:

*Ordon Estate*, supra note 33 at 497-498 (provincial law generally inapplicable to matters arising from maritime negligence law).
Constitution Act, 1930, which gave effect to the NRTAs, gave the Prairie provinces some special powers to regulate through game legislation certain aspects of Indian hunting, fishing and trapping activity, whether or not such activity is protected by s. 35 rights.\(^{158}\) If the 1982 amendments have a similar—only more general—impact on provincial authority, we would have a basis on which to conclude that the provinces now have the power to engage in justified regulation of s. 35 rights.

The fatal objection to this suggestion is that it has no foundation. To begin with, s. 35(1) itself says nothing about expanding the authority of the provinces; it recognizes and affirms existing treaty and aboriginal rights. In the course of determining what protection this new provision was to give to such rights, the Supreme Court in Sparrow insisted that the words of s. 35(1) be given a “generous, liberal interpretation” and agreed that any “doubtful expressions” within it should be “resolved in favour of the Indians.”\(^{159}\) It would be utterly inconsistent with these instructions to suppose, in the absence of much clearer language, that s. 35(1) leaves such rights with less protection from provincial interference than they would have had if it had not been enacted at all.\(^{160}\)

In fact, the Constitution Act, 1982 did confer some new authority on Canada’s provinces. Sections 50 and 51 gave effect to the provisions we now call s. 92A of the Constitution Act, 1867. These provisions exist to clarify and expand provincial authority over the marketing and development of certain energy forms and natural resources. They demonstrate how those responsible for the 1982 amendments proceeded when their purpose was to increase the constitutional authority of the provinces or otherwise to alter the pre-existing division of powers: by making those new powers explicit and by situating them in Part VI of the document (“Amendment to the Constitution Act, 1867”), so there could be no confusion about the impact they were to have. The contrast between these provisions and s. 35, which appears in Part II (“Rights of the Aboriginal Peoples of Canada”), could not be more clear. And unlike the 1930 amendments,\(^{161}\) sections 50 and 51 confer no special powers to regulate Indian activity, and they operate within the framework of the

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158. See supra notes 114-119, 142-148 and the accompanying text.
160. But see Kent McNeil’s observation, quoted at supra note 119, that s. 35(1), as interpreted and applied in Badger, supra note 6, appears to have made the harvesting rights protected in the NRTAs more vulnerable to provincial interference than they were before.
161. See supra notes 114-119 and accompanying text for quotations of, and citations to, the relevant text.
division of powers—subject, that is, to interjurisdictional immunity—not outside it.

Finally, Badger itself, as we saw, describes the 1930 amendments as exceptions from the constitution’s general rules: rules that assign to the federal order the power to regulate Indian hunting and that subordinate provincial laws to s. 35 rights. These are conclusions the Court could not have reached if it had understood the 1982 amendments to have given the provinces general authority to limit the use of such rights. Had that been the situation, the Court would have no occasion even to consider, for this purpose at least, the impact of the 1930 amendments.

The final possible source of provincial authority to restrict the use of s. 35 rights is s. 88 of the Indian Act. If there is doctrinal foundation for the Supreme Court’s recent intimations, in Côté and Delgamuukw, that the provinces routinely have such authority, it appears that s. 88 is where we shall have to find it.

The next section considers s. 88 in detail. Notice first, though, that any such scheme that depends on s. 88 is itself an acknowledgement that provincial measures as such have no weight to constrain s. 91(24) Indians’ use of s. 35 rights. It is, as described in more detail below, as federal—not provincial—law that provincial measures govern pursuant to s. 88. As a result, s. 88, even at its strongest and most facilitative, cannot equip provincial governments, acting as such, to constrain the use of s. 35 rights; at most, it can empower them to do so on behalf of the federal government. (Even that capacity, of course, is subject to the pleasure of Parliament.) Whatever the outcome of the s. 88 inquiry, therefore, it will almost certainly be incorrect, strictly speaking, to say that provincial governments themselves have the power routinely to infringe the s. 35 rights of s. 91(24) Indians.

162. See supra notes 142-148 and the accompanying text.
163. Even then, however, the Indians subject to the agreements adopted by the 1930 amendments would be entitled to the special protection those agreements themselves afford to Indian hunting, fishing and trapping 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” (see supra note 116 and accompanying text), because those protections continue to operate despite any Act amending the Constitution Act, 1867. See supra note 114. To that extent, the 1930 amendments could still affect results in Indian hunting and fishing cases in the Prairie provinces, even on the hypothesis suggested in the text.
164. One confirmation of this is the fact that s. 88 applies exclusively to provincial laws “which cannot apply to Indians without regulating them qua Indians”: see, e.g., Dick 85, supra note 73 at 326-328; infra notes 168-173 and the accompanying text.
165. See infra notes 168-173 and the accompanying text.
166. Compare McNeil, Defining Aboriginal Title, supra note 137 at 27 (“I think the Court will be obliged to accept the consequences of its decision that Parliament has exclusive jurisdiction over Aboriginal title. This means that, to the extent that infringements of Aboriginal title can be justified . . . the power to do so is exclusively federal”). See also McNeil, “Rethinking
2. Delegated Federal Authority: Section 88 of the Indian Act

a. How Section 88 Operates

The argument so far demonstrates that Canada's provinces have no independent capacity—except where the constitution or a treaty has specifically said otherwise—to interfere with the use by s. 91(24) Indians of their existing aboriginal or treaty rights. This means that such Indians' s. 35 rights will always take precedence—leaving aside these exceptional circumstances of special authorization—over provincial measures purporting to constrain their exercise. Despite the justification procedure embedded in s. 35, the provinces have no occasion to justify any such constraints because on their own they lack the constitutional authority to impose them.

Our question now is whether, and if so in what circumstances, s. 88 of the Indian Act intercedes to create any such occasion. The text of s. 88 reads:

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.

After years of struggle and (frankly quite understandable) confusion, the Supreme Court finally clarified in 1985 the impact of s. 88 on provincial law. There are, the Court said in Dick 85, "two categories of provincial laws[:] . . . provincial laws which can be applied to Indians without touching their Indianness, like traffic legislation [, and] provincial laws which cannot apply to Indians without regulating them qua Indians." It is, the court continued, "to the laws of the second category that s. 88 refers"; "[I]laws of the first category," on the other hand, "continue to apply to Indians ex proprio vigore, as they always did before the

Jurisdiction," supra note 18 at 453 ("Lamer C.J.C. did not really have his own views on exclusive federal jurisdiction in mind when he wrote the part of his judgment [in Delgamuukw] dealing with infringement of aboriginal title").

167. See supra notes 111-127 and the accompanying text.

168. See, e.g., Cardinal, supra note 73 at 727-728, Laskin J. (dissenting); Natural Parents, supra note 35 at 759-764, Laskin C.J.C. (for the plurality), 775-776, Martland J., 778-781, Ritchie J.; Kruger & Manuel, supra note 73 at 115-117; Four B, supra note 71 at 1048-1049. The dispute was between those for whom s. 88 incorporated by reference all provincial laws of general application and those who saw it as a mere declaration, for greater certainty, that such laws applied to Indians of their own force.

169. Dick 85, supra note 73 at 326.

170. Ibid. at 327.
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enactment of s. 88 in 1951... and quite apart from s. 88.”\(^{171}\) What s. 88 does, in other words, is to incorporate by reference, and apply as federal law, certain kinds of provincial laws that for constitutional reasons\(^ {172}\) could not otherwise apply to Indians. It leaves undisturbed those provincial laws that apply of their own force to Indians or on Indian lands.\(^ {173}\)

Provincial measures whose application would govern s. 35 rights are candidates for incorporation pursuant to s. 88 precisely because they cannot, as such, “apply to Indians without regulating them \textit{qua} Indians.”\(^ {174}\) Section 88, therefore, has at least some potential to assist in bringing s. 35 rights within the reach of such measures. It is clear from the text of s. 88 itself, however, that there are some limits on the assistance that it can provide, even in the best of circumstances. It is important to identify and acknowledge those limits.

b. \textit{Constraints Internal to Section 88}

First, s. 88 by its own terms subordinates all the provincial laws it incorporates to “the terms of any treaty.” By doing so, it gives Indian

\(^{171}\) \textit{Ibid.} at 326. This must be so, the court concluded, because of s. 88’s closing words: “and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.” Parliament, the court said (\textit{ibid.} at 327-328), has no authority to prescribe unilaterally the rules by which its own laws take precedence (have “paramountcy”) over valid and applicable provincial legislation. It may, on the other hand, “validly provide for any type of paramountcy of the \textit{Indian Act} over other provisions which it alone could enact, referentially or otherwise” (\textit{ibid.} at 328). Peter Hogg acknowledges the authority of this conclusion, but prefers the view that Parliament does have authority to prescribe a paramountcy rule in legislation: see Hogg, \textit{Constitutional Law, supra} note 19 at 395-396. For additional criticism and commentary on this issue, see Ryder, \textit{supra} note 107 at 352-357, 378-381.

\(^{172}\) See \textit{supra} notes 99-110 and the accompanying text.

\(^{173}\) Since 1985, the court, repeatedly and unanimously, has reaffirmed its support for this general approach: see, e.g., \textit{Derrickson, supra} note 62 at 296-297; \textit{Francis 88, supra} note 42 at 1028-1031; \textit{Côté, supra} note 9 at 191; \textit{Delgamuukw, supra} note 4 at 1121-1122.

The Supreme Court, however, has not been entirely conscientious in its application of this approach. In both \textit{Simon, supra} note 81 at 410-414 (decided less than a month after \textit{Dick 85, supra} note 73), and \textit{Sioui, supra} note 81, at 1065-1066, the court relied on s. 88 to protect a treaty right from restriction by provincial law, without first considering whether the provincial law at issue could apply of its own force to the relevant Indians. On other occasions, majority judgments—in contexts where it did not affect the result—have spoken loosely of provincial laws applying pursuant to s. 88 without acknowledging the distinction drawn in \textit{Dick 85, ibid.}, between provincial laws that apply of their own force and those that do not. See, e.g., \textit{Horseman, supra} note 117 at 936; \textit{Mitchell, supra} note 127 at 148, La Forest J. (for himself and two other judges), and \textit{Badger, supra} note 6 at 809, quoted in text \textit{supra} at note 143. In \textit{Dick 85, ibid.}, on the other hand, the s. 88 analysis was essential to the outcome (see \textit{ibid.} at 328). For that reason, and because the approach it set out has so often since been affirmed unanimously, I persist, despite these departures, in the view that \textit{Dick 85} is the law.

\(^{174}\) \textit{Dick 85, ibid.} at 326.
treaties and the rights they prescribe and protect.\textsuperscript{175} Virtually complete ascendancy over the provincial measures to which s. 88 applies:\textsuperscript{176} Better quality protection, in fact, than such rights receive from s. 35(1) of the \textit{Constitution Act, 1982}.\textsuperscript{177} Because the provinces have no power, except

\textsuperscript{175} It is now clear that this protection extends to all treaties the Crown makes with Indians, not just to those involving surrenders of land, and to all rights set out in those treaties, not just those that the Crown has conferred afresh: see \textit{Simon, supra} note 81 at 409-410; \textit{Sioui, supra} note 81 at 1042-1043.

\textsuperscript{176} See, e.g., \textit{George, supra} note 81 at 281 (reference to treaties included in s. 88 "so as to preclude any interference with rights under treaties resulting from the impact of provincial legislation"); \textit{Kruger & Manuel, supra} note 73 at 114-115 ("The Terms of the Treaty are paramount; in the absence of a treaty provincial laws of general application apply"); \textit{Simon, supra} note 81 at 410-414 ("it is clear that under s. 88 of the \textit{Indian Act} provincial legislation cannot restrict native treaty rights. If conflict arises, the terms of the treaty prevail": \textit{ibid.} at 413.; "[t]he effect of s. 88 of the \textit{Indian Act} is to exempt the Indians from provincial legislation which restricts or contravenes the terms of any treaty": \textit{ibid.} at 411); \textit{Sioui, supra} note 81 at 1065 ("Section 88 . . . is designed specifically to protect the Indians from provincial legislation that might attempt to deprive them of rights protected by a treaty"); \textit{Sundown, supra} note 6 at 418 ("The regulations in issue are provincial laws of general application that, if they were to apply to Mr. Sundown, would conflict with the treaty. Accordingly, they must give way to 'the terms of any treaty'"). See also \textit{Chippewas of Sarnia, supra} note 66 at 149 (para. 484).

\textsuperscript{177} This is so because s. 35(1) leaves room for justification of treaty rights infringements (see, e.g., \textit{supra} note 6 and the accompanying text), whereas s. 88 does not: see \textit{Côté, supra} note 9 at 191-192. In \textit{Côté}, the Supreme Court toyed briefly with the idea of eliminating this discrepancy. Although "[t]he statutory provision does not expressly incorporate a justification requirement analogous to the justification stage included in the \textit{Sparrow} framework," Lamer C.J.C. observed (\textit{ibid.} at 192), "I know of no case which has authoritatively discounted the potential existence of an implicit justification stage under s. 88" (emphasis in original).

Personally, I find this suggestion difficult to accept, either as an interpretation of the earlier cases (read the quotations set out above at note 176 and judge for yourself) or on its substantive merits. It would be truly remarkable to discover that Parliament, acting in 1951, arranged for treaty rights to receive only such protection as they would later turn out to derive from a 1996 decision of the Supreme Court about a 1982 constitutional document. Anachronisms aside, it makes perfect sense to suppose that a legislature might want to give greater statutory protection to certain rights than they would derive, by default, from the constitution. Human rights codes are an obvious example.

Review of s. 88's legislative history reveals a clear legislative intention to give Indian treaties absolute priority over conflicting provincial legislation. In 1951, Walter Harris, the minister responsible, assured aboriginal leaders he had convened to discuss the proposed revisions to the \textit{Indian Act}, when they asked about s. 87 (as it then was), "that provincial laws would not apply if they contravened any treaty, and/or any act of parliament, for example the \textit{Indian Act}": Canada, \textit{House of Commons Debates}, "A Summary of the Proceedings of a Conference with Representative Indians Held in Ottawa, February 28-March 3, 1951" (16 March 1951) at 1367. On the only occasion when s. 87 received thematic attention in the House of Commons, the minister assured the special committee reviewing the bill that "it does not affect their treaty rights at all." The committee, and eventually the House of Commons as a whole, approved s. 87 on the faith of that representation, having also been informed by senior department officials that "[i]n most cases the Indian is not subject to the game laws, particularly as they relate to hunting and fishing on their own reserves under provincial laws": see Canada, H.C., \textit{Special Committee appointed to consider Bill No. 79: An Act Respecting Indians, Minutes of Proceedings and Evidence} (23 April 1951) at 168, 171, respectively.
in unusual circumstances, to regulate treaty rights apart from s. 88, the
terms of a treaty prevail over provincial attempts to constrain them.\textsuperscript{178} The
most that s. 88 can do, in other words, is to equip provincial measures to
regulate the exercise of existing aboriginal rights.

Second, the only "Indians" to whom s. 88 renders the relevant provincial
measures applicable are statutory Indians: those who qualify as Indians
for purposes of the Indian Act.\textsuperscript{179} Provinces, therefore, are powerless,
even with s. 88's assistance, to regulate the existing aboriginal (or, of
course, treaty) rights of s. 91(24) Indians—Inuit most obviously,\textsuperscript{180} but
perhaps some Métis\textsuperscript{181} and others as well—who do not happen to meet the
current statutory definition of "Indian."

Third, there are important restrictions on the kinds of provincial laws
that s. 88 can incorporate. To begin with, although it can and does
incorporate and extend the reach of valid provincial measures that would
not on their own apply to Indians, s. 88 cannot and does not give any legal
effect to provisions that are themselves entirely beyond provincial
authority.\textsuperscript{182} Provincial measures whose primary purpose is to regulate
s. 35 rights or whose primary focus is on Indians or Indian lands, for
instance, are and remain invalid, and s. 88 does not "invigorate" them.\textsuperscript{183}
In addition, s. 88 incorporates and applies to statutory Indians only
provincial laws\textsuperscript{184} that are "of general application." Provincial measures
that do not "extend uniformly throughout the territory," or whose policy
is to impair the status or capacity of a particular group,\textsuperscript{185} cannot therefore
control the shape or the use of s. 35 rights, even by virtue of s. 88. Finally,
s. 88 refers only to “Indians”; it says nothing about the application of provincial law to reserves or to Indian lands. That omission has led a significant number of courts and commentators to conclude that provincial measures have no application to such lands, even pursuant to s. 88. If this conclusion is sound, it means that s. 88 will not equip provincial measures to regulate the exercise of aboriginal title, or of other s. 35 rights insofar as they involve the use of s. 91(24) lands.

The strongest claim one can make in respect of s. 88, therefore, is that it may make it possible for general provincial laws that are valid in their own right to govern statutory Indians in their use of aboriginal rights. Even then, such laws will not govern when, and to the extent that, they “make provision for any matter for which provision is made by or under” the Indian Act and they may well have no application to the exercise of such rights anywhere on Indian lands.


For relevant dicta from the Supreme Court of Canada, see Cardinal, supra note 73 at 727-728, Laskin J. (dissenting on other grounds) (s. 88 “deals only with Indians, not with Reserves”); Derrickson, supra note 61 at 297-299 (which considered the arguments but did not decide the issue); Delgamuukw, supra note 4 at 1122 (“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)”). Superior courts in both B.C. (Stoney Creek, ibid. at 204-205) and Ontario (Chippewas of Sarnia, ibid. at 151-152 (para. 493), however, have held in recent months that this passage from Delgamuukw should not be taken to have decided the issue.


188. I believe this issue is much more complicated than most of the courts and commentators (cited supra at notes 186-187) have acknowledged, but that the prevailing view is probably, on balance, the better one. But this too must await another day.
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Within this circumscribed range, however, there is some reason to conclude that s. 88 authorizes provincial legislation to govern the use of aboriginal rights. Nothing in the text of s. 88 itself protects aboriginal rights from the impact of the provincial measures it incorporates. And in *Kruger & Manuel*, the Supreme Court expressly rejected a submission that unsurrendered hunting rights should receive the same protection under s. 88 as treaty rights. “However receptive one may be to such an argument on compassionate grounds,” the Court concluded,

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.”

Assume, then, that s. 88, to this extent at least, facilitates provincial control over the use of aboriginal rights: that incorporated provincial standards, subject to the qualifications already identified, govern aboriginal rights just as they would if they had been enacted federally. Even if this

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190. I do not mean to suggest that this assumption is either inevitable or clearly sound. In *Kruger & Manuel*, ibid. at 108-109, the Supreme Court expressly declined to consider the issue of aboriginal title. As Kent McNeil recently observed, courts are, strictly speaking at least, still free to read s. 88 differently when weighing its impact on aboriginal title or on other aboriginal rights that the constitution now protects: see McNeil, “Rethinking Jurisdiction,” supra note 18 at 439 n. 38. And on at least two occasions now, the Supreme Court itself has suggested, in passing, a different view of s. 88’s relation to aboriginal rights: see *Badger*, supra note 6 at 809, quoted in text accompanying supra note 143; *Delgamuukw*, supra note 4 at 1122-1123, quoted below in this note.

McNeil has also recently offered a different, affirmative argument against the assumption I have made (for convenience) in the text: see McNeil, “Rethinking Jurisdiction,” ibid. at 437-439, 447-448. His argument begins from the well-established proposition that neither Crown nor legislature can extinguish aboriginal rights except by displaying a “clear and plain intention” to do so: see, e.g., *Sparrow*, supra note 2 at 1095-1099; *Gladstone*, supra note 4 at 748-755; *Delgamuukw*, supra note 4 at 1120, 1122. This is so, in significant part, he continues, because of the strong interpretative presumption in our law against interference with vested rights. At common law, however, that presumption operates generally in respect of the impairment, not just the extinguishment, of such rights: McNeil, ibid. at 438-439, citing *Delgamuukw* (C.A.), supra note 186 at 155-158. In McNeil’s view, therefore, “there appears to be no reason why the clear and plain test should be applied any less rigorously to infringement than it is to extinguishment of Aboriginal title” (ibid. at 439). Now in *Delgamuukw*, ibid., the Supreme Court concluded (at 1121-1123), as the Court of Appeal had before it (at 172), that s. 88 of the *Indian Act* did not equip provinces to extinguish aboriginal rights because it did not disclose a sufficiently clear and plain intention that they were to have the delegated power to do so. But where, then, McNeil asks (ibid. at 437), “is the clear and plain intent that s. 88 was meant to permit provincial laws to ‘diminish, impair or suspend the exercise of’ aboriginal rights?” The court’s observation that s. 88 “was clearly not intended to undermine Aboriginal rights” (*Delgamuukw*, ibid. at 1122-1123) suggests, he concludes, “not only that
assumption is sound, s. 88 cannot have this effect unless such a scheme can be justified—like any other federal arrangement that regulates aboriginal rights—in accordance with s. 35(1) of the Constitution Act, 1982.\textsuperscript{191} It is now time, finally, to return to s. 35(1) to see what constraints, if any, it imposes on s. 88’s operation.

c. Section 35’s Impact on Section 88

i. What Stands in Need of Justification?

For constitutional reasons, mandatory legislative measures cannot constrain the exercise of s. 35 rights unless, and except where, any constraints they would impose upon such rights can be justified.\textsuperscript{192} But how does this requirement govern measures incorporated pursuant to s. 88 of the Indian Act? Does it mean that provinces are now free to interfere with the exercise of aboriginal rights whenever they can justify interference? Or is it the entire arrangement that seems to give them that power that stands in need of justification in accordance with s. 35(1)?

We still have no guidance on this question from the Supreme Court of Canada. This very issue arose, however, before the B.C. Court of Appeal in two companion cases decided in 1993. In both, the Court considered and rejected the submission that s. 88 itself might be unconstitutional. Any such submission, it held in the first case, Alphonse, s. 88 does not authorize extinguishment of Aboriginal rights, but that it does not authorize infringement of those rights either, as that too would ‘undermine’ those rights” (McNeil, \textit{ibid.} at 448; emphasis in original).

This argument deserves careful consideration on its merits. The approach it proposes to the infringement inquiry, however, is quite different from the one the courts, so far, have adopted. Current doctrine distinguishes sharply between infringement and extinguishment issues (see, e.g., Chippewas of Sarnia, \textit{supra} note 66 at 163 (para. 544)). When addressing issues of infringement, the Supreme Court has focused almost exclusively on “whether the legislation in question has the effect of interfering with an existing aboriginal right” (\textit{Sparrow}, \textit{supra} note 2 at 1111 (emphasis added); compare \textit{Badger}, \textit{supra} note 6 at 816-820; \textit{Nikal}, \textit{supra} note 4 at 1059-1061; \textit{Gladstone}, \textit{ibid.} at 755-762; \textit{Adams}, \textit{supra} note 4 at 130-131; \textit{Côté}, \textit{supra} note 9 at 185-189), not on whether it was intended to have any such effect. Only in extinguishment cases (see, e.g., \textit{Sparrow}, \textit{ibid.} at 1095-1099; \textit{Gladstone}, \textit{ibid.} at 748-755) has it even paused to consider what impact the governmental measure at issue may have been intended to have on aboriginal rights. It is not clear, either, how the justification inquiry, as described to date, would operate if infringement of such rights necessarily reflected the undeniable intention of the government responsible.

Intriguing as McNeil’s argument is, it may, for these reasons, be too late (or perhaps too early) for courts to incorporate it into their general approach to aboriginal rights infringement. If so, it seems to me unlikely that they would single out s. 88 for interpretation and analysis in these terms.

\textsuperscript{191} See \textit{Delgamuukw} (C.A.), \textit{ibid.} at 172.

\textsuperscript{192} See, e.g., \textit{Nikal}, \textit{supra} note 4 at 1065-1068; \textit{Adams}, \textit{supra} note 4 at 133-135; \textit{Côté}, \textit{supra} note 9 at 189-190, 196-197.
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must rest on the premise that aboriginal rights are absolute. *Sparrow* has held that aboriginal rights are not absolute and that they may be impaired or restricted by valid regulations. Thus, a provincial law of general application, incorporated as federal law by s. 88, may have the effect of interfering with the exercise of aboriginal rights without being unconstitutional.\(^{193}\)

Even if s. 88's only function were “the incorporation of derogations from aboriginal rights,” it went on to say,

some interference with aboriginal rights by the effect of provincial law in combination with s. 88 could be justified. It is true that the incorporation of provincial laws by s. 88 could produce a result which is inconsistent with s. 35 of the *Constitution Act, 1982*; however, it is the incorporated law which must be examined and, if necessary, read down to eliminate the unconstitutional effect.\(^{194}\)

In *Dick 93*, the companion case, the Court of Appeal put it this way:

the fact that s. 88 referentially incorporates laws that affect Indians qua Indians does not necessarily mean that s. 88 is inconsistent with s. 35(1). The purpose of s. 88 is to give effect to provincial laws of general application. An unconstitutional regulation will not be incorporated as federal law. The question whether incorporated legislation may be challenged as violating s. 35(1) is distinct from the issue whether s. 88 is intra vires the powers of Parliament. Section 88 is an enabling provision. By itself it does not interfere with the exercise of aboriginal rights. In my opinion it is not inconsistent with s. 35(1).

If incorporated provincial legislation offends s. 35(1), and fails to meet the *Sparrow* tests, it will have no force and effect with respect to Indians by reason of s. 52(1) of the *Constitution Act, 1982*. The provisions of s. 88 play no part in that particular constitutional analysis.\(^{195}\)

According to these two decisions, s. 88 is nothing more than a transparent medium that courts look through, not at, in appraising provincial measures whose application as federal law interferes with aboriginal rights. If the impact of the provincial measure, standing alone, can be justified, then the measure survives and s. 88 gives full effect to it. If it fails the justification inquiry, then it, not s. 88, is without force or effect.

These conclusions, which also have the endorsement of a majority panel of the Saskatchewan Court of Appeal,\(^ {196}\) provide, if sound, a foundation for the Supreme Court’s later suggestion that the provinces

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may, after all, infringe aboriginal rights. From a doctrinal standpoint, however, this conclusion seems to me to be just wrong. In my judgment, it is s. 88 itself that requires justification. Here is why.

Aboriginal rights, like all other matters situated at the core of enumerated heads of exclusive federal authority, are matters that the provinces have never had power of their own to regulate, even in justified ways or for justified purposes. Provincial measures that make it their business to regulate or to govern such matters are for that reason invalid. Provincial measures that would have the effect of regulating such matters are given an interpretation that denies them that effect, in order to preserve the validity of their other applications. It is because the courts accept that a province's controlling intention is to act exclusively within the limits of its own powers that such measures have any legal force.

This circumstance has two key implications for s. 88 analysis. It means that s. 88 gives the measures it incorporates a range of applications that, on their own, they could not possibly have. And it means that s. 88 has given them that additional range despite the fact that—and only because—the originating province intended, by necessary constitutional hypothesis, that they not have it.

These implications, in turn, tell us two extremely important things about the aboriginal rights infringements that result from measures that s. 88 incorporates. First, such infringements are possible exclusively because of s. 88's intercession. Nothing the province itself could do could restrict, in any enforceable way, the exercise of such rights. Second, when such infringements occur, they occur in spite of the province's own controlling intention that its own measures give rise to no such result.

Finally, when such measures take on the character of federal law, their implementation and enforcement in that capacity is, necessarily and appropriately, subject to federal policy, priorities and discretion.

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197. See Delgamuukw, supra note 4 at 1107, quoted in text supra note 134.
198. See supra notes 57-110 and the accompanying text. Ignore for present purposes the exceptional circumstances already identified (see supra notes 111-127 and the accompanying text), with which s. 88 has nothing to do in any event.
199. See supra notes 99-110 and the accompanying text.
200. It would be a denial of the basic concept of federalism to permit the provincial authorities to have exclusive control of the enforcement of [the relevant federal] legislation and the sole determination as to how and when the legislation should be enforced by institution of prosecution or against whom such prosecution should be instituted. If the legislative field is within the enumerated heads in s. 91 [of the Constitution Act, 1867], then the final decision as to administrative policy, investigation and prosecution must be in federal hands:
administration of such measures in respect of statutory Indians, they do so, strictly speaking, pursuant to federal instructions and to delegated federal authority.

All such infringements occur, therefore, not just because of federal, not provincial, activity and decisions, but also pursuant to federal objectives, not provincial ones. 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.

There are some important differences, though, between the real s. 88 and a free-standing duplicate federal scheme. Because of them, it is simply unsound to suggest that s. 88’s operation is justified in a given instance if and only if the infringing provincial measure it incorporates can be justified. To begin with, as we have seen at length, the provincial measure incorporated stands in no need of justification because it is incapable, as such, of infringing aboriginal rights. There are at least two other reasons, though.

First, we know from Sparrow and later Supreme Court decisions that there can be no justification for infringing an aboriginal right unless the infringement is in service of a compelling and substantial objective.201 (At least twice already, the Supreme Court has dismissed a federal effort at justification because the objective on which it was based was not compelling or substantial enough.202) We know too, though, that s. 88 itself exists to serve objectives different from those that animate the provincial measures it incorporates. This is necessarily true, again, because it cannot be an objective of a valid provincial measure to seek, for whatever reason, to include aboriginal rights within some otherwise general scheme of regulation or control. But even apart from that, it is clear that s. 88 exists to do different work from that done by the provincial measures it incorporates. Those measures themselves have controlling

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201. See, e.g., Sparrow, supra note 2 at 1113; Nikal, supra note 4 at 1064; Gladstone, supra note 4 at 762, 773-775; Delgamuukw, supra note 4 at 1111.
202. See, e.g., Adams, supra note 4 at 133-134; Côté, supra note 9 at 189.
objectives such as conservation, public safety, certainty and finality in transactions, or whatever; "[t]he purpose of s. 88," on the other hand, according to the B.C. Court of Appeal in Dick 93, "is to give effect to provincial laws of general application." Whatever else one may think of them, such second-order objectives as those underlying s. 88 raise different justification issues from those raised by such first-order issues as conservation or safety. An 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, because its controlling objectives are both numerically and qualitatively different from any of theirs.

Second, the Supreme Court, in a closely related context, has expressly rejected such an approach. Consider the following lengthy passage from Adams:

In a normal setting under the Canadian Charter of Rights and Freedoms, where a statute confers a broad, unstructured administrative discretion which may be exercised in a manner which encroaches upon a constitutional right, the court should not find that the delegated discretion infringes the Charter and then proceed to a consideration of the potential justifications of the infringement under s. 1. Rather, the proper judicial course is to find that the discretion must subsequently be exercised in a manner which accommodates the guarantees of the Charter...

I am of the view that the same approach should not be adopted in identifying infringements under s. 35(1) of the Constitution Act, 1982. In 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. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will 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.

Adams dealt with conferral of administrative discretion, not with adoption by reference of provincial legislation, but the two settings nonetheless have some striking structural parallels. The scheme at issue in Adams left the exercise of the appellant’s aboriginal fishing rights at the mercy of a minister’s discretion; s. 88 exposes a broader range of aboriginal rights

203. Dick 93, supra note 195 at 453, quoted at more length in text at supra note 195.
204. Adams, supra note 4 at 131-132 (emphasis in original).
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 schemes it incorporates will operate with sufficient regard for aboriginal rights.

The option the Court considered and specifically rejected in Adams would have provided for case-by-case review, according to Sparrow standards, of decisions taken in the exercise of the minister's discretion under the fisheries regulations. That, as the Court acknowledged, is what ordinarily would have happened if the issue had been a Charter infringement instead of a contravention of s. 35. It chose a different path for s. 35, as I read Adams, because of the federal government's fiduciary obligation to aboriginal peoples. What Adams makes clear is that the federal order of government has an enforceable obligation, when conferring a discretion, to take care from the outset that the discretion not be used to interfere unacceptably with aboriginal rights. After-the-fact adjudication of particular instances, the Court insisted, is not good enough.

Exactly the same considerations should govern our understanding of s. 88. The Supreme Court in Adams characterized the scheme it was appraising there as "an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance";\textsuperscript{205} s. 88 is the statutory equivalent. The approach the Alphonse court adopted—after-the-fact consideration of the impacts of particular measures, or even of their specific provisions—would make it impossible for the courts to confront the structural threat that s. 88 itself represents to aboriginal rights.

The difference between s. 88 and specific federal measures crafted to duplicate, with some particularity, for Indians the impact individual provincial measures have on everyone else is that the federal government, in designing such particular measures, must turn its mind to the impact they will have on aboriginal rights and decide what it intends to do about it. The effect of s. 88, on the other hand, is to incorporate—essentially whole, with no prior review, and with no provision for protection of aboriginal rights—whole chunks of changing provincial law because those measures, once incorporated, will govern matters integral to

\textsuperscript{205} Ibid. at 132, quoted at length in text at supra note 204.
Indianness. 206 This is just the kind of enterprise that ought to engage the enforceable federal obligation, articulated in Adams, to take care in designing measures that they be mindful of aboriginal rights. 207 

This argument in no way rests, as the court in Alphonse supposed, "on the premise that aboriginal rights are absolute." 208 It assumes that s. 88, like any other federal measure that constrains aboriginal rights, is susceptible to justification. If the federal government can justify, in accordance with the standards prescribed under s. 35, a blanket incorporation of provincial legislation, with or without a subsequent case-by-case review of particular measures, then s. 88 deserves to stand.

If it cannot, on the other hand, then provincial measures, generally speaking, can have no enforceable impact on the exercise of aboriginal rights. Any such conclusion, however, flows not from a court's assessment of the merits of s. 88, but from the structure of the constitution itself. 209

ii. Can Section 88 Be Justified?

Can the federal government justify, in the manner that Sparrow prescribes, the shifting and generic constraints that s. 88 imposes on the use of aboriginal rights? In my judgment, the answer must be no.

Let us assume (though one could argue the point) that the objectives that s. 88 exists to serve—filling gaps in the federal law and harmonizing the legal regimes to which statutory Indians will be subject from time to time—are compelling and substantial enough to anchor a s. 35 justification. Even on this assumption, s. 88 will be justified only if it serves those objectives in a justified manner. In appraising whether Canada's means of pursuing these ends is justified, we must inquire, among other things, "whether there has been as little infringement as possible in order to effect the desired result," and whether it demonstrates sufficient "sensitivity to and respect for the rights of aboriginal peoples." 210

I do not believe that s. 88 can meet these standards, even if we acknowledge, as Nikal, with reason, says we must, that an infringement

206. See supra notes 168-174 and the accompanying text.
207. Compare McNeil, "Rethinking Jurisdiction," supra note 18 at 440-441:
the honour of the Crown is at stake in its dealings with the Aboriginal peoples. How would that honour be upheld by Parliamentary delegation of authority to the provinces to infringe Aboriginal rights through the mechanism of referential incorporation? Would this not be a dishonourable abdication of the responsibility that was placed primarily on the federal government by s. 91(24) of the Constitution Act, 1867? 208. Alphonse, supra note 18 at 421, quoted at more length in text at supra note 193.
209. See supra notes 57-166 and the accompanying text.
210. Sparrow, supra note 2 at 1119.
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will meet these tests "[s]o long as . . . in the context . . . [it] could reasonably be considered to be as minimal as possible." 211 As drafted, it makes no allowance whatever for aboriginal rights, either by according them some statutory priority (as it did for treaty rights), 212 or by requiring some prior review of incorporated statutes to ensure some threshold of sensitivity or of proportionality. 213 A version with either or both of these features would serve s. 88's purposes substantially less obtrusively. As is, its operation assumes that all provincial laws that meet its requirements ought to govern statutory Indians, even—indeed, especially—in the matters characteristic of Indians as such, 214 irrespective of the impact such laws may have on aboriginal rights. If this result is a justifiable consequence of a federal effort to complement and harmonize the mainstream legal regime, then aboriginal rights have no independent weight in our constitutional order. 215

For all these reasons, the better view is that s. 35 of the Constitution Act, 1982 deprives s. 88 of its force and effect as against aboriginal rights. 216 This, of course, does not necessarily mean that s. 88 is simply unconstitutional; the courts might well elect to read it down, in the usual way, so that it might survive to do other work. 217 So understood, it could continue to make use of eligible provincial legislation to regulate matters unrelated to s. 35 rights but otherwise integrally related to Indianness. What it could not do is equip the provinces, even notionally, to control the use of aboriginal rights.

Conclusion

Section 35(1) of the Constitution Act, 1982 recognizes and affirms the existing treaty and aboriginal rights of the aboriginal peoples of Canada. One of the most important questions that remains unresolved even now,

211. Nikal, supra note 4 at 1065. Compare Gladstone, supra note 4 at 767-768.
212. See supra notes 175-178, 189-191 and the accompanying text.
213. See supra notes 204-207 and the accompanying text.
214. See supra notes 168-174 and the accompanying text.
215. There might be reason to moderate this conclusion if there were evidence that s. 88 had been enacted in response to some emergency. There is, however, no such evidence. Section 88 was only one of several new measures included in the thoroughgoing Indian Act revision enacted in 1951 (as S.C. 1951, c. 29). That enactment culminated a deliberative process that had begun in 1946. For a brief description of that process, see Canada, House of Commons, Debates, 21st Parl., 2d session, 3936 (21 June 1950).
216. For an earlier, different argument that reaches the same conclusion, see Slattery, "Question of Trust," supra note 97 at 285-286.
217. The Supreme Court has already given two suggestive but inconclusive indications that this is its view of s. 88. See Badger, supra note 6 at 809, quoted in text at supra note 143; Delgamuukw, supra note 4 at 1122-1123, supra note 190.
almost twenty years after s. 35 first came into force, concerns the extent of provincial power to regulate the exercise of such rights.

The Supreme Court’s decision in Delgamuukw has undoubtedly intensified lawyers’ interest in this issue, but also, alas, their confusion about it, because of the principal judgment’s conflicting messages. On the one hand, it asserts quite clearly that provinces may indeed interfere, in justified ways, with the exercise of s. 35 rights; on the other, it has told us that such rights lie within the essential core of exclusive federal authority over Indians and Indian lands, and therefore, as a general rule, beyond the provinces’ reach even apart from s. 35.219

The purpose of this article has been to examine this issue, and these two propositions, within the larger context of the Canadian constitutional order. As it turns out, the latter of these two contrary messages, on which the Supreme Court relied in concluding that provinces have no authority to extinguish s. 35 rights, is fully consistent with established Canadian constitutional doctrine; indeed, it follows necessarily from the original distribution of governmental powers and from the Court’s own earlier definition of aboriginal rights. That doctrine, however, does not just preclude the provinces from extinguishing such rights; it also denies them authority to regulate their exercise. In subsequent jurisprudence, the Supreme Court has used Delgamuukw as authority for this broader limitation on the scope of provincial power.220 The former message in Delgamuukw, in comparison, fares much less well. Nothing in that decision depends upon the Supreme Court’s assertion that provinces may infringe s. 35 rights; moreover, that assertion itself draws no support from the authorities cited there in its defence. We cannot regard it as a repudiation of recognized principles that limit the scope of provincial authority, because the Supreme Court has reaffirmed those principles in Delgamuukw itself and subsequently. There is no plausible basis on which to conclude that the 1982 amendments to the constitution gave the provinces new authority over s. 35 rights. And s. 35 itself precludes both orders of government from relying on s. 88 of the Indian Act to give effect for that purpose to otherwise valid provincial measures.

218. Delgamuukw, ibid., esp. at 1107. For discussion, see supra notes 134-136 and the accompanying text.  
219. Ibid. at 1116-1121.  
220. See Ordon Estate, supra note 33 at 497-498, quoted supra note 157.
The provinces, therefore, remain without power to limit, even in justified ways, the use of s. 35 rights by s. 91(24) Indians or on s. 91(24) lands, except in a very few extraordinary circumstances: where special provisions in treaties or constitutional instruments give them specific authority to do so; where they themselves have validly made affirmative promises in treaties, or where, for constitutional reasons, the federal government needs the cooperation of a province to implement treaty promises of its own.

If this analysis is correct the consequences may be profound and, for some, profoundly disturbing. We in non-native society have become quite attached to the notion that we have the capacity, at the end of the day, to ensure that our own arrangements prevail. It may indeed be disconcerting to find, in respect of one of our constitutive orders of government, that that capacity is now in doubt. Disconcerting or not, it is a conclusion that seems to me inescapable based on the structure of our constitution, as interpreted by any number of judicial decisions of the highest authority. I frankly see no principled basis on which to resile from it. This is, to all appearances, the business we have chosen, and we are going to have to find a way, together, to make the best of it.

221. It makes sense, however, to suppose that provinces may control the exercise elsewhere of such rights by any aboriginal peoples who are not s. 91(24) Indians. See supra notes 111-113 and the accompanying text.

222. For discussion of these exceptions, see supra notes 114-127 and the accompanying text.