

Negative Capability: Of Provinces and Lands Reserved for the Indians

KERRY WILKINS*

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* Of the Ontario bar and adjunct professor of law, University of Toronto. These are, of course, personal views, not necessarily shared by any of my employers or colleagues, past, present or future. Special thanks to Kent McNeil, Patrick Macklem, Tim McCabe, Eileen Hipfner and two anonymous reviewers at the Indigenous Law Journal for their helpful and educative comments on an earlier draft of this work, and to Kent, as well, for access to some of his unpublished work. Thanks also to the students in LAW 370 at the University of Toronto. Any remaining miscues here are, as always, in spite of their best efforts.

Canada's constitution assigns to the provinces general power to govern the lands and resources located within their boundaries but reserves to the federal order of government the authority in relation to "Lands reserved for the Indians." Under Canadian law, the mere existence of this federal power imposes substantial restrictions on provincial authority to regulate these lands and the interests in them. How, then, is one to determine which, if any, provincial measures having to do with land have legal force on, or in application to, such lands? And which lands, in the end, are subject, under mainstream Canadian law, to provincial, and which exclusively to federal, authority?

Release of the Delgamuukw decision in late 1997 made the task of answering the first of these questions more urgent and the task of answering the second more difficult. We now know that "Lands reserved for the Indians" include not only Indian reserves set aside deliberately but all lands subject to valid Indian claims of Aboriginal title. We do not yet know which lands those are, but we do know that non-Aboriginal people believe they have rights and interests, derived from provincial authorities, in many of the lands that are in dispute. The legal status of those putative rights and interests is now open to question.

This article explores these issues from within the matrix of existing Canadian constitutional law. It argues that provinces, acting as such, have no power to determine or to regulate matters relating to the ownership, possession, occupation, use or disposition of Indian lands, even in the absence of countervailing federal measures, and it doubts that any mechanism now exists in Canadian law to extend, for practical purposes, the reach of provincial measures to such lands. It suggests a test for use in ascertaining which provincial measures generally can, and which cannot, apply on lands reserved for the Indians; it wonders, on constitutional grounds, how provincial law can authorize enforcement on such lands of provincial measures that do apply there; and it documents some of the challenges now facing both Aboriginal and non-Aboriginal peoples interested in clarifying which lands are Indian lands and which are not.

I INTRODUCTION

Like all national constitutions prescribing federal systems of government, Canada's constitution distributes the subject-matter jurisdiction it confers exhaustively between a national (federal) and more local and territorial (provincial) orders of government.¹ Here, as in all federal states that have In-

1. See *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 91-95, reprinted in R.S.C. 1985, App. II, No. 5 [hereinafter *Constitution Act, 1867*]; *Ontario (A.G.) v. Canada (A.G.)* ("Reference Appeal"), [1912] A.C. 571 (P.C.) at 581.

digenous populations, the way in which the constitution distributes the range of substantive powers affects, and indeed determines, the ways in which, and the extent to which, the duly constituted mainstream orders of government may deal with Aboriginal peoples and with their claims, needs, rights and interests.

Different federal orders may, and do, make different provision for this interface. In Australia, for instance, the Commonwealth has legislative authority to pass laws with respect to “[t]he people of any race for whom it is deemed necessary to make special laws,”² but the states, it appears, are free to deal with Aboriginal peoples and their interests just as they might with the interests of any others within their boundaries, as long as what they do does not conflict with validly enacted Commonwealth statutes³ such as the *Racial Discrimination Act*⁴ or the *Native Title Act*.⁵ In the United States, on the other hand, the underlying constitutional proposition on this issue is, despite a host of subsequent clarifications and exceptions, that “the whole intercourse between the United States and [the Cherokee N]ation,” and by extension Indian nations in the U.S. generally, “is, by our constitution and laws, vested in the government of the United States,”⁶ that is, the federal government. This includes subject-matter jurisdiction in relation to Indian lands.⁷

In this respect, as Canadian readers already know, the constitution of Canada more closely resembles the American than the Australian scheme. It gives the federal order of government exclusive legislative and executive authority over “Indians, and Lands reserved for the Indians.”⁸ (In this article, I focus exclusively on the latter). As a result, such lands are an explicit exception⁹ to the more general proposition that the provinces are the ones with

2. *The Constitution* (Australia) (U.K.), 63 & 64 Vict., c. 12, s. 51(xxvi).

3. *Ibid.*, s. 109. For a thorough and careful judicial discussion of these and related intricacies, in a case that involves Aboriginal peoples and their interests in land, see *Western Australia v. The Commonwealth* (“*Native Title Case*”) (1995), 183 C.L.R. 373 (H.C. Aus.).

4. *Racial Discrimination Act*, 1975 (Cth.).

5. *Native Title Act*, 1993 (Cth.), as amended.

6. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) at 561, Marshall C.J.; U.S. Const., art. I, § 8, cl. 3.

7. See e.g., *Oneida Indian Nation v. Oneida (County of)*, 414 U.S. 661 at 670, 94 S. Ct. 772 at 778-779 (1974); *Oneida County, N.Y. v. Oneida Indian Nation*, 470 U.S. 226 at 234-235, 105 S. Ct. 1245 at 1251-1252 (1985).

8. *Constitution Act, 1867*, s. 91(24).

9. Not the only such exception. Section 91(1A) of the *Constitution Act, 1867* reserves to the federal order power over federal public lands, and federal public property generally. Such property includes “[t]he Public Works and Property of each Province, enumerated in the Third Schedule” (s. 108) and any lands “required for Fortifications or for the Defence of the Country” that the federal order may choose to assume (s. 117). And certain specific kinds of lands remained under federal authority when Canada, in the Natural Resources Transfer Agreements (“NRTAs”) of 1930, transferred to the three prairie provinces ownership and control of most public lands within their boundaries: see *Constitution Act, 1930*, (U.K.), 20 & 21 George V, c. 26 [hereinafter *Constitution Act, 1930*] and its accompanying schedules.

governmental authority over the lands within their territorial boundaries.¹⁰ There continues to be confusion, to say the least, about what this arrangement means in practice.

Some things about it seem clear enough from general Canadian constitutional principles. The fact that Indian lands come within exclusive federal authority is not enough, on its own, to insulate them altogether from the reach of provincial governance. It does, however, constrain in two ways the power that the provinces may exercise over such lands. It precludes provincial legislatures and governments from making it their business to regulate or to govern such lands; provincial measures for which any “Lands reserved” are the primary subject matter are simply invalid, without any legal force. More important here, it also prescribes a “core” set of matters—those that “form an integral part of the exclusive federal jurisdiction over”¹¹ Indian lands—that are, as such, protected completely from the effects of provincial regulatory or executive power, even when such power is being exercised in the service of otherwise valid provincial schemes or objectives.¹²

The obvious practical challenge arising from this basic framework is to distinguish, among those matters having to do with “Lands reserved,” the ones that do from the ones that do not come within this protective cocoon of core federal authority. Properly drafted provincial measures will govern the latter, according to their terms, but not the former. Few legal issues have given rise to quite so much ongoing confusion over the past thirty years as this one has.¹³

For those of us interested in such matters, that fact alone is probably reason enough to revisit the issue, if only to try to clarify an important, if

10. See *e.g.*, *Constitution Act, 1867*, ss. 92(5) (“Public Lands belonging to the Province”), (13) (“Property and Civil Rights in the Province”), (16) (“Generally, all Matters of a merely local or private Nature in the Province”), 92A (regarding non-renewable natural resources, forestry and electrical energy).

11. See *Canada (National Battlefields Commission) v. Quebec (C.T.C.U.Q.)*, [1990] 2 S.C.R. 838 at 853.

12. For a much more detailed discussion of these general notions, see Kerry Wilkins, “Of Provinces and Section 35 Rights” (1999) 22 Dal. L.J. 185 [hereinafter “Section 35 Rights”] at 191-196, 203-209.

13. See *e.g.*, notes 139-153 below and the text accompanying them.

rather narrow, corner of constitutional law.¹⁴ In recent years, however, these questions have taken on new urgency, because the stakes in this ongoing contest have risen considerably.

Until late 1997, when the Supreme Court of Canada released its decision in *Delgamuukw*,¹⁵ it was common (and understandable) for discussion of the relationship between provinces and Indian lands to focus almost exclusively on the Indian *reserves*:¹⁶ those discrete, ascertainable and generally rather small parcels of federally-owned land, defined by the *Indian Act* as “ha[ving] been set apart by Her Majesty for the use and benefit of [particular Indian] band[s].”¹⁷ Needless to say, conclusions about the application to reserves of provincial arrangements and measures can and do have very sig-

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14. Mine is, of course, by no means the first such attempt. It is important here to acknowledge as much as possible of the good and insightful work that others have already done on these issues. See e.g., Kenneth Lysyk, “The Unique Constitutional Position of the Canadian Indian” (1967) 45 Can. Bar Rev. 513 [hereinafter “Unique Position”]; K.M. Lysyk, Q.C., “Constitutional Developments Relating to Indians and Indian Lands: An Overview” [1978] L.S.U.C. Special Lectures 201-228 [hereinafter “Constitutional Developments”]; Robert D.J. Pugh, “Are Northern Lands Reserved for the Indians?” (1982) 60 Can. Bar Rev. 36; Patricia Hughes, “Indians and Lands Reserved for the Indians: Off-Limits to the Provinces?” (1983) 21 Osgoode Hall L.J. 82; Douglas Sanders, “Prior Claims: Aboriginal People and the Constitution of Canada” in Stanley M. Beck & Ivan Bernier, eds., *Canada and the New Constitution: The Unfinished Agenda*, vol. 1 (Montreal: Institute for Research in Public Policy, 1983) 225-279 [hereinafter “Prior Claims”]; Brian Slattery, “Understanding Aboriginal Rights” (1987) 66 Can. Bar Rev. 727 [hereinafter “Understanding”], esp. at 775-777; Douglas Sanders, “The Constitution, the Provinces, and Aboriginal Peoples” in J. Anthony Long & Menno Boldt, eds., *Governments in Conflict? Provinces and Aboriginal Nations in Canada* (Toronto: University of Toronto Press, 1988) [hereinafter *Governments in Conflict*] at 151-174 [hereinafter “The Constitution, the Provinces”]; Bruce Ryder, “The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations” (1991) 36 McGill L.J. 308; Brian Slattery, “First Nations and the Constitution: A Question of Trust” (1992) 71 Can. Bar Rev. 261, esp. at 287-293; Kent McNeil, “Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction” (1998) 61 Sask. L. Rev. 431 [hereinafter “Rethinking Jurisdiction”]; Kent McNeil, *Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got It Right?* (Toronto: Robarts Centre for Canadian Studies, York University, 1998) [hereinafter *Defining Aboriginal Title*]; Nigel Bankes, “Delgamuukw, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights” (1998) 32 U.B.C. L. Rev. 317; Kenneth J. Tyler, “The Division of Powers and Aboriginal Water Rights Issues” (National Symposium on Water Law, Canadian Bar Association, Toronto, April 1999), esp. at 4-9.
15. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*].
16. The rough equivalent, in Canadian law, to what Americans call “reservations”.
17. See *Indian Act*, R.S.C. 1985, c. I-5 [hereinafter *Indian Act*] s. 2(1) (“reserve”). Part of the *Indian Act*'s definition of “reserve,” in fact, is “a tract of land, the legal title to which is vested in Her Majesty ...” The *Indian Act* itself does not define “Her Majesty”; in *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, however, La Forest J., writing for the majority on the point, held (at 123) that “a reading of the [*Indian Act*], as a whole, leads to the conclusion that the term ‘Her Majesty’, unless specifically qualified, is meant to refer solely to the federal Crown,” not least because “whenever Parliament meant to include ‘Her Majesty in right of a province’, it was careful to make it clear by using explicit terms.” But see also *Indian Act*, s. 36, which prescribes that other lands “set apart for the use and benefit of a band” are also subject to the *Act*, “as though the lands were a reserve within the meaning of this *Act*,” even though “legal title thereto is not vested in Her Majesty”.

nificant implications for the parties, for life on the reserves themselves and often for the surrounding off-reserve communities, whether Aboriginal or not. Even so, because the reserves are typically not very large and are often (though not always) located at some distance from the centres of mainstream population, wealth and activity, most Canadians—lawyers included—could have been forgiven for concluding that such determinations had little to do with them, and for acting accordingly.

In a sense, no doubt, Canadians probably should have known better all along. As early as 1888, the Privy Council had made it clear that “Lands reserved for the Indians” did not refer exclusively to the parcels we think of today as reserves, because “the words actually used [in section 91(24) of the *Constitution Act, 1867*] are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation,”¹⁸ including most particularly the lands identified for exclusive and undisturbed Indian occupancy by the Royal Proclamation of 1763.¹⁹ Even so, it was very tempting not to give much practical weight to this determination because so much Proclamation land was subject to land cession treaties, because there was controversy about the territorial scope of the Royal Proclamation itself,²⁰ and because, for a long time, it was difficult for mainstream law to imagine what kinds of lands—other than the reserves themselves and possibly any unsundered Royal Proclamation lands—could possibly be “Lands reserved for the Indians.”

All that changed with the *Delgamuukw* decision. In *Delgamuukw*, the Supreme Court confirmed that Canadian law recognizes and protects Abo-

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18. *St. Catherine's Milling and Lumber Co. v. The Queen* (1889), 14 A.C. 46 (P.C.) [hereinafter *St. Catherine's Milling*] at 59. For authoritative recent reaffirmation of this conclusion, see *Delgamuukw*, *supra* note 15 at 1116-1117 (para. 174).
 19. *St. Catherine's Milling*, *ibid.* at 59, 53-55. The text of the Royal Proclamation of October 7, 1763 appears at R.S.C. 1985, Appendix II, No. 1. For a thoroughgoing discussion of the history, interpretation and impact of the Royal Proclamation of 1763, see Brian Slattery, *The Land Rights of Indigenous Canadian Peoples* (Ph.D. Dissertation, Oxford University, 1979) at 191-349.
 20. In *Calder v. The Queen*, [1973] S.C.R. 313, for example, three of the six Supreme Court of Canada judges who considered the issue concluded that the Proclamation “has no bearing upon the problem of Indian title in British Columbia” (*ibid.* at 323-328); the other three concluded (*ibid.* at 394-401) that the Proclamation does apply to the lands in present-day British Columbia. In *Delgamuukw v. British Columbia*, [1993] 5 W.W.R. 97 (B.C. C.A.) [hereinafter *Delgamuukw (C.A.)*], *rev'd* on other grounds by *Delgamuukw*, *supra* note 15, four judges concluded that the Proclamation did not apply in B.C. (see *ibid.* at 153-154 (para. 177), Macfarlane J.A.; at 226-227 (paras. 486-494), Wallace J.A.; at 384 (para. 1122), Hutcheon J.A.); the fifth judge, Lambert J.A., considered the issue (*ibid.* at 365-369 (paras. 1034-1053)) but reached no conclusion about it. Brian Slattery's view is that the Royal Proclamation applies throughout the territory (in present-day Canada) that the British Crown claimed as its own in 1763: see Slattery, *ibid.* at 126-190 (dimensions of British territories in 1763), 244-260 (application of the Proclamation to them).

original title²¹ and that Aboriginal title lands, like *Indian Act* reserves, are, for constitutional purposes, “Lands reserved for the Indians.”²² It follows, as the court acknowledged, from this proposition that where Aboriginal title still exists, there is nothing the provinces can do, on their own, to get rid of it. The power to extinguish, or to accept surrender of, Aboriginal title lies at the “core” of federal authority over lands reserved and has therefore belonged

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21. *Delgamuukw*, *supra* note 15 at 1091-1092 (para. 133) (Aboriginal title recognized as a common law right before 1982 and as a result, since 1982, as a constitutional right). *Mabo v. Queensland (No. 2)* (1992), 175 C.L.R. 1 (H.C. Aus.) had prefigured this result. There, the High Court of Australia held that Native title survived the Crown’s acquisition of sovereignty and continued to be entitled to protection at common law until surrendered, abandoned or extinguished by valid legislation. In Australia, however, Native title has never had constitutional protection.
 22. *Delgamuukw*, *ibid.* at 1116-1119 (paras. 174-181). In a recent article, Gordon Christie, after having acknowledged this conclusion and the precedents from which it follows, suggests nonetheless that “this would be a point the Court could retreat from,” at least in respect of those Aboriginal title lands that have been subject to no affirmative act of reservation, by treaty or otherwise. “[I]t makes little sense,” Christie suggests, “to hold that prior to the existence of a treaty Aboriginal lands could be ‘set aside’”: see “*Delgamuukw* and the Protection of Aboriginal Land Interests” (2000) 32 *Ottawa L. Rev.* 85 at 100-101, n.47. Christie goes on to argue (*ibid.*) that other aspects of Canadian law could ensure sufficient protection to Aboriginal title even if such title were understood to reside within the exclusive legislative authority of the provinces. Of course, the Supreme Court *could* retreat from this, as from any other, conclusion of law it has reached. From a doctrinal standpoint, however, it seems unclear what ought to prompt it to do so. To begin with, the court itself has observed that any lands apt to qualify as Aboriginal title lands will be lands “of central significance to the culture of the claimants” (*Delgamuukw*, *ibid.* at 1101-1102 (para. 151)): at least as much so, one should think, as any lands set aside for exclusive Aboriginal use by treaty, legislation, or executive or prerogative act. On this ground, such lands seem at least as well qualified for inclusion within the core of exclusive federal authority as any lands that have been set aside expressly. Second, in my view, it makes full sense to say that Aboriginal title lands continue, by operation of law, to be “reserved for the Indians” pursuant to the well-known “principle that a change in sovereignty over a particular territory does not in general affect the presumptive title of the applicants”: *Guerin v. The Queen*, [1984] 2 S.C.R. 335 [hereinafter *Guerin*] at 378, Dickson J., citing *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399 (P.C.) [hereinafter *Amodu Tijani*]. Aboriginal title is “an independent legal right” (*Guerin*, *ibid.*) “to exclusive use and occupation of the [relevant] land” (*Delgamuukw*, *ibid.* at 1083 (para. 117)). Finally, if Aboriginal title comes within provincial legislative authority, then it seems to follow necessarily that provincial legislatures and governments have, or had till 1982, sufficient authority to extinguish any and all such title. Apart from the fact that this conclusion too is inconsistent with precedent (see next note and accompanying text), I should have thought that it would trouble those concerned with the legal protection of such interests.

exclusively to the federal order of government.²³ And even the federal order itself has lacked, since 1982, the constitutional competence to extinguish Aboriginal title, or any other Aboriginal rights, unilaterally.²⁴

It is crucial that we grasp the full significance of this development. It means that the limits—whatever they are—on Canadian provinces' constitutional capacity to govern Indian lands pertain not just to those tracts that

23. More specifically, the provinces do not have, and have not had since Confederation, power to extinguish Aboriginal title (or other Aboriginal rights), either by legislative means or by executive measures such as grants to others of fee simple interests in the relevant lands: *Delgamuukw*, *ibid.* at 1115-1123 (paras. 172-183). Neither may they, as a matter of constitutional law, procure or accept surrender of Aboriginal interests in land: *ibid.* at 1117-1118 (paras. 175-176). This is so, the court emphasized (*ibid.*), despite the fact that it is the Crown in right of the province that holds the underlying title to unsurrendered Aboriginal title lands (*Constitution Act, 1867*, s. 109 and, for the prairie provinces, para. 1 of the NRTAs executed with them in 1930 as schedules to the *Constitution Act, 1930*), because the Aboriginal interest in such lands is, while it subsists, an "Interest other than that of the Province" to which the Crown provincial's underlying title is subject (*ibid.*). Compare *St. Catherine's Milling*, *supra* note 18 at 57-59.

These are constraints that the constitution imposes on provincial capacity. Federal legislation, however, has given the provinces of Ontario and Quebec some statutory power to obtain, at their own expense and subject to case-by-case federal approval, surrenders of Indian interests in the northern lands annexed to their territory in 1912: see *The Ontario Boundaries Extension Act, 1912*, S.C. 1912, c. 40, ss. 2(a)-(c); *The Quebec Boundaries Extension Act, 1912*, S.C. 1912, c. 45, ss. 2(c)-(e). In addition, s. 35(1) of the *Indian Act* gives provinces statutory power, subject to case-by-case federal approval, to expropriate reserve land, where provincial legislation permits expropriation without consent. The Supreme Court of Canada recently held that this federal statutory provision does suffice to authorize extinguishment of Aboriginal interests in reserve land: *Osoyoos Indian Band v. Oliver (Township of)*, 2001 SCC 85, 206 D.L.R. (4th) 385 [hereinafter *Osoyoos*] at 406-407 (paras. 56-57), Iacobucci J. (for the majority). Compare *ibid.* at 424-439 (paras. 123-174), Gonthier J. (dissenting on other grounds). It is, however, subject today to s. 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), c. 11 [hereinafter *Constitution Act, 1982*], which may well preclude unilateral expropriation of the entire Aboriginal interest in reserve lands protected by treaty or by Aboriginal title. And even apart from any constitutional protection, the federal Crown has a fiduciary obligation, even in circumstances where expropriation of reserve lands is in the public interest, "to expropriate or grant only the minimum interest required in order to fulfill that public purpose, thus ensuring a minimal impairment of the use and enjoyment of Indian lands by the band": *Osoyoos*, *ibid.* at 405 (para. 52).

24. This is so, of course, because of s. 35(1) of the *Constitution Act, 1982*: see *Van der Peet v. The Queen*, [1996] 2 S.C.R. 507 at 538 (para. 28).

happen to have been set aside as reserves²⁵ and to such additional lands as come within the contemplation of the Royal Proclamation.²⁶ In principle, these limits will also restrict provincial authority in respect of any land in Canada that happens to meet the *Delgamuukw* test for Aboriginal title,²⁷ unless that land has been surrendered absolutely in a valid land cession treaty²⁸ (or an equivalent instrument) or has been the subject of some specific

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25. At least some constitutional constraints on provincial authority do pertain exclusively, for the moment at least, to lands that qualify as “reserves” for purposes of the *Indian Act*. I refer here to the constraints that flow from the doctrine that federal legislation trumps—is “paramount” over—conflicting provincial legislation in circumstances where both are otherwise valid and applicable, because the provinces have no power to interfere, even indirectly or inadvertently, with the exercise of valid federal authority: see e.g., Peter W. Hogg, *Constitutional Law of Canada*, 4th ed., abridged (Toronto: Carswell, 1997) at 383-385; *Reference re Provincial Court Judges*, [1997] 3 S.C.R. 3 at 71 (para. 98). Paramountcy doctrine ensures, apart from any other constraints that limit provincial authority, that any provincial laws that conflict with provisions of the *Indian Act* (or other relevant federal legislation) are inoperative—unenforceable—to the extent of the conflict. With the exception of ss. 42-52 (disposition of Indian property on death or incapacity), which also apply to Indians living on federal or provincial Crown lands (see s. 4(3)), however, the *Indian Act*’s land-related provisions apply, at present, exclusively to reserves. (The same is true of the recently enacted *First Nations Land Management Act*, S.C. 1999, c. 24 [hereinafter *First Nations Land Management Act*]). This arrangement, needless to say, could change at any time. Until it does change, however, the *Indian Act* (and the *First Nations Land Management Act*) will operate to neutralize provincial land law only in respect of the reserves. Compare “Rethinking Jurisdiction,” *supra* note 14 at 462, n.147.
26. See note 20 above for some views and sources on this issue.
27. See note 203 below and the text accompanying it. Consider, in this context, the recent claim of the Haida Nation to have Aboriginal title to the whole of Haida Gwaii (the Queen Charlotte Islands), to the ocean waters surrounding them, and to the resources beneath the seabed: see e.g., Rod Mickleburgh, “Queen Charlotte Islands Site of Haida Land Claim” *The [Toronto] Globe and Mail* (6 March 2002) A8; “The Haida’s Case” [editorial] *The [Toronto] Globe and Mail* (8 March 2002) A16.
28. And even that, in some instances, may not prove to be enough. The Aboriginal title claim of the Algonquins of Golden Lake in Ontario and Quebec, for instance, comprises in significant part lands acquired by the Crown in land cession treaties with other Aboriginal peoples. The Crown, for whatever reason, did not treat with the Algonquins for such interests as they may have had in those lands. As a result, the Algonquins, of course, will not routinely be bound by the surrenders contained in those instruments. If their Aboriginal title claim is sound on its legal and factual merits, at least some of the lands they are claiming will, despite those treaties, still be “Lands reserved for the Indians.”

federal or Imperial act that sufficed to extinguish Aboriginal interests in it.²⁹ (The burden of proving extinguishment rests upon the party asserting it.)³⁰ And if First Nations were to succeed in their current court actions challenging the validity of the surrender provisions in their numbered treaties,³¹ that could (for all we know) turn out to be quite a lot of land indeed.³²

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29. Particular lands remain subject to s. 91(24) of the *Constitution Act, 1867*, and to the restrictions that provision imposes on provincial authority, only as long as they continue to qualify as “Lands reserved”. Lands cease to be “Lands reserved” upon the extinguishment or *absolute* surrender of the Aboriginal interests in them: see *e.g.*, *Ontario Mining Co. v. Seybold*, [1903] A.C. 73 (P.C.) [hereinafter *Seybold*] at 82; *Smith v. The Queen*, [1983] 1 S.C.R. 554 [hereinafter *Smith*] at 564, 569, 578. As long as *some* possessory interest, even a mere reversion, subsists in the relevant lands, however, they remain “Lands reserved” and subject to s. 91(24): see *e.g.*, *St. Ann’s Shooting and Fishing Club v. The Queen*, [1950] S.C.R. 211 at 215-219; *Corporation of Surrey v. Peace Arch Enterprises* (1970), 74 W.W.R. 380 (B.C. C.A.) [hereinafter *Peace Arch*] at 386; *Western Industrial Contractors Ltd. v. Sarcee Developments Ltd.* (1979), 98 D.L.R. (3d) 424 (Alta. C.A.) [hereinafter *Sarcee*] at 426, Prowse J.A. (dissenting), at 434-436, Morrow J.A.; *Reference re Stony Plain Indian Reserve No. 135* (1981), 130 D.L.R. (3d) 636 (Alta. C.A.) [hereinafter *Stony Plain*] at 650-653.
30. See *Sparrow v. The Queen*, [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*] at 1099; *R. v. Badger*, [1996] 1 S.C.R. 771 [hereinafter *Badger*] at 794 (para. 41); *Gladstone v. The Queen*, [1996] 2 S.C.R. 723, esp. at 750 (para. 34); *Côté v. The Queen*, [1996] 3 S.C.R. 139 [hereinafter *Côté*] at 184 (para. 72).
31. Such actions are based in significant part on claims that the Aboriginal signatories to the relevant treaties did not, despite the printed text of those treaties, understand themselves to have been surrendering (or sometimes even to have had the capacity to surrender) their interest in, or their responsibility for, their traditional lands. Several recent Supreme Court decisions have created a context more receptive to consideration of such claims on their merits. In *R. v. Sundown*, [1999] 1 S.C.R. 393, for example, the court, in articulating its general approach to treaty interpretation, gave significant weight to the fact that “[i]n many if not most treaty negotiations, members of the First Nations could not read or write English and relied completely on the oral promises made by the Canadian negotiators”: *ibid.* at 406-407 (para. 24). *Marshall v. The Queen*, [1999] 3 S.C.R. 456, synthesizing the recent jurisprudence on treaty rights, acknowledged the need for “special rules ... dictated by the special difficulties of ascertaining what in fact was agreed to. The Indian parties,” the court continued (*ibid.*),

did not, for all practical purposes, have the opportunity to create their own written record of the negotiations. Certain assumptions are therefore made about the Crown’s approach to treaty making (honourable) which the Court acts upon in its approach to treaty interpretation (flexible) as to the existence of a treaty ..., the completeness of any written record (the use, *e.g.*, of context and implied terms to make honourable sense of the treaty arrangement ...), and the interpretation of treaty terms once found to exist ...

It makes good sense, therefore, to pause to clarify, in Canada, the scope of the provinces' power, through either legislative or executive means,³³ to control what happens to lands reserved for the Indians, in order to gain a better understanding of the kinds of provincial (and, at the threshold, municipal)³⁴ arrangements that can be counted on to govern and structure dealings with such lands. To the two mainstream orders of government, such clarification promises greater perspicuity about their respective roles and capacities, under the current Canadian constitutional regime, as regards the management and governance of land. To Aboriginal peoples and others with interests, actual or potential, in lands that are, or turn out to be, "reserved for the Indians," it offers greater capacity to ascertain which provincial measures can have enforceable effects—as permissions, as restrictions or as requirements—on such interests or on activities taking place on such lands, and which of them it is permissible, from a constitutional standpoint, to ignore.

In particular, the *Marshall* court stressed the relevance of evidence from outside the treaty's written text in determining whether the written version comprised the entire treaty and how the parties would have understood the agreement they reached: *ibid.* at 471-472 (paras. 9-12). Earlier, in *Delgamuukw*, *supra* note 15, the court had broadened the range of extrinsic evidence admissible in support of Aboriginal claims. "[T]he laws of evidence," it concluded (at 1069 (para. 87)), "must be adapted in order that [oral history] evidence [from Aboriginal societies] can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents." For discussion of two recent claims attacking treaty surrender provisions, and the legal issues they raise, see Kenneth J. Tyler, "Will *Delgamuukw* Eclipse the Prairie Sun? The Implications of the Supreme Court's Decision for the Prairie Treaties" in Owen Lippert, ed., *Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision* (Vancouver: The Fraser Institute, 2000) [hereinafter *Nass Valley*] at 197.

32. Kenneth Lysyk recognized this problem, at least in respect of the lands that now form part of British Columbia, over thirty years ago. See "Unique Position," *supra* note 14 at 515-516. This realization is one of the factors that prompted Gordon Christie to contemplate reconsideration of the Supreme Court's conclusion that Aboriginal title lands, as such, are lands reserved: see Christie, *supra* note 22 at 100, n.47 ("Few would dispute the fact, for example, that it is odd to suppose that the federal government has had, irrespective of over a century of provincial activity in British Columbia, exclusive jurisdictional authority over much of the land falling within this province's borders"). For brief discussion of Christie's arguments, see note 22 above.
33. The *Constitution Act, 1867* distributes executive as well as legislative authority; it vests in each order of government (federal and provincial) "such of these [executive or prerogative] powers ... as were necessary for the due performance of its constitutional functions ...": *Liquidators of the Maritime Bank v. Receiver-General of New Brunswick*, [1892] A.C. 437 (P.C.) at 442. Both orders of government, however, have 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 Peter W. Hogg, *Liability of the Crown*, 2d ed. (Toronto: Carswell, 1989) at 163-166.
34. See Jack Woodward & Talha Syed, "Can Municipalities Regulate Indian Lands? A Review of *Delgamuukw* and Other Recent Developments" in *Aboriginal Claims and Private Property* (Vancouver: Pacific Business & Law Institute, 2000) [hereinafter *Aboriginal Claims and Private Property*] at 7.1 for a discussion, compatible with the approach taken here, of municipalities' powers in respect of s. 91(24) lands.

This article is my attempt to help achieve that objective.³⁵

II THE CORE OF EXCLUSIVE FEDERAL AUTHORITY OVER LANDS RESERVED

In a recent article concerned with somewhat related matters, I took the position that “the core of exclusive federal authority over s. 91(24) lands is virtually coextensive with the full extent of that power.”³⁶ “All indications are,” I suggested, “that the exclusive core of federal power over lands reserved is extremely broad, and may even be plenary.”³⁷ I want to begin by reconsidering here the merits of that conclusion, first in respect of Aboriginal, then in respect of non-Aboriginal parties’ interests in and dealings with the relevant lands.

It is only fair to acknowledge that acceptance of this view of the federal power over “Lands reserved” would make it quite unusual in the canon of federal classes of subjects.³⁸ Generally speaking, identification of a core of matters integral to a head of federal power enumerated in section 91 of the *Constitution Act, 1867* serves two related but different purposes: it shields the matters within that core altogether from valid mandatory provincial measures, and it acts as a springboard for a broader range of federal measures dealing with matters outside the core but still “sufficiently integrated” with it. Outside the core, the validity of federal activity does not, as such, circumscribe the reach of provincial authority; indeed, it is fairly common for federal and provincial measures, each a valid use of constitutional authority, to coexist and overlap in their coverage. This is true, for example, of the power over “Indians” that the constitution confers on the federal order of government. Provincial highway traffic legislation, for instance, applies on reserve because regulation of motor vehicle traffic lies outside the core of exclusive federal authority over Indians. Federal measures regulating high-

35. In focusing here on *this* objective, defined deliberately as a problem within the mainstream constitutional law of Canada, I necessarily leave to one side, for discussion elsewhere another time, a host of very important issues about the existence, nature and scope of Aboriginal peoples’ own inherent authority in relation to North American lands and about the relationship today between such authority and the powers that derive more explicitly from the *Constitution Act, 1867*. (For a comprehensive and thought-provoking discussion of some of these issues, see James [sákéj] Youngblood Henderson, “Empowering Treaty Federalism” (1994) 59 Sask. L. Rev. 241.) In this article, my intention is to take no position on these issues and controversies.

36. See “Section 35 Rights,” *supra* note 12 at 199.

37. *Ibid.* at 198.

38. For some commentators, this in itself might well be sufficient reason to dismiss this view of the “Lands reserved” power. See *e.g.*, Hughes, *supra* note 14 at 110 (“The principles of constitutional interpretation provide no justification for treating the section 91(24) power any differently than any other section 91 power nor any reason for placing a greater onus on the application of provincial laws because they happen to apply to Indians or reserves than when they apply to any other easily identifiable group in the province”). Compare Tyler, *supra* note 14 at 6-9.

way traffic on reserve are also valid, however, because they link closely enough to other matters that *do* lie at the core of that head of power. Both schemes can operate, and be enforced, at the same time, as long as the provincial one does not interfere with the federal one's operation.³⁹

Concluding, on the other hand, that the core of exclusive federal authority over "Lands reserved" is coextensive with the reach of that power would depart from this usual pattern in at least two ways: it would leave no scope for federal "springboard" authority in respect of such lands, and it would preclude the operation of the familiar constitutional doctrine of federal paramountcy. On this view, such lands would be subtracted altogether from the provinces' generic authority over land regulation and management.⁴⁰ No provincial measures could operate to govern such lands or matters relating to them, even in the absence of federal measures in place to do so. There would, for that reason, simply be no room for overlapping provincial and federal measures in respect of such lands.

What evidence would suggest that this might be so?

It is prudent to begin with what we know. About reserve lands, we know from *Derrickson* 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) of the *Constitution Act, 1867*" and that valid provincial legislation "dealing with the right of ownership and possession of immoveable property ... cannot apply to lands on an Indian reserve,"⁴¹ from *Paul* that the same is true in respect of rights of occupancy on such lands,⁴² and from *CP v. Paul* that Aboriginal interests in such lands are not subject to diminution by provincial limitation periods.⁴³ We know that there is, in addition, substantial lower court authority,⁴⁴ some of it cited with approval by the Supreme Court of Canada,⁴⁵ to the effect that power to regulate the use of reserve land is assigned exclusively to the federal order of government under

39. See *Francis v. The Queen*, [1988] 1 S.C.R. 1025 [hereinafter *Francis*]. On the consequences of provincial interference with valid federal measures, see note 25 above. For more detailed discussion, see "Section 35 Rights," *supra* note 12 at 191-196.

40. See "Section 35 Rights," *ibid.* at 191-192 and the sources cited there.

41. *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285 [hereinafter *Derrickson*] at 296.

42. *Paul v. Paul*, [1986] 1 S.C.R. 306 [hereinafter *Paul*] at 31.

43. *Canadian Pacific v. Paul*, [1988] 2 S.C.R. 654 [hereinafter *CP v. Paul*] at 673. See also *Stoney Creek Indian Band v. B.C.*, [1999] 1 C.N.L.R. 192 (B.C. S.C.) [hereinafter *Stoney Creek (S.C.)*] at 210-218 (paras. 48-69), set aside on other grounds (1999), 179 D.L.R. (4th) 57 (B.C. C.A.); *Chippewas of Sarnia Band v. Canada (A.G.)* (2000), 51 O.R. (3d) 641 (C.A.) [hereinafter *Sarnia (C.A.)*] at 708-714 (paras. 220-242), leave to appeal to S.C.C. refused.

44. See e.g., *Peace Arch*, *supra* note 29; *R. v. Isaac* (1975), 13 N.S.R. (2d) 460 (C.A.) [hereinafter *Isaac*]; *Sarcee*, *supra* note 29; *Stony Plain*, *supra* note 29; *R. v. Duncan Supermarket Ltd.*, [1982] 4 W.W.R. 181 (B.C. S.C.) [hereinafter *Duncan Supermarket*]; *R. v. Fiddler*, [1993] 3 W.W.R. 594 (Sask. Q.B.) [hereinafter *Fiddler*]; *Municipalité d'Oka c. Simon*, [1999] 2 C.N.L.R. 205 [hereinafter *Oka '99*] at 224-225 (paras. 71-72).

45. See *Cardinal v. A.G. Alberta*, [1974] S.C.R. 695 [hereinafter *Cardinal*] at 704-705, citing *Peace Arch*, *ibid.* ("Once it was determined that the lands remained lands reserved for the Indians, Provincial legislation relating to their use was not applicable").

section 91(24). And we know that the Ontario Court of Appeal has reached the conclusion that only the federal order may dedicate reserve lands for public highways.⁴⁶

The jurisprudence on Aboriginal title, though much less extensive, is fully consistent with what we already know about reserve lands. We know from *Delgamuukw* that the core of exclusive federal power over “Lands reserved for the Indians” includes not only Aboriginal title—“the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes”⁴⁷—but all Aboriginal rights that are in relation to land.⁴⁸ And we know that the B.C. Court of Appeal has concluded that provincial land titles and registration schemes cannot apply to lands that are subject to valid claims of Aboriginal title.⁴⁹

Finally, we know from *Star Chrome*, *Guerin* and *Delgamuukw* that the nature of the Aboriginal interest in land is qualitatively the same whether that land is reserve land, Royal Proclamation land or land held subject to

46. See *Hopton v. Pamajewon* (1993), 16 O.R. (3d) 390 (C.A.) at 402.

47. *Delgamuukw*, *supra* note 15 at 1083 (para. 117).

48. *Ibid.* at 1118 (para. 176), 1119 (para. 178). See also *Oka '99*, *supra* note 44 at 224-225 (paras. 71-72). This is perhaps the place to acknowledge that the Supreme Court, in *Delgamuukw*, *ibid.*, also contemplates openly (but in *obiter*) the prospect of permissible provincial infringement of Aboriginal title, and indeed of Aboriginal rights generally (see *e.g.*, *ibid.* at 1107 (para. 160)), and even, in one place, enactment of provincial regulations “in relation to [A]boriginal lands” (*ibid.* at 1113 (para. 168)). In *R. v. Maurice and Gardiner*, 2002 SKQB 68 (25 February 2002) at paras. 20-26, the Saskatchewan Court of Queen’s Bench, also in *obiter* (it found no infringement of the relevant Aboriginal right), appears to have adopted this view. Several commentators, however, have already noted the incompatibility between these *obiter* observations and the Supreme Court’s conclusion, on which part of its decision in *Delgamuukw*, *ibid.*, rested, that Aboriginal rights, including Aboriginal title, come within the core of exclusive federal authority under s. 91(24) of the *Constitution Act, 1867*: see *e.g.*, “Rethinking Jurisdiction,” *supra* note 14 at 463; *Defining Aboriginal Title*, *supra* note 14 at 24-25; “Section 35 Rights,” *supra* note 12 at 213-219. My own view, articulated at length in “Section 35 Rights,” *ibid.*, is that the provinces have no power of their own to regulate matters within the core of exclusive federal authority, even if those matters happen to be Aboriginal rights. The Supreme Court’s recent conclusion, in *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, 210 D.L.R. (4th) 577 [hereinafter *Kitkatla*] at 605 (para. 71), that British Columbia’s heritage conservation legislation cannot, for constitutional reasons, “apply to any [A]boriginal heritage object or site which is the subject of an established [A]boriginal right or title” appears to be, at a minimum, consistent with this view. For additional judicial opinion to similar effect, see *Paul v. Forest Appeals Commission* (2001), 201 D.L.R. (4th) 251 (B.C. C.A.) [hereinafter *Thomas Paul*] at 272-276 (paras. 55-72), leave to appeal to S.C.C. granted, and *Taku River Tlingit First Nation v. Ringstad* (2002), 211 D.L.R. (4th) 89 (B.C.C.A.) at 153-155 (paras. 144-152), where the court raised the issue of its own motion, even though the Aboriginal party had not argued it. Compare *R. c. Savard*, [2001] 2 C.N.L.R. 343 (Que. S.C.). *Haida Nation v. British Columbia*, [2002] 2 C.N.L.R. 121 (B.C.C.A.) appears to take a contrary view. It suggests (at 132-133 (para. 32)) that the provinces may infringe Aboriginal title indirectly, by means of laws of general application, even though they may not do so directly, in laws that are aimed at core federal matters. But even Peter Hogg, himself no champion of interjurisdictional immunity, has acknowledged, in a related context, that this view “cannot be right”: see Hogg, *supra* note 25 at 364, n.129.

49. *Re Uukw and the Queen* (1987), 37 D.L.R. (4th) 408 (B.C. C.A.) [hereinafter *Uukw*] at 417.

Aboriginal title.⁵⁰ Matters at the core of exclusive federal power over one kind of “Lands reserved for the Indians,” therefore, are almost certainly at the core of such power in respect of all other kinds of lands reserved.⁵¹ And we know that the Aboriginal interest in land cannot, as such, be alienated except upon surrender to the Crown,⁵² and that only the federal Crown has capacity under the constitution to accept such surrenders.⁵³

Considered together, these various individual precedents suggest a core of exclusive federal power over lands reserved that is already unusually broad: a core that encompasses ownership, use, possession, occupation and disposition of lands that are subject to Aboriginal interests. If all these matters already lie behind the shield of exclusive federal authority, one has to wonder what aspects of land management and governance having to do with such lands can be left to provincial, or even to federal springboard, authority.

An empirical review of the existing case law, in other words, supports the proposition that the core of federal authority over lands reserved may indeed be coextensive with the ultimate reach of that head of power. Other observations from the Supreme Court and the Privy Council not only help confirm this view, but suggest that such a plenary core was part of the scheme from the outset. In *St. Catherine's Milling*, for instance, the Privy

50. See *Quebec (A.G.) v. Canada (A.G.)*, [1921] 1 A.C. 401 (P.C.) [hereinafter *Star Chrome*] at 410-411; *Guerin*, *supra* note 22 at 379; *Delgamuukw*, *supra* note 15 at 1085 (para. 120). One must be careful not to make too much of this proposition. Inferring, for instance, that Aboriginal title lands are subject, as such, to the regulatory regime that governs reserve lands from time to time in the *Indian Act* would run afoul of the Supreme Court's admonition in *Sparrow*, *supra* note 30 at 1091 that “an existing [A]boriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982.” In *Delgamuukw*, *ibid.* at 1085-1088 (paras. 121-124), the Supreme Court majority came very close to making this very mistake when it referred to provisions in the *Indian Act* and the *Indian Oil and Gas Act*, R.S.C. 1985, c. 1-7 [hereinafter *Indian Oil and Gas Act*], as a basis for certain conclusions about the nature of Aboriginal title. For criticism of this approach, see *Delgamuukw*, *ibid.* at 1127 (para. 192), La Forest J. (concurring in the result); Bankes, *supra* note 14 at 325, n.37. And as Kent McNeil has pointed out, “provisions of the *Indian Act* may,” because of the constitutional doctrine of federal paramountcy, “provide additional statutory protections to reserve lands that are not enjoyed by Aboriginal title lands”: “Rethinking Jurisdiction,” *supra* note 14 at 462, n.147. Considerations such as these may account for the somewhat greater care the Supreme Court used in its most recent discussion of this issue. In *Osoyoos*, *supra* note 23, the Supreme Court (at 401-402 (paras. 41-42)) described Aboriginal interests in reserve lands as “not identical” with, but “fundamentally similar” to, their interests in Aboriginal title lands. “The features common to both,” the court said, “include the facts that both interests are inalienable except to the Crown, both are rights of use and occupation, and both are held communally.” Both, therefore, “are *sui generis* interests ... distinct from ‘normal’ proprietary interests”: *ibid.*

51. For a similar view, see “Rethinking Jurisdiction,” *ibid.* at 461-462.

52. See *e.g.*, *Star Chrome*, *supra* note 50 at 408; *Guerin*, *supra* note 22 at 376, 379-384; *CP v. Paul*, *supra* note 43 at 677-678; *Delgamuukw*, *supra* note 15 at 1081-1082 (para. 113), 1090 (para. 129).

53. *Delgamuukw*, *ibid.* at 1117-1118 (para. 175). Conferral by federal legislation of statutory authority on Ontario and Quebec to accept, at their own expense, surrenders of Indian interests in the lands they acquired in 1912 (see note 23 above) only helps confirm that the provinces lack independent constitutional authority to accept surrenders of Aboriginal interests in land.

Council, having just confirmed the natural breadth of the words “Lands reserved” in section 91(24),⁵⁴ declared that “[i]t appears to be the plain policy of the [*Constitution Act, 1867*] 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.”⁵⁵ In *Smith*, almost a century later, the Supreme Court characterized the Aboriginal interest in section 91(24) lands as a “right ... to enjoy the use of the land under federal legislative regulation,”⁵⁶ a description that makes sense only if the federal scheme is understood as exclusive. And in *Derrickson*, the Supreme Court cited with approval 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 regulations).”⁵⁷ Lysyk, in turn, had derived his own list by analogy from a catalogue of provincial powers in relation to land that the Supreme Court earlier had held to be “not contested.”⁵⁸ Implicit here is the notion that the federal order has exclusive power to act in relation to section 91(24) lands in the same ways, and in relation to all the same matters, generally available to the provinces in relation to lands within provincial boundaries.⁵⁹ The inference is that the provinces, acting as such,⁶⁰ have no authority over such matters when it comes to lands reserved.⁶¹ The core of exclusive federal power over section 91(24) lands, in other words, does indeed appear to be plenary.⁶²

54. See note 18 above and the text accompanying it.

55. *St. Catherine’s Milling*, *supra* note 18 at 59.

56. *Smith*, *supra* note 29 at 564.

57. *Derrickson*, *supra* note 41 at 295, citing “Constitutional Developments,” *supra* note 14 at 227, n.49.

58. “Constitutional Developments,” *ibid.*, citing *Morgan v. A.G.P.E.I.*, [1976] 2 S.C.R. 349 at 357.

59. For more recent authority to this same effect, see *Stoney Creek (S.C.)*, *supra* note 43 at 213 (para. 55) (“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.)* (1999), 40 R.P.R. (3d) 49 (Ont. S.C.J.) [hereinafter *Sarnia (S.C.)*] at 219 (para. 477), *aff’d* on this point by *Sarnia (C.A.)*, *supra* note 43 at 709 (para. 222).

60. It is arguable that s. 88 of the *Indian Act*, which incorporates by reference, and applies as federal law, certain provincial laws of general application, extends the reach of many provincial land laws that could not apply as such. On this issue, see notes 105-120 below and the text accompanying them.

61. See to similar effect *Morin v. Canada*, [2000] 4 C.N.L.R. 218 (F.C.T.D.) [hereinafter *Morin*] at 225 (para. 21) (“I am of the view that lands reserved for Indians are at the core of federal jurisdiction.”).

62. There are, of course, at least some respects in which federal authority in relation to lands reserved is not plenary. The federal order does not, for example, have unilateral power to appropriate provincial Crown lands to set them aside as Indian reserves, even in fulfilment of a treaty obligation: see *Seybold*, *supra* note 29 at 82. And if this is so, then Canada almost certainly cannot expand the range of lands over which its s. 91(24) jurisdiction extends merely by deeming or declaring, in legislation or otherwise, that particular lands are lands reserved for the Indians or by enacting an artificially broad definition of “reserve.”

Unusual as this conclusion seems from the standpoint of division of powers doctrine generally, it now seems all but incontrovertible, at least in respect of Aboriginal interests in, and uses of, section 91(24) lands.⁶³ I have yet to find a Canadian precedent that has applied to such lands provincial measures or activities whose effect would have been to govern such Aboriginal interests or uses, considered as such.⁶⁴

What, then, of *non*-Aboriginal interests in, or uses of, section 91(24) lands? Questions about the constitutional status of such interests have arisen from time to time in cases involving reserve land parcels that *Indian Act* bands have surrendered to the Crown for lease to non-Aboriginal interests. Such lands remain section 91(24) lands because the bands retain reversionary or other beneficial interests in them. The lower court decisions to date⁶⁵ agree that only the federal government has authority to act in relation to the surviving Aboriginal interest in such lands, but divide on whether provinces and municipalities have any power to regulate the nature, use or enjoyment of the non-Aboriginal interests. *Peace Arch*⁶⁶ (municipal zoning, water and sewage bylaws), *Palm Dairies*⁶⁷ (builders' lien legislation), the dissenting judgment in *Sarcee*⁶⁸ (also about builders' lien legislation), *Morin*⁶⁹ and the

63. To the best of my knowledge, Brian Slattery noticed this first. See "Understanding," *supra* note 14 at 773-777.

64. For a similar view, see "Rethinking Jurisdiction," *supra* note 14 at 460-462. Three possible counterexamples may come to mind. They deserve brief discussion. One is *Kitkatla*, *supra* note 48, which concerns, in relevant part, the scheme for issuing site alteration permits under British Columbia's *Heritage Conservation Act*. The court upheld the scheme's application, even in circumstances where it could result in disturbance or removal of culturally modified trees that, in the band's submission, had spiritual or archival significance. Neither the trees nor the site to which the permit under challenge pertained, however, were located on a reserve (see *ibid.* at 606 (para. 74)) and the band had expressly refrained, for the purposes of that proceeding, from asserting any claim of aboriginal right or aboriginal title (see *ibid.* at 596 (para. 47), and, in the court below, (2000), 183 D.L.R. (4th) 103 (B.C. C.A.) at 119 (para. 43), 122 (para. 54)). (Had the band claimed and established either, the statute, in the Supreme Court's view, could not have applied: *Kitkatla*, *ibid.* at 605 (para. 71).) *Kitkatla*, therefore, has nothing to do with section 91(24) lands. The others are *CP v. Paul*, *supra* note 43 and *Sarnia (C.A.)*, *supra* note 43, both of which uphold non-Aboriginal interests derived from locally authorized legislation or Crown patents at the expense of unsundered Aboriginal interests. In each case, though, the relevant legislation or Crown activity occurred before Confederation, when no division of powers concerns arose.

65. To the best of my knowledge, the Supreme Court of Canada has yet to consider and decide this issue. *Musqueam Indian Band v. Glass*, [2000] 2 S.C.R. 633 [hereinafter *Glass*] did consider what rents were payable under leases to non-Native residents of lands on the Musqueam reserve, but did not consider the impact, if any, on such rental arrangements of B.C.'s residential rent regulation legislation, despite the existence of Court of Appeal authority (*Re Park Mobile Home Sales Ltd. and Le Greely* (1978), 85 D.L.R. (3d) 618 (B.C. C.A.) [hereinafter *Park Mobile*]) holding that such legislation applies to on-reserve tenancies involving non-Native tenants.

66. *Peace Arch*, *supra* note 29 at 383, 387.

67. *Palm Dairies v. The Queen* (1978), 91 D.L.R. (3d) 665 (F.C.T.D.) [hereinafter *Palm Dairies*] at 672.

68. *Sarcee*, *supra* note 29 at 428-430, Prowse J.A. (dissenting).

69. *Morin*, *supra* note 61 at 223-225 (paras. 15-21).

trial judgment in *Millbrook*⁷⁰ (both residential landlord-tenant) all conclude that federal authority over section 91(24) lands is exclusive, even in respect of the non-Aboriginal interests in those lands; *Park Mobile*⁷¹ (residential rent regulation) and the majority in *Sarcee*⁷² support the view that non-Aboriginal interests on reserve are subject to the local land regulations.⁷³ And in *Oka '99*, the Court of Appeal for Quebec held that possession and *Indian* use do indeed come within the core of exclusive federal power over lands reserved, but, despite *Peace Arch*,⁷⁴ that the use of such lands more generally does not.⁷⁵

Which of these quite different views ought to prevail? The better view, at least from the standpoint of doctrinal coherence, is that the core of exclusive federal authority over lands reserved includes all land-related matters—ownership, use, occupation, possession and disposition—that pertain to, or arise from, limited interests in reserve land conferred by the federal Crown pursuant to the *Indian Act*. This is the way the courts have dealt, under section 91(1A) of the *Constitution Act, 1867*, with the third party leasehold interests the federal Crown has conferred in federal public property. In a line

70. *Millbrook Indian Band v. Northern Counties Residential Tenancies Board* (1978), 84 D.L.R. (3d) 175 (N.S. S.C.) [hereinafter *Millbrook (S.C.)*], aff'd without reference to the point (1978), 93 D.L.R. (3d) 230 (N.S. C.A.) [hereinafter *Millbrook (C.A.)*].

71. *Park Mobile*, *supra* note 65 at 620.

72. *Sarcee*, *supra* note 29 at 440-442, Morrow J.A. (for the majority).

73. See also, on the general issue, the following passage from *Stony Plain*, *supra* note 29 at 654, which can be read to support either view:

We accept the general proposition that provincial legislation relating to use of reserve lands is inapplicable to lands that are found to be reserved for Indians: *Cardinal v. A.G. Alta* ... Moreover, if land is surrendered for the purpose of a leasing, the reversion still remains reserved for Indians, and any provincial law impairing the full enjoyment of the reversion will be inapplicable. Finally, even if surrendered lands no longer remain part of a reserve as defined by the *Indian Act*, they remain, until finally disposed of, lands reserved for the Indians within the meaning of s. 91(24) and, as such, within federal legislative and administrative jurisdiction ... The federal Government has continuing responsibility for the control and management of such land until its final disposition.

And see *R. v. Gullberg*, [1933] 3 W.W.R. 639 (Alta. Dist. Ct.) [hereinafter *Gullberg*], which held that provincial restaurant legislation applies to non-Indians operating restaurants on reserve, but did not say clearly whether that statute related, in its view, to the governance or management of land. For discussion of most of these cases, see “Rethinking Jurisdiction,” *supra* note 14 at 459, n.131.

74. *Supra* note 29.

75. *Oka '99*, *supra* note 44 at 224-225 (para. 72), and generally *ibid.* at 222-225 (paras. 67-75) (leave to appeal to the S.C.C. refused).

of authority originating with *Spooner Oils*,⁷⁶ the courts have held consistently that provincial or municipal schemes of land regulation do not apply to such interests, because, in land-related matters,⁷⁷ the federal order's authority over such interests and their enjoyment is exclusive.⁷⁸ Even when made available for purely commercial enterprises, such leases, according to these decisions, have expressed and reflected federal interests lying at the core of exclusive federal authority over federal public property. By the same token, conferral on third parties of such limited interests in specific reserve lands is an expression of federal management of such lands for the Indians' use and benefit; the federal government has an ongoing role in such transac-

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76. *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629 [hereinafter *Spooner Oils*], esp. at 643 ("the public lands of the Dominion are vested in Parliament, in the sense that only by virtue of Parliamentary authority can such lands be disposed of or dealt with ... Nor is it material that, by the lease, an interest in the tract has passed to the lessee"). In *Construction Montcalm v. Minimum Wage Commission*, [1979] 1 S.C.R. 754 [hereinafter *Construction Montcalm*], the Supreme Court (at 778-779) considered and distinguished *Spooner Oils, ibid.*, in holding that provincial minimum wage legislation governs private contractors engaged in airport construction on federal lands. In *Construction Montcalm*, however, the contractors had no interest in the land itself and the regulation at issue had nothing to do with land.
77. It is crucial to remember here that section 91(24) lands and federal public property are not enclaves free altogether from the reach of provincial law. Federal authority over them is exclusive only as regards subject matters related to land. See e.g., *Cardinal, supra* note 45 at 703; *Construction Montcalm, ibid.* at 777; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031 [hereinafter *Four B*] at 1049-1050.
78. See e.g., *Delta v. Aztec Aviation Group* (1985), 28 M.P.L.R. 215 (B.C. S.C.) [hereinafter *Aztec Aviation*] (municipal building code bylaws not applicable to private airport lessee); *Canadian Occidental Petroleum Ltd. v. North Vancouver (District of)* (1986), 13 B.C.L.R. (2d) 34 (C.A.) [hereinafter *CanOxy*] (municipal zoning bylaws not applying to company occupying lands under lease from Ports Canada); *International Aviation Terminals (Vancouver) v. Richmond (Township of)* (1991), 54 B.C.L.R. (2d) 325 (S.C.) [hereinafter *International Aviation*] (private airport lessee not subject to municipal development charges, even if it applies voluntarily for building permits); *Greater Toronto Airports Authority v. Mississauga (City of)* (1999), 43 O.R. (3d) 9 (G.D.) [hereinafter *GTAA (G.D.)*], aff'd (2000), 50 O.R. (3d) 641 (C.A.) [hereinafter *GTAA (C.A.)*] (leave to appeal to S.C.C. refused 14 June 2001) (airport lessee not subject to municipal building codes or development charges, or generally to provincial laws whose subject matter is land or land development). But see *Oka '99, supra* note 44, where the Quebec Court of Appeal commented (at 219 (para. 52)) that the results in *CanOxy, ibid.* and *International Aviation, ibid.* were supportable only because the lessees involved in those cases were engaged in activities related to a head of exclusive federal authority. It is true that all the lessees of federal lands in the cases listed above were engaged there in activities that were subject to federal legislative authority, and that this fact gave the courts additional reason to doubt the application of the relevant provincial or municipal measures. In each case, though, the court dealt independently with the federal public property issue, concluded that s. 91(1A) afforded sufficient reason for saying that the provincial measure did not apply to the lessee, and reached that conclusion for reasons unrelated to the nature of the lessee's use of the relevant lands. See also *R. v. Smith*, [1942] 3 D.L.R. 764 (Ont. C.A.) [hereinafter *Smith '42*], where the Ontario Court of Appeal concluded (at 766) that provincial hunting restrictions applied to military personnel hunting partridge on military reserves but noted (*ibid.*), in so doing, that the "*Game and Fisheries Act*—in any event such part of it as is relevant here—is not concerned with land."

tions because it acts in a fiduciary capacity⁷⁹ on behalf of the bands whose partial surrenders (or designations)⁸⁰ make them possible.⁸¹ In these circumstances, it makes good sense to regard the management and control of these non-Aboriginal interests as matters integral (and therefore exclusive) to federal authority over lands reserved.

Federal Crown reserve land leases, however, are not the only possible sources of the non-Aboriginal interests that may be asserted in section 91(24) lands. Section 91(24) lands, again, include all lands still held pursuant to valid claims of Aboriginal title.⁸² We still don't know, and won't know for some time, precisely which lands those are; there is good reason, though, to suppose that they may include some substantial tracts of land, especially in parts of Canada not subject to land cession treaties.⁸³ There is a very good chance that private non-Aboriginal persons hold, or believe they hold, interests in at least some of those lands, based on patents or other permissions or entitlements conferred initially, in good faith, by the Crown in right of a province. All the while, these non-Aboriginal patentees, provincial Crown lessees and licensees, and their successors will have been using and developing those lands, and enjoying and disposing of the interests conferred upon them, in accordance with provincial measures that relate to such matters generally. Ought we now to say, as a matter of constitutional law, that such uses and interests have instead been subject all along exclusively to federal authority under section 91(24)?

These are uncharted waters, so one cannot speak with full confidence, but I think the answer may very well be yes. It seems clear from the federal public property cases (*Constitution Act, 1867*, section 91(1A))⁸⁴ that federal authority over land-related matters on federal public lands is exclusive, irrespective of the legal character or identity of those who happen to hold interests in them, in part because the federal interest in their management and use, and in the enjoyment and disposition of other proprietary interests in

79. See *Guerin*, *supra* note 22; *Morin*, *supra* note 61 at 226 (para. 24).

80. See *Indian Act*, s. 2(1) ("designated lands").

81. It is possible for non-Indian third parties to obtain possessory interests in unsurrendered reserve lands, either by way of permit for a limited period (*Indian Act*, s. 28(2)) or through lease of an individual Indian's reserve allotment (*Indian Act*, s. 58(3)): see *The Queen v. Devereux*, [1965] S.C.R. 567 [hereinafter *Devereux*]. It appears, in the latter instance, at least, that the federal Crown has no fiduciary duty to the band at large: see *Boyer v. Canada*, [1986] 2 F.C. 393 (C.A.) [hereinafter *Boyer*] at 405-406; *Tsartlip Indian Band v. Canada (Minister of Indian Affairs and Northern Development)* (1999), 181 D.L.R. (4th) 730 (F.C.A.) [hereinafter *Tsartlip*] at 741-743 (paras. 33-37). In both instances, however, federal participation is essential; only the federal Minister of Indian Affairs (or his or her designate) may issue s. 28(2) permits or lease lands pursuant to s. 58(3). And the minister, in exercise of these statutory powers, has an obligation to give sufficient weight, in all the circumstances, to such concerns as the band as a whole may have about the impact of the third party lease or permit: *Tsartlip*, *ibid.* at 746-749 (paras. 51-59).

82. See note 22 above and accompanying text.

83. See notes 25-32 above and accompanying text.

84. See notes 76-78 above and accompanying text.

them, is integral to that authority. It is difficult to imagine why this should be any less true in respect of persons whose presence or activity on such lands may in some way be unauthorized or colourable.⁸⁵

All this seems equally true of section 91(24) lands. Although the federal interest in such lands is not necessarily or routinely proprietary,⁸⁶ federal participation is essential, as a matter of law, to any transaction in which non-Aboriginal persons first acquire legally recognized interests in such lands. Two of the defining characteristics of Aboriginal title, and of the other Aboriginal interests in land equivalent to it,⁸⁷ are that it “encompasses the right to *exclusive* use and occupation of the land held pursuant to that title”⁸⁸ and that it is “inalienable to [non-Aboriginal] third parties”: “[l]ands held pursuant to [it] cannot be transferred, sold or surrendered to anyone other than the Crown” in right of Canada.⁸⁹ “[T]he law of [A]boriginal title represents a distinct species of federal common law rather than a simple subset of the common civil law or property law operating within the province.”⁹⁰ The very nature of Aboriginal title, in other words, and the fiduciary character of the federal role in relation to it,⁹¹ necessarily implicate the federal Crown in every non-Aboriginal person’s interest in section 91(24) lands while they remain section 91(24) lands:⁹² especially, one might argue, the interests that non-Aboriginal persons claim to have derived from some other source. Capacity to control the enjoyment and disposition of all such interests seems,

85. In *Smith ‘42*, *supra* note 78, the court took note (at 766) of the fact that the accused, engaged in hunting game on a federal military base, did not have permission to do so from the federal Crown, and gave this as a reason for concluding that provincial hunting regulations applied to their activity. For present purposes, however, this may not be relevant, because the court had already concluded (*ibid.*) that the relevant provincial statutory provisions were “not concerned with land”.

86. See e.g., *St. Catherine’s Milling*, *supra* note 18 at 57-59; *Seybold*, *supra* note 29 at 82.

87. See note 50 above and accompanying text.

88. *Delgamuukw*, *supra* note 15 at 1083 (para. 117) [emphasis added].

89. *Ibid.* at 1081 (para. 113), 1118 (para. 175). But see, in respect of lands on reserve, note 81 above.

90. *Côté*, *supra* note 30 at 173 (para. 49), citing *Roberts v. Canada*, [1989] 1 S.C.R. 322 [hereinafter *Roberts*] at 340.

91. See *Guerin*, *supra* note 22 at 376-384, Dickson J. (for half the court) (fiduciary duty arises from inalienability of Indian title except upon surrender to the Crown and the Crown’s discretion to deal with surrendered land on the Indians’ behalf). Wilson J., concurring in *Guerin*, *ibid.*, took a somewhat broader view of the federal fiduciary obligation (at 349):

Indian Bands have a beneficial interest in their reserves and ... the [federal] Crown has a responsibility to protect that interest and make sure that any purpose to which reserve land is put will not interfere with it ... in this sense the Crown has a fiduciary obligation to the Indian Bands with respect to the uses to which reserve land may be put ...

92. One of the Supreme Court’s reasons in *Delgamuukw*, *supra* note 15, for vesting with the federal order exclusive jurisdiction over Aboriginal title was to ensure against the risk that “the government vested with primary constitutional responsibility for securing the welfare of Canada’s Aboriginal peoples would find itself unable to safeguard one of the most central of Native interests—their interest in their lands”: *ibid.* at 1118 (para. 176).

on this view, integral, and therefore exclusive, to the federal authority to act in relation to such lands.

These conclusions, finally, draw still further support from the general structure of federal legislative authority under section 91(24) of the *Constitution Act, 1867*. As early as 1980, the Supreme Court of Canada made it clear that

Section 91.24 of the *British North America Act, 1867* [now the *Constitution Act, 1867*] assigns jurisdiction to Parliament over two distinct subject matters, Indians *and* Lands reserved for the Indians, not Indians *on* Lands reserved for the Indians. The power of Parliament to make laws in relation to Indians is the same whether Indians are on a reserve or off a reserve. It is not reinforced because it is exercised over Indians on a reserve any more than it is weakened because it is exercised over Indians off a reserve.⁹³

If the specifications that govern the federal power over “Indians” are identical whether or not the relevant Indians find themselves, at the relevant time, on section 91(24) lands, then one has good reason to conclude, in respect of the separate but parallel federal authority over lands reserved, that its nature and scope are not going to vary from case to case, depending on who might be using such lands or have interests in them.⁹⁴

III OTHER POSSIBLE MECHANISMS FOR APPLYING PROVINCIAL LAND REGIMES

If the conclusions suggested in the previous part are sound, it will follow that no province, acting as such, has the capacity to regulate or to facilitate by means of legislation or mandatory executive action the ownership, use, occupation, possession, enjoyment or disposition of any lands that turn out to be subject to a subsisting Aboriginal interest.⁹⁵ We shall need later on to think carefully about what this means generally for the application of provincial laws on section 91(24) lands: about the task of ascertaining precisely which provincial measures can and cannot apply on and to such lands.⁹⁶ It

93. *Four B*, *supra* note 77 at 1049-1050 [emphasis in original]. As the court acknowledges (*ibid.* at 1050), it was Kenneth Lysyk who noticed this first. See “Unique Position,” *supra* note 14 at 514-515, 541-542.

94. One must, of course, begin by establishing that the relevant lands are “Lands reserved for the Indians,” *i.e.*, that they remain subject to at least some subsisting Aboriginal interest. See note 29 above.

95. Kent McNeil has expressed a similar view in recent work. See *e.g.*, “Rethinking Jurisdiction,” *supra* note 14 at 463-464; *Defining Aboriginal Title*, *supra* note 14 at 24-25. The provinces may, however, make valid use of their spending power to encourage particular outcomes that they have no power to achieve through legislation or other mandatory measures: see *e.g.*, *Lovelace v. Ontario*, [2000] 1 S.C.R. 950 at 1012-1013 (paras. 109-111).

96. See notes 139-186 below and accompanying text.

should be clear already, though, that the consequences of these conclusions are potentially momentous. We have known for quite some time, for instance, that the provinces' underlying title to lands reserved is subject to any and all surviving Aboriginal interests in those lands.⁹⁷ If provinces have no capacity to relieve their underlying title of those Aboriginal interests, then any disposition a provincial Crown may make of its interest, and any claims of entitlement to particular lands that non-Native persons may base on such dispositions, are subject to any surviving Aboriginal rights or interests linked to that land.⁹⁸ When we recall that those surviving Aboriginal interests typically include "rights to exclusive use and occupation ... for a variety of purposes, which need not be aspects of those [A]boriginal practices, customs and traditions which are integral to distinctive [A]boriginal cultures,"⁹⁹ we begin to appreciate how much more precarious, and how much less valuable,¹⁰⁰ any interests claimed in those lands by non-Aboriginal patentees, licensees or their successors may now be and how little the provinces, acting

97. See *Constitution Act, 1867*, s. 109; *Delgamuukw*, *supra* note 15 at 1117-1118 (para. 175); *St. Catherine's Milling*, *supra* note 18 at 57-58.

98. See *e.g.*, *Amodu Tijani*, *supra* note 22 at 407-408 ("The introduction of a system of Crown grants which was made subsequently [to the Crown's assumption of sovereignty] must be regarded as having been brought about mainly, if not exclusively, for conveyancing purposes, and not with a view to altering substantive titles already existing."); *Council of the Haida Nation v. Minister of Forests* (1997), 153 D.L.R. (4th) 1 (B.C. C.A.) esp. at 4-5 (paras. 5-6). See also Mark D. Walters, "The Sanctity of Patents: Some Thoughts on the Validity of Crown Patents for Un-surrendered Aboriginal Lands," (Pacific Business & Law Institute, 19-20 April 2001) [unpublished] at 10.21-10.22 and throughout.

In *CP v. Paul*, *supra* note 43, the Supreme Court upheld, at the expense of subsisting Aboriginal interests, an easement granted to a railway by the province of New Brunswick, but the easement had been granted before Confederation and subsequently ratified by federal legislation. In *Sarnia (C.A.)*, *supra* note 43, the court exercised its discretion to refuse, on grounds of acquiescence, good faith purchase and delay, equitable relief that would have protected unsurrendered Aboriginal interests in reserve land from the claims of downstream owners whose rights derived initially from Crown patents. (See Walters, *ibid.*, for criticism of this general approach.) Again, though, the Crown patent in issue predated Confederation, so no questions of constitutional incapacity arose. Even so, the court took pains to make clear that, in the exercise of its remedial discretion, "*a priori* consideration [must] be given to the party whose rights have been taken, especially where the rights at issue are as fundamental in nature as the right of [A]boriginal title" (*Sarnia (C.A.)*, *ibid.* at 721-722 (para. 264)) and "[i]n particular," that "it would plainly be wrong to deny a remedy to vindicate a valid claim to [A]boriginal title purely on the grounds that recognition of the claim would be troublesome to others" (*ibid.* at 721 (para. 262)).

99. *Delgamuukw*, *supra* note 15 at 1083 (para. 117).

100. Compare *e.g.*, *Glass*, *supra* note 65, where a majority of the Supreme Court of Canada held, on the facts of that case, that the market value of reserve land being leased on a long-term basis to outsiders was properly understood to be fifty per cent of the market value of appropriate off-reserve comparators nearby, and held expressly that "[l]egal restrictions on land use, as opposed to restrictions found in the lease, may affect the market value of freehold property": *ibid.* at 662 (para. 47), Gonthier J. (for four of nine judges). Compare *ibid.* at 670 (para. 65), Bastarache J. (concurring in the result). This conclusion reduced by fifty per cent the amount of rent the federal Crown was allowed to charge the lessees on the band's behalf pursuant to the master lease agreement governing those lands.

on their own, may be able to do about that.¹⁰¹ To take just one specific example, there is now good reason, from a doctrinal standpoint, to doubt that provincial legislation governing purchase and sale of interests in land has any application to lands that turn out, after all, to be subject to Aboriginal title, or that its specifications about constructive notice can equip a subsequent purchaser of any such lands with a title unencumbered by unregistered Aboriginal interests.¹⁰²

Little of this may matter in respect of section 91(24) lands already set aside and classified as Indian reserves. For one thing, it is the federal Crown, not the Crown in right of a province, that now routinely holds the underlying title to Indian reserve lands; for another, the *Indian Act* already deals in quite substantial detail with matters of use, occupation, possession, protection, expropriation, enjoyment and disposition of reserve lands and the interests in them.¹⁰³ Quite apart from everything else, these federal provisions would routinely oust, by way of paramountcy, any municipal or provincial land arrangements with which they came into conflict.

Generally speaking, however, federal Indian legislation does not, by its terms, purport to apply to lands that are not reserve lands, whether or not they too may be section 91(24) lands.¹⁰⁴ In respect of lands off reserve that are subject to Aboriginal title, therefore, *no* statutory regime now exists to govern most land-related matters if the provincial regime does not apply.

101. This is just the kind of predicament that might, in ancient times, have prompted recourse to “the honour of the Crown”. (For a similar view, see *Skeetchestn Indian Band v. B.C. (Registrar, Kamloops Land Title District)*, [2000] 10 W.W.R. 222 (B.C. C.A.) [hereinafter *Skeetchestn*] at 228 (paras. 5,6), Southin J.A. (concurring).) Today, “the honour of the Crown” arises most often in respect of the federal Crown’s relationship with Aboriginal peoples (see e.g., *Sparrow*, *supra* note 30 at 1107-1108, 1110); originally, however, it emerged as a general instruction to interpret Crown grants and other exercises of Royal prerogative in such a way as to ensure against the disgrace of the sovereign. In the extreme case, where an executive act could not be reconciled with the honour of the Crown, the law would deny it effect, in deference to the proposition that “[t]he king . . . is not only incapable of doing wrong, but even of thinking wrong: he can never mean to do an improper thing”: 1 Bl. Com. (1979) at 238-239. See also, more recently, *Lieding v. Ontario* (1991), 77 D.L.R. (4th) 193 (Ont. C.A.) at 200.

102. See e.g., *Uukw*, *supra* note 49 at 417. The equitable doctrine protecting the interests of good faith purchasers for value without notice may sometimes, however, operate nonetheless: see *Sarnia (C.A.)*, *supra* note 43 at 734-736 (paras. 303-309), aff’g generally *Sarnia (S.C.)*, *supra* note 59 at 273-297 (paras. 680-769). This prompts one to ask what would count, in this context, as notice of a claim of Aboriginal title. For further discussion, see notes 202-234 below and accompanying text.

103. See *Indian Act*, ss. 18-31, 34-41, 53-60, 71, 81, 89-90, 93. See also *First Nations Land Management Act*, which provides, in respect of the reserves of fourteen listed First Nations, for alternative land management arrangements to the exclusion of relevant provisions of the *Indian Act*.

104. See note 25 above. The *Indian Oil and Gas Act* and its regulations, SOR/94-753, may be exceptions. That *Act*, by its terms, applies to “Indian lands” and has defined “Indian lands” to mean “lands reserved for the Indians,” along with some more specific inclusions.

In these circumstances, it seems wise to consider alternative ways in which provincially enacted land regimes might, *faute de mieux*, be given effect on lands reserved even though they cannot apply there as such.

A Section 88 of the *Indian Act*

The obvious candidate, of course, is section 88 of the *Indian Act*.¹⁰⁵ Subject to several exceptions and qualifications that need not concern us much here,¹⁰⁶ section 88 incorporates by reference, and applies as federal law to statutory Indians,¹⁰⁷ valid provincial laws of general application that, for constitutional reasons, cannot apply, as such, to section 91(24) Indians.¹⁰⁸ Because provincial measures incorporated through section 88 apply to Indians as federal, not provincial, law, and to everyone else they govern as provincial, not federal, law, there are some very difficult—and, as far as I know, unresolved—administrative issues about which level of government, acting pursuant to whose authority and policies and at whose expense, is to enforce such measures, especially in situations where it is not already clear whether the provincial measure can apply to Indians of its own force or whether, if it cannot, enforcement officials are dealing in a given case with an Indian.¹⁰⁹ But never mind. What matters here is whether section 88 can extend to section 91(24) lands the reach of provincial land regimes (of general application) that cannot, of their own force, govern such lands.

The short answer is that, fifty years later, we still do not know for sure. On the one hand, section 88 says that “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”; the words “all laws” are broad enough, by almost anyone’s reckoning, to accommodate provincial land laws as candidates for incorporation by reference. On the other hand, it says that “all laws . . . are applicable to and in respect of *Indians* in the province”; it does not provide

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

106. For detailed discussion of them, and of s. 88 in general, see Kerry Wilkins, “Still Crazy After All These Years: Section 88 of the *Indian Act* at Fifty” (2000) 38 *Alta. L. Rev.* 458 [hereinafter “Still Crazy”].

107. *I.e.*, to “Indians” as defined in s. 2(1), 4(1) and 4.1 of the *Indian Act*.

108. See *e.g.*, *Dick v. The Queen*, [1985] 2 S.C.R. 309 at 326-327; *Derrickson*, *supra* note 41 at 296-297; *Francis*, *supra* note 39 at 1028-1029, 1030 -1031; *Côté*, *supra* note 30 at 191 (para. 86); *Delgamuukw*, *supra* note 15 at 1121-1122 (para. 182), and, for discussion, “Still Crazy,” *supra* note 106 at 466-468.

109. See “Still Crazy,” *ibid.* at 470-472.

expressly for their application to Indian *lands*. Proponents of either view, therefore, can find support in this unhappy choice of text. And the Supreme Court of Canada has yet to offer us clear direction or authority on this difficult issue.¹¹⁰ All we know for sure so far is that section 88 “does not evince the requisite clear and plain intent to extinguish [A]boriginal rights,” including Aboriginal title.¹¹¹ Parliament, now considering revisions to the *Indian Act*, would do us all a service if it rephrased section 88 to clarify its intentions on this question.

In the meantime, we must do the best we can. Although some courts¹¹² and commentators¹¹³ have supported, or at least remained open to, the broader view, a substantial majority of the opinion so far on this issue, both judicial¹¹⁴ and academic,¹¹⁵ holds that section 88 does *not* incorporate provin-

110. In *Cardinal*, *supra* note 45, Laskin J., dissenting on other grounds, concluded (at 727-728) that s. 88 “deals only with Indians, not with Reserves”; the majority did not consider the issue. In *Derrickson*, *supra* note 41, the court considered (at 297-299) the arguments for the opposing views but left the issue undecided. And in *Delgamuukw*, *supra* note 15, the court observed (at 1122 (para. 182)) that “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).” This *Delgamuukw* passage could be construed to have decided the issue; so far, however, the commentators and the lower courts have treated it as insignificant, because this issue did not arise for decision in *Delgamuukw*, because the court did not take time to consider the fairly extensive lower court jurisprudence on the issue, and because it showed no awareness of the practical consequences of adopting that result: see *e.g.*, *Stoney Creek (S.C.)*, *supra* note 43 at 204-205 (para. 35); *Sarnia (S.C.)*, *supra* note 59 at 224-225 (paras. 493-494); “Rethinking Jurisdiction,” *supra* note 14 at 447; Bankes, *supra* note 14 at 333-335; Kent McNeil, “Aboriginal Title and Section 88 of the *Indian Act*” (2000) 34 U.B.C. L. Rev. 159 [hereinafter “Aboriginal Title and Section 88”] at 161-162.

111. *Delgamuukw*, *ibid.* at 1122 (para. 183).

112. See *e.g.*, *Delgamuukw (C.A.)*, *supra* note 20 at 172 (paras. 256-257) and, arguably, *Delgamuukw*, *supra* note 15 at 1122 (para. 182), quoted above at note 110. For criticism of *Delgamuukw (C.A.)*, *ibid.*, on this issue, see “Rethinking Jurisdiction,” *supra* note 14 at 439-441. See also *Boyer*, *supra* note 81, where the court observed in passing (at 404) that the use of reserve land “will, of course, always remain subject to provincial laws of general application,” and *Stoney Tribal Council v. PanCanadian Petroleum Ltd.*, [1999] 1 W.W.R. 41 (Alta. Q.B.), *aff’d* without reference to the point [2001] 2 W.W.R. 442 (Alta. C.A.), where the court appears to have assumed (at 62-63 (paras. 83-87)) that s. 88 could incorporate by reference provincial laws prescribing the calculation of natural gas royalties, even though it had earlier held (at 55-59 (paras. 53-64)) that the on-reserve royalty interest at stake in that case was indeed an interest in land.

113. See Patrick Monahan & Andrew Petter, “Developments in Constitutional Law: The 1985-1986 Term” (1987) 9 Sup. Ct. L. Rev. 69 at 169-170. See also Bankes, *supra* note 14 at 328-329, 333, 335, which reviews the controversy but takes no firm position in favour of one view or the other.

114. See *e.g.*, *R. v. Johns* (1962), 39 W.W.R. 49 (Sask. C.A.); *Isaac*, *supra* note 44; *Millbrook (S.C.)*, *supra* note 70, *aff’d* without reference to the point by *Millbrook (C.A.)*, *supra* note 70; *Palm Dairies*, *supra* note 67; *Park Mobile*, *supra* note 65; *R. v. Smith*, [1981] 1 F.C. 346 (C.A.), *rev’d* without reference to the point by *Smith*, *supra* note 29; *Stony Plain*, *supra* note 29; *R. v. Martin* (12 August 1985) (Ont. Dist. Ct.) [unreported]; *Fiddler*, *supra* note 44; *Stoney Creek (S.C.)*, *supra* note 43; *Sarnia (S.C.)*, *supra* note 59 at 224-225 (paras. 492-494), *aff’d* in part without reference to the point by *Sarnia (C.A.)*, *supra* note 43 at 708-714 (paras. 220-242); *Thomas Paul*, *supra* note 48 at 277-279 (paras. 75-78).

cial land measures by reference and apply them, as federal law, to lands reserved.

Elsewhere, I have reviewed in detail the various arguments for and against incorporation by reference, pursuant to section 88, of generic provincial land legislation.¹¹⁶ Suffice it here to say that I share, on balance, the majority view that opposes incorporation. I do so because the most that section 88 could do to extend the reach of provincial land measures is to apply them, in respect of section 91(24) lands, exclusively to statutory Indians. In other contexts, in which the provincial laws of general application applied to everyone else of their own force, this result could make sense; there, its effect would be to put the statutory Indians on the same footing—substantively, if not administratively¹¹⁷—as all relevant others. Provincial land regimes, however, cannot apply, of their own force, to anyone in respect of section 91(24) lands, because they deal with matters at the core of exclusive federal authority over lands reserved. Extending *their* reach, by incorporation, to statutory Indians only would mean that statutory Indians were the *only* ones bound by those measures in respect of lands reserved for the Indians.¹¹⁸ It is difficult to imagine a rational Parliament consciously choosing such a result.¹¹⁹ And as the Supreme Court reaffirmed recently in a wholly different context, “[i]t is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences.”¹²⁰

The better view, in my judgment, therefore, is that section 88 does not equip generic provincial land-related legislation to apply, even *faute de*

115. See e.g., “Unique Position,” *supra* note 14 esp. at 518; Hughes, *supra* note 14 at 99; “Understanding,” *supra* note 14 at 779-781; “The Constitution, the Provinces,” *supra* note 14 at 156, n.14 (at 287); Leroy Little Bear, “Section 88 of the Indian Act and the Application of Provincial Laws to Indians” in *Governments in Conflict*, *supra* note 14, 175 at 187; Robert A. Reiter, *The Law of First Nations* (Edmonton: Juris Analytica, 1996) at 201; “Rethinking Jurisdiction,” *supra* note 14 at 439-441; Douglas Lambert (J.A.), “*Van der Peet* and *Delgamuukw*: Ten Unresolved Issues” (1998) 32 U.B.C. L. Rev. 249 at 266-267; “Aboriginal Title and Section 88,” *supra* note 110 at 170-194.

116. See “Still Crazy,” *supra* note 106 at 483-497.

117. See note 109 above and accompanying text.

118. For elaboration, see “Still Crazy,” *supra* note 106 at 494-497. See also “The Constitution, the Provinces,” *supra* note 14 at 156, n.14 (at 287)—Doug Sanders was, to the best of my knowledge, the first to comment on this problem—and “Aboriginal Title and Section 88,” *supra* note 110 at 177-179.

119. And for the record, what I have seen of the legislative history that led to s. 88 gives no indication that Parliament, or the government of the day, considered this possibility and decided affirmatively to adopt it. Despite its importance today, s. 87 (as it was at first) received almost no thematic consideration in the lengthy deliberations that led to the enactment of the 1951 *Indian Act* reforms. See “Still Crazy,” *ibid.* at 459-465, 501. For a thorough and helpful analysis of the debates and policy initiatives of the period, see John F. Leslie, *Assimilation, Integration or Termination? The Development of Canadian Indian Policy, 1943-1963* (Ph.D., Carleton University, 1999)[unpublished] esp. at 112-243.

120. *Re Rizzo & Rizzo Shoes*, [1998] 1 S.C.R. 27 at 43 (para. 27). Compare *Berardinelli v. Ontario Housing Corporation*, [1979] 1 S.C.R. 275 at 284.

mieux, to lands reserved for the Indians. If such legislation cannot apply there of its own force, it appears that it cannot apply there at all.

B Suspending Enforcement of the Constitutional Impediment

What prompted our interest in section 88 of the *Indian Act*, again, was concern that, without it, there might very well be *no* mainstream law in place to govern the use, possession, occupation or disposition of those off-reserve Indian lands in respect of which the federal order has so far chosen not to legislate. If, as seems likely, section 88, as drafted, does not suffice to extend to such lands, as federal law, the reach of provincial land measures, what other options might exist to allay apprehensions about a mainstream “legal vacuum” in respect of such lands?

Perhaps it makes sense to consider here how the Supreme Court of Canada responded to a somewhat different risk of “legal vacuum” some years ago. In the *Manitoba Language Reference*,¹²¹ the court was driven to conclude that virtually all legislation enacted in Manitoba since 1890 was, and always had been, constitutionally invalid because it had been enacted exclusively in the English language, contrary to section 23 of the *Manitoba Act, 1870*.¹²² It then faced the challenge of ensuring preservation of the rule of law in Manitoba, despite the invalidity of the vast majority of the provincial legislation there.¹²³

The Supreme Court realized and acknowledged that recognized legal principles such as *res judicata* and the *de facto* doctrine would go some distance, even in those extraordinary circumstances, to protect settled expectations based on past transactions and to preserve stability and order in Manitoba while the legislature there was engaged in translating and re-enacting its unilingual laws. It concluded, however, no doubt correctly, that these principles would provide, at best, a partial solution; they could not preserve all the otherwise routine and desirable arrangements that might now be open to question.¹²⁴ The situation, therefore, called for more comprehensive response.

In the court’s view, the “only appropriate solution” was to “deem temporarily valid and effective the unilingual Acts of the Legislature of Manitoba which would be currently in force, were it not for their constitutional defect,” and to declare that all rights, obligations and other effects arising from these invalid laws (and not saved by other legal doctrines) “have, and

121. *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 [hereinafter *Manitoba Language Reference*].

122. R.S.C. 1970, App. II. Section 23 requires that all Manitoba legislation be “printed and published” in both official languages.

123. *Manitoba Language Reference*, *supra* note 121 at 754.

124. *Ibid.* at 754-757.

will continue to have, the same force and effect they would have had if they had arisen under valid enactments, for that period of time during which it would be impossible for Manitoba to comply with its constitutional duty under s. 23 of the *Manitoba Act, 1870*.¹²⁵ In other words, the court suspended temporarily the effect of its declaration that the laws of Manitoba were invalid, in order to give the Manitoba legislature sufficient time (but only that) to repair the constitutional defect in the manner of their enactment. In justifying this measure, it pointed to several occasions on which the highest courts in other jurisdictions—all with British antecedents—had given interim force to extraconstitutional measures in the interest of preserving the rule of law. Such occasions had involved the temporary interposition of insurrectionary regimes, external interventions that prevented the fulfilment of explicit domestic constitutional requirements, or executive measures to preserve order after lengthy periods of deliberate refusal to observe constitutional formalities.¹²⁶ What these various cases, despite their differences, demonstrate, in the court's view, is that "the courts will not allow the Constitution to be used to create chaos and disorder."¹²⁷

There is, in other words, precedent from the highest court in Canada for temporary judicial suspension of the effects of constitutional restrictions where such restrictions, applied full strength, would threaten the possibility of preserving the rule of law. Is the situation that interests us here—the fact that provincial land legislation cannot apply to Indian lands—sufficiently grave to warrant contemplating judicial suspension of this restriction on the reach of provincial law?

Reasonable people, perhaps, may differ in their initial responses to such a question. Mature conclusions about it, however, require that we appreciate three key differences between this situation and the one the Supreme Court had to address in the *Manitoba Language Reference*. Full appreciation of these differences discloses how substantial the extension of the judicial suspension doctrine, and how dramatic the constitutional consequences of giving effect to such an extension, would be if it were used here.

The first and most obvious difference is in the scope of the practical problem posed by the constitutional impediment. Unlike the *Manitoba Language Reference*, where 95 years of provincial statute law was undone in a

125. *Ibid.* at 758. Compare *ibid.* at 766-768. Despite the sweep of this declaration of temporary validity and effectiveness, one surely must assume that it would not protect unilingual Manitoba laws that also proved, on other grounds, to be invalid or constitutionally inapplicable. The court appears not to have considered this issue.

126. See *ibid.* at 758-766.

127. *Ibid.* at 766. Compare *ibid.* at 758: "The Province of Manitoba would be faced with chaos and anarchy if the legal rights, obligations and other effects which have been relied upon by the people of Manitoba since 1890 were suddenly open to challenge. The constitutional guarantee of the rule of law will not tolerate such chaos and anarchy."

single stroke, or the *Ibrahim* case in Cyprus,¹²⁸ where an insurgency made it impossible to constitute the courts in accordance with the constitution, the present situation is one in which many provincial laws (including those that provide for adjudication) continue to govern throughout the province and all provincial legislation that is otherwise valid continues to apply throughout the province except on section 91(24) lands. Resort in these circumstances to the judicial suspension doctrine would depreciate substantially the threshold of exigency originally considered sufficient to justify extraordinary judicial intervention.

At one time, this concern alone might well have sufficed to discourage approaches that showed potential to erode established constitutional boundaries.¹²⁹ In recent years, however, the Supreme Court itself, while enforcing provisions of the *Charter of Rights*,¹³⁰ has sometimes, in much less extreme circumstances, suspended temporarily orders striking down individual legislative provisions, either to avoid a specific risk of public danger¹³¹ or to address the special problem posed when underinclusive legislation breaches unjustifiably *Charter* equality guarantees.¹³² To this extent, at least, the courts have already lowered the threshold of exigency. Other things equal, they might very well be persuaded, on appropriate facts, to recognize still other grounds as sufficient, in principle, to warrant temporary suspension of these or even of other accepted constitutional restrictions. Nothing in the recent jurisprudence suggests that these categories are closed.

There are, however, at least two other important features that distinguish the kinds of constitutional limits that the courts so far have suspended from the restriction under discussion here. One is that, constitutionally speaking, there is absolutely nothing extraordinary about the circumstance that prevents the application to Indian lands of valid provincial land measures. Unlike the situations addressed in the *Manitoba Language Reference*, or in any of the foreign decisions on which it relies, it does not result from any extraconstitutional crisis or even from a course of domestic governmental conduct that has been deliberately unconstitutional. It does not even result

128. *Attorney General of the Republic v. Mustafa Ibrahim*, [1964] Cyprus L.R. 195, discussed in *Manitoba Language Reference*, *ibid.* at 761-763, 765.

129. See *e.g.*, *N.S. (A.G.) v. Canada (A.G.)*, [1951] S.C.R. 31 [hereinafter *Nova Scotia Interdelegation*].

130. Part I of the *Constitution Act, 1982* [hereinafter *Charter* or *Charter of Rights*].

131. *Swain v. The Queen*, [1991] 1 S.C.R. 933 at 1021 (release into the community of wrongly detained insane acquittees).

132. *Charter of Rights*, s. 15. See *e.g.*, *The Queen v. Schachter*, [1992] 2 S.C.R. 679 at 715; *M. v. H.*, [1999] 2 S.C.R. 3 at 87 (paras. 145-147); *Corbière v. Canada*, [1999] 2 S.C.R. 203 at 226 (para. 23), 283-285 (paras. 116-119). Special remedial problems arise from unacceptably underinclusive benefit-conferring programs because just striking such measures down might very well deny the benefit to deserving others, who have come to depend on it. Temporary judicial suspension gives the relevant legislature a chance to address the underinclusiveness problem in its own preferred way, either by finding a suitable way of extending the reach of the benefit program or by deciding itself to terminate it.

from inadvertent but unjustified transgression of such violable standards of constitutional behaviour as those the *Charter of Rights* prescribes. It results instead from the utterly familiar and traditional operation of the constitution of Canada: from the application, here as throughout division of powers jurisprudence, of well-accepted principles and precedents to preserve the proper boundaries, as prescribed in 1867, of the federal and provincial orders of government. These boundaries, once ascertained, have long been understood to be absolute.¹³³

The other, perhaps most important, difference is that the constitutional defect preventing provincial land law from applying to Indian lands is exactly as permanent as the current Canadian constitutional arrangement. It is, for that reason, not corrigible in the course of a *temporary* judicial suspension designed, as discussed above, to facilitate a “return to normal” in an orderly way. The only defensible reason for suspending temporarily enforcement of a compulsory constitutional restriction is to give the recipient order of government a chance to cure the constitutional defect on its own—to bring the relevant measures into compliance with the restriction—in a way that preserves the desirable features of the status quo. This, in turn, is sensible only where the relevant order of government already has the authority, as a matter of law and apart from the temporary dispensation, to do so. In Manitoba, for instance, the legislature has always had the power, by enacting bilingual laws, to repair the constitutional defect that had invalidated all the statutes it had passed since 1890. Similarly, in the cases involving suspensions in the *Charter* context, the relevant federal and provincial legislative bodies have always had sufficient constitutional authority to use the additional time provided to enact new schemes that achieved their objectives in ways more consonant with the *Charter*. In the present instance, this is simply not possible. There is nothing under the constitution that provinces, acting as such, can do to extend to Indian lands the reach of their own valid land laws. Only a constitutional amendment¹³⁴ or a federal statute incorporating such laws by reference can achieve that result.

Resort here to judicial suspension to facilitate application of provincial land legislation to section 91(24) lands would amount, in other words, to a determination that the normal operation of the constitution itself, or at least of its relevant parts, had led, or was going to lead, to unacceptable results and thus could no longer be allowed to continue as prescribed. I do not want

133. See *e.g.*, *Nova Scotia Interdelegation*, *supra* note 129 at 33-34, Rinfret C.J.C. (“the Members elected to Parliament or to the [provincial] Legislatures are the only ones entrusted with the power and the duty to legislate concerning the subjects exclusively distributed by the constitutional Act to each of them ... [T]he word ‘exclusively’ used both in section 91 and in section 92 indicates a settled line of demarcation ...”).

134. Remember here that the constitution now requires a constitutional conference, at First Ministers’ level with Aboriginal representation, before any amendment is made to s. 91(24) of the *Constitution Act, 1867*: see *Constitution Act, 1982*, s. 35.1.

to say that such a conclusion about the constitution, or about some parts of it, is altogether unthinkable. I do suggest, though, that those who have been most critical of “judicial legislation” and judicial creativity in respect of the constitution and its recent impact on Aboriginal peoples¹³⁵ might have reason to be especially cautious about promoting judicial suspension as a possible answer to the limits on provincial authority over Indian lands. In these circumstances, its invocation might well be the equivalent of a constitutional amendment, fashioned and imposed unilaterally by the judiciary. At a minimum, it would invite real doubt about the architectural soundness of the Canadian constitutional order as a whole. A better approach, almost certainly, is to seek a way of working with the edifice we have.

IV SOME APPLICATION AND ENFORCEMENT ISSUES

It may help to summarize what seems to follow from the discussion so far. On lands within a province’s territorial jurisdiction that are not subject to subsisting Aboriginal interests, that province’s measures apply routinely, according to their terms, subject only to the usual generic constitutional constraints. On lands that are subject to subsisting Aboriginal interests (section 91(24) lands), provincial measures relating to land do not, it appears, apply, either of their own force or pursuant to section 88 of the *Indian Act*. But a great many other, otherwise valid, provincial measures—highway traffic laws, for instance¹³⁶—do apply to life on section 91(24) lands no differently than they would apply anywhere else within the province.¹³⁷ In the absence of any other constitutional impediments such as federal paramountcy or encroachment on the core of some other head of exclusive federal power, the measures in this last group will have full, enforceable legal effect there.

In these circumstances, three tasks take on exceptional importance: ascertaining which provincial measures can apply on section 91(24) lands and which cannot; ascertaining whether and how provincial officials can enforce on section 91(24) lands those provincial measures that do apply there; and ascertaining precisely which lands are, or may turn out to be, section 91(24) lands. For provincial governments, the answers to these questions will be particularly important, partly for the purpose of effective allocation of limited government resources but also, and perhaps more so, because of the risks of civil liability they may face when harm results from their failure to

135. See e.g., F.L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000).

136. See e.g., *Francis*, *supra* note 39.

137. See e.g., notes 38-39 above and accompanying text.

enforce whatever provincial regulatory standards, in fact, do apply.¹³⁸ The rest of us, whether Aboriginal or not, will need this information as background in order to plan our affairs in a rational way. It is prudent, therefore, to turn now to these questions individually.

A Determining which Provincial Laws Apply

In my experience, few legal tasks in the past thirty years have generated as much confusion among the lower courts as the task of determining which kinds of provincial measures can apply on section 91(24) lands. With relatively little effort, one can find judicial decisions to the effect: that provincial partition of property legislation applies on reserve,¹³⁹ and that it does not,¹⁴⁰ that provincial mechanics' (or builders') liens are enforceable against non-Aboriginal interests in reserve lands,¹⁴¹ and that they are not;¹⁴² that provincial regulations restricting the setting of fires apply on reserve,¹⁴³ and that they do not;¹⁴⁴ that provincial or municipal building code requirements are enforceable on reserve,¹⁴⁵ but that municipal zoning restrictions are not;¹⁴⁶ that provincial landlord-tenant legislation applies on reserve,¹⁴⁷ and that it does not,¹⁴⁸ that some provisions in provincial common pause day (Sunday closing) leg-

138. I can do no more here than call attention to the developing law on regulatory negligence. Although that law is still developing, and results turn very much on the facts of particular cases, I doubt that it is safe to assume, when harm results from non-enforcement of provincial regulatory standards on s. 91(24) lands, that a province can excuse itself from civil liability merely by showing that it had, at the time, a mistaken belief that, for constitutional reasons, those particular standards did not apply on those lands. The principal Canadian decisions on regulatory liability include *Barratt v. North Vancouver (City of)*, [1980] 2 S.C.R. 418; *Kamloops (City of) v. Nielson*, [1984] 2 S.C.R. 2; *Laurentide Motels v. Beauport (City of)*, [1989] 1 S.C.R. 705; *Just v. British Columbia*, [1989] 2 S.C.R. 1229; *Rothfield v. Manolagos*, [1989] 2 S.C.R. 1259; *Brown v. British Columbia*, [1994] 1 S.C.R. 420; *Swinamer v. N.S. (A.G.)*, [1994] 1 S.C.R. 445; *Lewis v. British Columbia*, [1997] 3 S.C.R. 1145; *Cooper v. Hobart*, 2001 SCC 79, 206 D.L.R. (4th) 193; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, 206 D.L.R. (4th) 211.

139. *Re Bell and Bell* (1977), 16 O.R. (2d) 197 (H.C.J.) [hereinafter *Bell*].

140. *Re Simpson and Ziprick* (1995), 126 D.L.R. (4th) 754 (B.C. S.C.) [hereinafter *Simpson*].

141. *Palm Dairies*, *supra* note 67; *Sarcee*, *supra* note 29, Prowse J.A. (dissenting).

142. *Sarcee*, *ibid.*, Morrow J.A. (majority).

143. *Fiddler*, *supra* note 44.

144. *R. v. Sinclair*, [1978] 6 W.W.R. 37 (Man. Prov. Ct.).

145. *Oka (Municipalité) c. Simon* (1989), 44 M.P.L.R. 212 (Que. S.C.) [hereinafter *Oka '89*], *aff'd* on other grounds by *Oka '99*, *supra* note 44; *Brantford (Township of) v. Doctor*, [1996] 1 C.N.L.R. 49 (Ont. G.D.) [hereinafter *Doctor*]. But see *GTAA (C.A.)*, *supra* note 78 at 660-665 (paras. 62-79), *aff'g GTAA (G.D.)*, *supra* note 78 at 20-24 (provincial building code legislation not applicable to lessees of federal public property).

146. *Peace Arch*, *supra* note 29; *Oka '89*, *ibid.*, *rev'd* on the point by *Oka '99*, *ibid.*

147. *Park Mobile*, *supra* note 65 (residential rent regulation); *Toussowasket Enterprises v. Mathews*, [1982] B.C.J. No. 293 (QL) (S.C.) [hereinafter *Mathews*] at paras. 9, 69 (residential rent regulation, notices of termination).

148. *Millbrook (S.C.)*, *supra* note 70; *Matsqui Indian Band v. Bird*, [1993] 3 C.N.L.R. 80 (B.C. S.C.) [hereinafter *Bird*]; *Morin*, *supra* note 61.

islation apply on reserve but that others quite possibly do not;¹⁴⁹ that provincial restaurant licensing rules apply on reserve,¹⁵⁰ but that bylaws requiring licenses of municipal businesses do not;¹⁵¹ and that municipal bylaws regulating soil deposit and removal apply on reserve¹⁵² but that provincial measures authorizing removal of trailer homes from reserve land do not.¹⁵³

The heterogeneity displayed by just this group of decisions¹⁵⁴ indicates the lower courts' conceptual discomfort and doctrinal difficulty with this kind of determination. It is somewhat surprising, therefore, how little academic discussion there has been of this predicament. In 1982, Robert Pugh observed presciently that the courts seem prepared not only "to find that the exclusive jurisdiction of Parliament in relation to Indian lands pertains to land use" but also "to find provincial legislation that appears, on first glance, to relate to land use or at least land law, as legislation that only incidentally affects the use of land. This approach," he continued, "allows for the settlement of a maximum amount of equity upon competing interests but may, if carried too far, confuse the state of the law respecting Indian lands."¹⁵⁵ More recently, Kent McNeil, in important discussions of these general issues, has contented himself (as I have above) with saying that provincial measures will not apply on section 91(24) lands when they are "in relation to land."¹⁵⁶ These observations, though sound, do little, unfortunately, to assist the courts (or potential litigants concerned to organize their affairs) with the task of ascertaining, in a given instance, whether or not a given provincial measure "relates to land." Let me see what sense I can make of these issues for this purpose, with a view to suggesting a path that may help us all predict outcomes.

149. *Duncan Supermarket*, *supra* note 44.

150. *Gullberg*, *supra* note 73.

151. *Campbell River (District of) v. Naknakim*, [1984] 2 C.N.L.R. 85 (B.C. Prov. Ct.).

152. *Rempel Bros. Concrete v. Chilliwack (District of)* (1994), 88 B.C.L.R. (2d) 209 (B.C. C.A.) [hereinafter *Rempel Bros.*].

153. *Mathews*, *supra* note 147.

154. Other decisions suggest some other potential inconsistencies. Compare, for example, *Isaac*, *supra* note 44 (Nova Scotia hunting laws govern land use and so do not apply on reserve) with *Cardinal*, *supra* note 45 and *R. v. Charles*, [1998] 1 W.W.R. 515 (Sask. Q.B.) [hereinafter *Charles*] (Alberta and Saskatchewan hunting laws apply to Indians on reserve). This may not be a true conflict; the results in both *Cardinal*, *ibid.* and *Charles*, *ibid.* turn on the application of para. 12 of the Alberta and Saskatchewan NRTAs (see *Constitution Act, 1930*), respectively, provisions that have no relevance outside the prairie provinces. But see also *Smith '42*, *supra* note 78 (Ontario hunting laws applicable on federal military base because "not concerned with land").

For further discussion of this specific issue and most of these cases, see Kent McNeil, *Indian Hunting, Trapping and Fishing Rights* (Saskatoon: Native Law Centre, 1983) at 13-17. For discussion of additional, mostly earlier cases, see "Prior Claims," *supra* note 14 at 257-259.

155. Pugh, *supra* note 14 at 76.

156. See *e.g.*, "Rethinking Jurisdiction," *supra* note 14 at 458-463; *Defining Aboriginal Title*, *supra* note 14 at 24-25.

Three factors, I think, help account for the rather startling variety and incompatibility of the results in the lower courts on the application issue: some inclination to deal differently with Aboriginal than with non-Aboriginal interests in section 91(24) lands; the clarification wrought to the law by the Supreme Court of Canada's decision in *Derrickson*,¹⁵⁷ and the particular difficulty courts have had in deciding what kinds of measures regulate *use* of land. Each of these considerations deserves attention in turn.

First, these cases demonstrate that the courts have been much more willing to apply provincial law to non-Aboriginal interests in reserve lands than to the interests of Indians or bands. Of the eight decisions just cited that involved interests that were exclusively non-Aboriginal,¹⁵⁸ all but two—*Peace Arch*¹⁵⁹ and *Palm Dairies*¹⁶⁰—held that the provincial law applied;¹⁶¹ of all the others cited, only four—*Oka '89*¹⁶² (building code); *Fiddler*¹⁶³ (fire regulations), *Doctor*¹⁶⁴ (building code) and, arguably, *Oka '99*¹⁶⁵ (building code and zoning rules)—concluded that provincial measures in issue applied to regulate an Aboriginal interest.

We met this issue earlier on, while engaged in measuring the dimensions of the core of exclusive federal authority over section 91(24) lands. We saw then that there is dispute, involving some of these same decisions, about whether the power to control the enjoyment and disposition of non-Aboriginal interests in section 91(24) lands comes within that exclusive core, but that the better view is that this power *is* exclusive to Canada.¹⁶⁶ If this is so, it should make no difference to the present inquiry whether the relevant interests in (or uses of) section 91(24) lands are those of an Aboriginal or a non-Aboriginal person. The only issue is whether the relevant provincial measure would impair in any way the legal character of such lands or the legitimate interests in them, or would have the effect of regulating or determining matters related to the use of, or the nature of the interests in, such lands.

157. *Supra* note 41.

158. *Gullberg*, *supra* note 73; *Peace Arch*, *supra* note 29; *Park Mobile*, *supra* note 65; *Palm Dairies*, *supra* note 67; *Sarcee*, *supra* note 29; *Mathews*, *supra* note 147; *Duncan Supermarket*, *supra* note 44; *Rempel Bros.*, *supra* note 152. See also *Stony Plain*, *supra* note 29.

159. *Ibid.*

160. *Supra* note 67.

161. In *Mathews*, *supra* note 147, the court upheld the application of most aspects of the provincial residential tenancy scheme at issue, but concluded (at paras. 68, 70), based on *Peace Arch*, *supra* note 29, that provincially authorized orders involving movement or removal of house trailers from the trailer site could not apply, because they had to do with the use of land.

162. *Supra* note 145.

163. *Supra* note 44.

164. *Supra* note 145.

165. *Supra* note 44.

166. See notes 65-94 above and accompanying text.

Second, it was only in 1986, with the Supreme Court decision in *Derrickson*,¹⁶⁷ that the full substantive reach of exclusive federal authority over section 91(24) lands, and the scope of the corresponding immunity from provincial measures, began to be clear. It was primarily because of *Derrickson* that the B.C. Supreme Court, in *Simpson*,¹⁶⁸ departed from coordinate Ontario authority¹⁶⁹ to hold that provincial partition measures do not apply on reserve, and felt able, in *Bird*,¹⁷⁰ to ignore a contrary precedent from its own Court of Appeal¹⁷¹ and to conclude that the band, as landlord, was not subject to provincial rent regulation provisions.

Third, these decisions demonstrate how difficult it is to tell with confidence whether a given provincial measure regulates land use. Almost all regulated activity implicates some use of some land, yet we know that some provincial regulatory schemes¹⁷² apply without distinction on section 91(24) lands and so must not count as land use regulation. Differences about how to recognize land use regulation seem to me to account, more than anything, for the confusing array of results that emerge from these decisions. The task of finding a path among them is made still more challenging because so few of them offer clear reasons for their characterizations¹⁷³ and because we still have no guidance on the issue from the Supreme Court of Canada.

Oka '89 is one decision that attempts a rationale. The court there held, in preliminary proceedings concerning development of an apartment building on land held by the federal Crown for the Mohawks of Kanesatake, that municipal zoning bylaws control the use of land and therefore cannot apply on reserve, but that bylaws requiring building and demolition permits do not, and therefore can. The difference, it said, citing earlier authority with approval, is that the building code, unlike the statute authorizing zoning by-

167. *Supra* note 41.

168. See *Simpson*, *supra* note 140 at 757-759 (paras. 13-19).

169. *Bell*, *supra* note 139.

170. See *Bird*, *supra* note 148 esp. at 82.

171. *Park Mobile*, *supra* note 65.

172. Highway traffic measures remain the obvious paradigm. See, again, *Francis*, *supra* note 39.

173. And in some of these decisions, at least, what reasoning does appear may prompt caution about their authority. *Doctor*, *supra* note 145, for example, a case about building codes, takes no account of *Derrickson*, *supra* note 41, and does not acknowledge that federal authority over land use on Indian lands is exclusive. And *Rempel Bros.*, *supra* note 152, the case about soil and gravel extraction and deposit, relies heavily (at 213-214 (para. 23)) on a passage from *Cardinal*, *supra* note 45 at 703 that overlooks the distinction between the issue of a provincial measure's validity and the subsequent issue of its application (if valid) to Indian or to Indian lands. (For criticism of *Cardinal*, *ibid.* on this and related grounds, see "Section 35 Rights," *supra* note 12 at 208, n.109; Banks, *supra* note 14 at 338-343.) Besides, it was not necessary for the court in *Rempel Bros.*, *ibid.* to consider whether the municipal bylaws relevant there applied as such to gravel extraction activity on reserve. The federal permit authorizing such activity there expressly required the contractor to comply with all relevant federal and provincial regulations, "whether normally applicable to Indian Reserves or not": see *ibid.* at 212-213 (para. 22). As long as the bylaw was valid, therefore, its terms were binding on the contractor pursuant to the permit.

laws, “is an Act which is expressly aimed at individuals and attempts to regulate and govern the activities and licensing of *persons* ... Any mandatory injunction granted is directed at a person and is not visited upon the land.”¹⁷⁴

This approach has not been well received in other recent decisions concerned with similar issues. Ultimately, it did not prevail in the *Oka* case itself; addressing the matter on its merits, the Court of Appeal for Quebec concluded that the municipal zoning and building code bylaws *both* applied in respect of the relevant property.¹⁷⁵ In *Aztec Aviation*, which held that *neither* municipal building code nor zoning bylaws could apply on federal public lands, the B.C. Supreme Court gave the following reasons for declining to accept this kind of approach:

All legislation concerns itself with the rights and duties of persons, some with respect to rights and duties which arise out of the ownership, possession and use of land. It is people who have rights and duties, not land. If the land in question is federal Crown land, provincial or municipal legislation insofar as it purports to affect the rights and duties of persons in respect thereto is ineffective. I see no basis in the Constitution Act, 1867 or in principle for distinguishing between the ‘use’ of land by a person and the manner in which he constructs a building on the land.¹⁷⁶

And in *GTAA (G.D.)*, the Ontario Court observed dismissively that, although “[a]ll laws apply to persons[,] that truism does not identify the *subject-matter* of a law.”¹⁷⁷ Citing Supreme Court of Canada authority on the very point, the court concluded that the subject matter of Ontario’s building code legislation is land development.¹⁷⁸

On other grounds, too, the approach proposed in *Oka ‘89* is unsatisfactory. If adopted, it would make the application of provincial measures to section 91(24) lands contingent on the happenstance of legislative drafting: measures expressed to be aimed at persons would apply on such lands (and indeed, on federal public lands generally); those expressed to be aimed at lands would not. No doubt a measure’s subject matter does impose some constraints on the manner in which its provisions can be expressed. Even so,

174. *Oka ‘89*, *supra* note 145 at 254, citing *Shuniah (Township of) v. Richard* (1982), 37 O.R. (2d) 471 (H.C.J.) [hereinafter *Richard*] at 479 [emphasis in original]. The issue in *Richard*, *ibid.* was whether bylaws passed pursuant to Ontario’s *Building Code Act* could apply to federal lands governed by the federal *Veterans’ Land Act*. On the latter issue, see also *R. v. Gay*, [1959] O.W.N. 375 (C.A.) at 376.

175. See *Oka ‘99*, *supra* note 44 at 219-25 (paras. 54-78). The Supreme Court of Canada has refused leave to appeal.

176. *Aztec Aviation*, *supra* note 78 at 217-218.

177. *GTAA (G.D.)*, *supra* note 78 at 22 [emphasis in original]. On appeal, the municipality did not reassert the argument: see *GTAA (C.A.)*, *supra* note 78 at 660-665 (paras. 62-79).

178. *GTAA (G.D.)*, *ibid.* at 22, citing *Ontario Home Builders Ass’n. v. York Regional Board of Education*, [1996] 2 S.C.R. 929 [hereinafter *Ontario Home Builders Ass’n.*] at 987. On this basis, the Ontario Court concluded that *Richard*, *supra* note 174, is no longer good law.

a competent drafter probably would have little trouble designing a zoning ordinance phrased in terms of what persons may or may not do, or a building code bylaw that set out the circumstances in which certain activities could take place on land. Constitutional questions of this much importance should not be that easy to beg.

The *Fiddler* decision suggests a different approach. There, the Saskatchewan Court of Queen's Bench adopted as its own the Crown's submission that "[l]aws regulating the use of land must require something to be done to the land itself ...".¹⁷⁹ This test, unlike the one proposed in *Oka '89*, at least has the advantage of focusing on the substance, not on the form, of the regulatory instrument. As phrased, however, it seems unduly restrictive. Consider, for instance, zoning, which many consider a paradigm of land use regulation. Typical zoning regulations permit certain uses of certain lands and prohibit others, but they rarely *require* anyone to use particular lands in particular ways, let alone to "do something to the land itself." On the test adopted in *Fiddler*, such measures would turn out, for that reason alone, not to regulate land use. One would need a very good reason to adopt an approach that led to that result.

That said, I believe that the *Fiddler* approach does contribute to our understanding of what constitutes land use. Although, for the reasons given above, it seems doubtful that meeting the *Fiddler* test is a *necessary* condition for accreditation as land use regulation, it seems to me equally clear that meeting that standard is, for that purpose, a *sufficient* condition. If anything is to count as regulation of the use of land, a measure that "require[s] something to be done to the land itself" will do so.¹⁸⁰ The question is how far beyond that benchmark one ought to be able to go in the name of "land use." My answer, at the moment, would be as follows.

There are, in my view, certain kinds of activities—forestry,¹⁸¹ mining,¹⁸² farming and land development¹⁸³ come to mind—that seem to be so intimately connected with the land, and with proprietary interests in certain place-specific resources, that any provincial measure that regulates, structures, authorizes or prohibits them will necessarily be land-related, irrespec-

179. *Fiddler*, *supra* note 44 at 601. Because the fire regulations in issue there did not require any alteration to the land itself, the court concluded (at 602) that they could apply on reserve because they did not concern the use of land.

180. See *e.g.*, *Texaco Canada v. Vanier (City of)*, [1981] 1 S.C.R. 254 at 258 (municipal bylaw "concerned with esthetic considerations, with the external appearance of the property on which the business is being carried on," goes to land use, not business licensing regulation).

181. See *e.g.*, *R. v. Paul* (1997), 153 D.L.R. (4th) 131 (N.B. Q.B.) (treaty land rights equivalent to beneficial ownership, entitle bearers to harvest trees and logs on provincial Crown land), *rev'd* on other grounds (1998), 158 D.L.R. (4th) 231 (N.B. C.A.).

182. See *e.g.*, *Delgamuukw*, *supra* note 15 at 1086-1087 (para. 122) ("[A]boriginal title also encompass[es] mineral rights, and lands held pursuant to [A]boriginal title should be capable of exploitation in the same way, which is certainly not a traditional use for those lands").

183. See notes 177-178 above and accompanying text.

tive of the form of the measure. These, to use the language of *Fiddler*, are *activities* that “require something to be done to the land itself.”¹⁸⁴ Provincial measures that govern such activities regulate uses of land and, for that reason, do not apply on section 91(24) lands.

Many other human enterprises and activities, however, do not, by their nature, involve such intimate connection with the land, or with specific physical features of particular land; in principle, there is, for that reason, greater flexibility about where they can take place. Provincial measures or provisions that govern such activities, therefore, do not necessarily regulate the use of land; they may or may not do so, depending on how they operate and what they seek to do. What we need is a sensible basis on which to determine which among such measures are not to apply on section 91(24) lands because they regulate land use.

I suggest that we base such determinations on whether a given provincial measure seeks to control or specify *where* such an activity may or may not take place. Some provincial arrangements (or municipal bylaws), for instance, permit, prohibit or impose the same restrictions on a given enterprise no matter where within the jurisdiction it occurs; laws that provide for consumer protection, professional regulation or collective bargaining are fairly obvious examples. It makes good sense to say that such measures do not regulate uses of land, because location makes no difference to their operation. Where this is so, there is no good reason to say that exclusive federal authority over section 91(24) lands precludes such measures from applying there.

Other common provincial (or municipal) measures, however, specify in various ways *where* we may or may not engage in certain activities or undertake particular projects, or they take account of our choice of location¹⁸⁵ in deciding whether, or on what terms, we may do so. It is easy, for instance, to imagine a regulatory scheme that imposed more rigorous standards of emission control on manufacturers operating near populated areas or that prohibited certain kinds of activities in floodplains or near bodies of water. These and other measures that regulate in a *site-specific* way purport to prescribe, in their different ways, what we may or may not do on or with particular land. All such measures, I suggest, can fairly be said to regulate uses of land. If they were to apply on section 91(24) lands, their effect, there as elsewhere, would be to govern the kinds of things one may use those lands to do, and who may use them.

It is, of course, always a matter of regulatory choice whether or not to design a given measure to operate or to distinguish in a site-specific way.

184. See note 179 above and accompanying text.

185. See *e.g.*, *Re Cities Service Oil Co. and City of Kingston* (1956), 5 D.L.R. (2d) 126 (Ont. H.C.J.) (specifying minimum frontage permissible for service stations is land use regulation, not business licensing regulation).

One consequence of the approach I suggest is that some environmental protection measures and retail business holiday schemes¹⁸⁶—to take just two examples—may apply on section 91(24) lands though others do not. This need not seem incongruous if we remember that the kinds of activities that such measures regulate are not, as such, necessarily linked or restricted to particular locations. There are different ways of regulating such activities; only some of those ways involve concern with where they take place. When provinces choose to regulate them in ways unconcerned with place, there is no obvious reason (other things equal) why their measures should not govern on section 91(24) lands, as elsewhere.¹⁸⁷

Let me summarize briefly what follows from the argument in this section. Provincial measures will not apply in respect of “Lands reserved for the Indians” if their effect would be to define interests in, or to regulate ownership, occupation, possession, disposition or use of any such lands. This is so, I have argued, even where the relevant interest in, or the use of, the land at issue is not that of Indians, individually or collectively. A provincial measure will be taken to regulate the use of land whenever: (1) it requires affirmatively that something be done to land, or to particular land; (2) it regulates activities that, by their nature, require doing something to the land, *or*

186. See *e.g.*, *Duncan Supermarket*, *supra* note 44 at 191-192, where the B.C. Supreme Court distinguished between one provincial measure, which prohibited “selling or offering for sale goods” on a holiday and another, in the same statute, which prohibited admitting the public to a retail business establishment on a holiday. The former provision, the court concluded, could and did apply on reserve, because, although the prohibited activity “happened to occur on Indian lands ... it might have occurred at any place in the province”. The latter provision, it said, on the other hand, might not apply on Indian land, because it “must be seen as being rooted in a *place*” [emphasis in original] and might therefore be said to be “directed to the use of land”.

187. Earlier, I criticized the approach proposed in *Oka '89*, *supra* note 145, for seeking to determine on the basis of “the happenstance of legislative drafting” whether a given provincial measure should be taken to regulate use of land: see text above between notes 178-179. Isn't this equally true of the alternative I am proposing here, which also leaves some room for provincial regulatory flexibility? I do not believe it is. The problem I see with the test suggested in *Oka '89*, *ibid.* is that it seems to allow one to treat the *same* provincial measure as land use regulation, or not, depending only on whether that measure is phrased to aim at persons or at lands. On the other hand, I see the choice between generic and site-specific regulation of particular activity as a choice between substantively *different* kinds of regulatory measures.

(3) it regulates in a site-specific way activities that, by their nature, could take place anywhere.¹⁸⁸

B Enforcing Provincial Measures on Section 91(24) Lands

We saw above, when describing the core of exclusive federal authority over “Lands reserved for the Indians,” that the law of Aboriginal title is federal common law,¹⁸⁹ that Aboriginal title “encompasses the right to exclusive use and occupation of the land held pursuant to that title” and “vests in the [A]boriginal community which holds [the title] the ability to exclude others from the lands held pursuant to that title,”¹⁹⁰ and that the nature of the Aboriginal interest in section 91(24) lands is the same, whether they are reserve lands or Aboriginal title lands.¹⁹¹ We concluded there that exclusive federal authority over lands reserved is coextensive in subject matter with the au-

188. Kent McNeil’s initial response to the analysis in this section was to say that these three criteria were each sufficient, but perhaps not necessary, even together, to warrant saying that a given provincial measure relates to the use of land. Other kinds of measures might also qualify. Suppose, he suggested, that a province passed legislation banning toxic waste disposal sites throughout its territory. Such a measure might well not satisfy any of these criteria, yet surely, in his view, it would be legislation relating to land use and, as such, would not apply to lands reserved for the Indians.

It’s possible, of course, that my three criteria are not exhaustive; further conversation on these difficult issues will help clarify that. And I confess that I don’t know what to say, in the end, about McNeil’s example. For what it’s worth, though, here is the way I would, at the moment, be disposed to approach its analysis.

McNeil is surely right, in my view, to say that provincial legislation banning toxic waste disposal sites throughout the province does not regulate in a site-specific way. If “site-specific” means anything useful, it cannot extend that far. For me, then, the remaining question is whether toxic waste disposal meets one of my other criteria: whether it is an enterprise that requires doing something particular to the land. Speaking personally, I know much too little about toxic waste disposal to be able to answer that question with any confidence. This may well be a matter for evidence and for expert opinion. Suppose for the moment, though, that it is such an enterprise: that it is suitable only for land that has certain physical and geographic characteristics and that it involves, by its nature, some preparation of, or engagement with, the relevant lands. (Aiming the relevant legislative prohibition at “sites” might, other things, equal, count in support of this view.) On that supposition, I share McNeil’s view that legislation prohibiting it would indeed relate to land use, but submit that the criteria I have offered would accommodate that result.

Now suppose the contrary: that toxic waste disposal turns out not to be such an enterprise, but instead to be an activity that, by its nature, can take place anywhere. In that case, my strong current view would be that legislation prohibiting it would not relate to the use of land. Though aimed, for whatever reason, at “sites,” the purpose of such a measure, on this view, would just be to prohibit outright the activity in the province. (The same would be true of legislation prohibiting, incongruously, “unfair labour practice sites.”) As argued above, the constitutional status of a provincial measure should not turn exclusively on the happenstance of legislative drafting: see notes 175-179 above and the text accompanying them.

189. See *Roberts*, *supra* note 90 at 340; *Côté*, *supra* note 30 at 173 (para. 49).

190. *Delgamuukw*, *supra* note 15 at 1083 (para. 117) and 1104 (para. 155), respectively.

191. See note 50 above and accompanying text.

thority of a province over the other lands within its territory.¹⁹² From these propositions, it seems to follow that matters having to do with access to section 91(24) lands—the law of trespass and suchlike—are among those at the core of federal authority over such lands.¹⁹³ And if this is so, it means that only the federal order of government has the power to limit the rights of those in lawful possession of section 91(24) lands to exclude others from entering on those lands.

Any such conclusion imposes potentially serious limitations on provinces' capacity to enforce on Indian lands even those of their regulatory measures that apply there. Here is why.

Effective enforcement of many provincial regulatory schemes requires that provincial officials be able to attend, sometimes unannounced and without consent, at specific locations, to inspect records or sites, to investigate complaints, or generally to satisfy themselves of compliance with provincial standards. Like everyone else, however, provincial officials require "lawful justification" to enter private property without consent;¹⁹⁴ when doing so on government business, such justification depends on conferral of statutory authority.¹⁹⁵ Many provincial statutes contain provisions expressly authorizing designated officials to attend, inspect, investigate and report, or to arrest and detain, on private property, no doubt to satisfy just this requirement.

Such provisions, by their nature, impose restrictions on the power of those possessing the relevant lands to exclude from those lands the provincial enforcement officials. Under normal circumstances, such restrictions raise no issues of provincial capacity;¹⁹⁶ such measures are a straightforward exercise of provincial authority over, for instance, matters related to property and civil rights in the province. The problem here, though, is that the right to exclude outsiders from section 91(24) lands appears to be integrally related

192. See notes 36-64 above and accompanying text.

193. *R. v. Trubulsey* (1995), 22 O.R. (3d) 314 (C.A.) [hereinafter *Trubulsey*] may appear to be authority to the contrary. At issue there was the applicability on federal airport lands of Ontario's *Trespass to Property Act*. The appellant, seeking to challenge the application of the statute, argued unsuccessfully that such lands were a federal enclave, immune from the reach of provincial law: see *ibid.* at 327. It is difficult to disagree with this conclusion, as far as it goes. The court in *Trubulsey, ibid.*, however, did not go on to consider whether the provincial statute had the effect of determining or regulating any matters that lay at the core of exclusive federal authority over federal public property. In *GTAA (C.A.)*, *supra* note 78, on the other hand, which dealt expressly with issues of interjurisdictional immunity, the same court concluded (at 665 (para. 77)), *despite* the fact that airports are not enclaves of federal authority, that provincial measures that affected property rights there could not apply. Compare *GTAA (G.D.)*, *supra* note 78 at 24 ("It is also clear that the broad federal power over federal public property acts not only as a positive source of federal jurisdiction, but also operates defensively to shield such property from provincial laws in relation to it").

194. See *e.g.*, *R. v. Gingrich* (1958), 29 W.W.R. 471 (Alta. C.A.) [hereinafter *Gingrich*] at 472-473.

195. See *e.g.*, 8 Hals. (4th) para. 828 (1974); *Entick v. Carrington* (1765), 19 St. Tr. 1029 (C.P.); *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

196. Depending on the phrasing and the circumstances, of course, they may or may not raise issues under s. 8 of the *Charter*.

to the nature of the Aboriginal interest in such lands: an interest whose enjoyment only the federal order of government has authority to regulate. If this is so, it appears that the provinces lack the constitutional power to authorize their officials to go on such lands without consent, even in the course of enforcing provincial regulatory measures that otherwise apply there.¹⁹⁷ In principle, therefore, Aboriginal collectivities holding Aboriginal interests in particular lands appear to be in a position to invoke the common law of tres-

197. See e.g., *Re Yang and The Queen* (1996), 31 O.R. (2d) 66 (G.D.) [hereinafter *Yang (G.D.)*] at 76, rev'd on other grounds (1998), 38 O.R. (3d) 417 (C.A.) [hereinafter *Yang (C.A.)*]:

Special Investigations ... set up its surveillance by way of trespassing on Indian Reserve lands which they knew or ought to have known was unlawful without any prior authorization from the government of the Six Nations to undertake. Investigators with Special Investigations are not peace officers as defined by the *Criminal Code* and therefore cannot claim any greater right than any other person to carry out the activities they did within the boundaries of the reserve.

This limitation, of course, does not, on its own, suffice to prevent provincial officials from enforcing the *Criminal Code* or other federal legislation, because their powers of entry to do so derive from federal, not provincial, law.

pass to restrain officials not otherwise authorized to be on their lands¹⁹⁸ from enforcing provincial measures there.¹⁹⁹

So substantial a restriction on provincial enforcement capacity would, of course, have significant implications for Aboriginal autonomy, for the scope of provincial exposure to regulatory liability²⁰⁰ and sometimes, quite possibly, for public safety. Given these implications, I am surprised there has been no academic discussion and very little judicial authority pertaining to this issue.²⁰¹ To me, at least, it needs and deserves further thought.

198. One must be somewhat careful here. Canadian case law suggests that the defence of legal authority in response to a claim in tort (such as trespass) remains available, *despite* the invalidity or constitutional inapplicability of the statutory provision on which the defence is based, if the defendant government official can show she acted in good faith on the basis of the statutory provision *before* it was known to be invalid: see *e.g.*, *Central Canada Potash Co. v. Saskatchewan*, [1979] 1 S.C.R. 42 at 88-90 (Minister properly entitled to seek to enforce regulations unless and until they are found to be *ultra vires*); *Quebec (A.G.) v. Guimond*, [1996] 3 S.C.R. 347 at 357-358. These authorities suggest that a claim in trespass against a provincial enforcement official would not succeed unless it pertained to conduct occurring *after* the courts had determined that the relevant provincial measure conferring power of entry did not apply on lands reserved for the Indians (or, perhaps, unless it was aimed at preventing future trespass). There is, however, another view. Peter Hogg and Patrick Monahan concluded recently, somewhat reluctantly, that “where tortious acts are committed under the authority of a statute that is subsequently held to be unconstitutional[,] the officials whose duty it was to enforce the statute ... will be personally liable for any tortious acts committed under its provisions,” despite their honest, reasonable belief at the time that the statute was valid, “for an invalid statute cannot clothe their acts with the required legal authority”: see *Liability of the Crown*, 3d ed. (Toronto: Carswell, 2000) at 190. Recent Australian High Court authority seems to support this latter view: see *Kruger v. The Commonwealth* (1997), 190 C.L.R. 1 at 46, Brennan C.J. (“an attempt to deny or escape that liability fails when justification for the act done or omission made depends on a statute or an action that is invalid for want of constitutional support”); compare *ibid.* at 93, Toohey J.

199. Under current law in some provinces, participation in certain kinds of enterprise or activity—the regulated professions or industries are good examples—is prohibited without provincial license or permission. Where this is so, a province dealing with applicants located on s. 91(24) lands may consider requiring, as a precondition to issuance of the permission or license, that the applicant consent to provincial entry for purposes of enforcement activity. This approach may well suffice in respect of the possessory interests in s. 91(24) lands of non-Aboriginal persons, including any corporations. The Aboriginal interest in s. 91(24) lands, however, is a collective interest (see *e.g.*, *Delgamuukw*, *supra* note 15 at 1082-1083 (para. 115)), so individual Indians, acting as such, cannot give effective consent in respect of even the s. 91(24) lands allotted to them unless authorized to do so by the collectivity: *ibid.*; *Devereux*, *supra* note 81.

200. See note 138 above and accompanying text.

201. Aside from *Yang (G.D.)*, *supra* note 197, the only decision I know that has made a finding on this issue is *Charles*, *supra* note 154, where the Saskatchewan Court of Queen’s Bench concluded (at 523 (paras. 29-31)) that provincial “wildlife officers were legally entitled to enter the reservation to conduct their investigation,” even without consent from the relevant Indian bands or the Department of Indian Affairs, “[b]ecause Indians, and Indian reservations, are subject to the provisions of the [*Saskatchewan Wildlife Act*].” In doing so, however, it did not consider the relationship among powers of entry, rights of exclusion, Aboriginal interests in land and the scope of exclusive federal authority over Indian lands. Elsewhere in the decision, however, the court observed, I think correctly, that special considerations govern the application of provincial game laws to Indians in the prairie provinces, because of the terms of the NRTAs concluded with those provinces: see *ibid.* at 521-522 (paras. 18-24). The combined

C Identifying (Actual or Potential) Section 91(24) Lands

If the discussion so far is sound, it follows that provincial law is pretty much irrelevant in determining issues (and in defining rights and incidents) of ownership, possession, occupation, management and disposition in respect of section 91(24) lands, or in specifying permissible (or constraining impermissible) uses of such lands. Provincial measures that regulate in a site-specific way do not apply there. There is even reason to doubt the power of provincial enforcement officials to enter upon such lands to enforce there provincial laws that would otherwise apply. On lands that are not section

effect of those agreements and s. 1 of the *Constitution Act, 1930* is to make “laws respecting game in the Province from time to time” apply “to the Indians within the boundaries thereof” “notwithstanding anything in the *Constitution Act, 1867*, or any *Act* amending the same ...”. This may well suffice, in these special circumstances, to ensure the application of the enforcement provisions in such laws to s. 91(24) lands within those provinces, subject to the hunting and fishing rights that those agreements themselves protect. Compare *Agricredit Acceptance Canada v. Muskowekan Band*, [2002] 1 C.N.L.R. 1 (Sask. Q.B.), a case about a creditor’s efforts to recover a piece of farm machinery from a reserve. There (at 9-10 (para 38)), the same court said:

This is not a case where the Court has any desire to deal with or conclusively determine the issue of whether or not a person in the position of Agricredit, or its lawfully appointed agents or representatives, is entitled to enter upon Reserve lands if not invited or has not [sic] obtained permission to do so. The Court is prepared, for the purposes of resolving these matters, to respect the wishes of the Band with respect to whom it invites or permits to enter upon its Reserve lands in the context of these circumstances.

In the result, the court ordered the relevant Band to deliver the equipment to the plaintiff off the reserve. This suggests, at minimum, that the issue is still open in Saskatchewan, at least where the NRTA does not apply.

In *Gingrich*, *supra* note 194, the Alberta Court of Appeal concluded (at 473-474) that a *pre-Confederation* statute protecting religious freedom gave clergy “lawful justification” to enter a reserve without permission from the band, but wondered without deciding (at 474-475) what authority teachers, inspectors and school officials had to enter reserves to carry out their duties. In *Isaac v. Workers’ Compensation Board* (1994), 93 B.C.L.R. (2d) 273 (C.A.), the court said (at 289 (para. 77)) that it was not “persuaded without further argument that Board employees engaged in a lawful purpose who enter a reserve without permission are necessarily ‘trespassers’ under the *Indian Act*,” but did not have to decide the issue because, in that case, the band council had cooperated. In *R. v. Whiskeyjack*, [1985] 2 W.W.R. 481 (Alta. C.A.) and *R. v. Pinay*, [1990] 4 C.N.L.R. 71 (Sask. Q.B.), courts held that provincial officials entering on reserves were not trespassing, but in both instances the officials had acted pursuant to federal, not provincial authority. In *Yang (C.A.)*, *supra* note 197, the court observed (at 422) that any problems with provincial surveillance on reserve could not affect the rights of *this* accused under s. 8 of the *Charter*, “since Mr. Yang is not a [N]ative person and had no connection with the reserve”. And in *D.T.L. v. Listuguj (Police Service)*, [1999] Q.J. No. 5364 (QL), *aff’d (sub nom. D.T.L. v. L. (Police Service))* [2001] Q.J. No. 1444 (QL), the Quebec Superior Court concluded (at paras. 38-51), without reference to the land rights issues, that the local First Nations police, empowered as constables under the *Loi de police du Québec*, had both the power and the duty to enforce on their reserve a foreign custody order given domestic effect by the law of Quebec. First Nations constables, as band members themselves, would already, other things equal, have had the right to enter their own reserve.

91(24) lands, on the other hand, provincial measures, other things equal, will apply and govern as usual.

Much depends, therefore, on whether or not the lands at issue in a given situation turn out to be lands reserved for the Indians. For this reason, it seems crucial that there be fair and reliable ways of identifying such lands, where they exist, and of managing the process of, and the interests at stake in, making such identifications.

Initially, this task of identification may seem straightforward. To qualify as a “reserve” for purposes of the *Indian Act*, a tract of land will have to have been “set apart by Her Majesty for the use and benefit of a band”;²⁰² section 21 of the *Act* creates a Reserve Land Register to keep track of such lands and of transactions concerning them. Generally speaking, one can determine whether particular lands are reserve lands by consulting the register. And to validate a claim of Aboriginal title in certain lands, an Aboriginal collective must demonstrate that it occupied, and had exclusive occupation of, those lands at and before the moment the Crown asserted sovereignty over them.²⁰³

So simple a description, however, masks the key complications. As regards reserve lands, there continue, after all this time, to be important questions of detail concerning certain reserves—often involving boundaries,²⁰⁴ the efficacy of alleged surrenders²⁰⁵ or issues of treaty land entitlement²⁰⁶—that leave open, until resolved, the legal and constitutional status of particular lands. And because there is, even today, no legally prescribed procedure

202. See *Indian Act*, s. 2(1) “reserve”. This definition also requires that legal title to the tract vest in Her Majesty (*ibid.*); s. 36 of the *Act*, however, deems other lands, not legally owned by the Crown, to be reserves where they have been set apart for bands’ use and benefit. According to recent authority, however, no lands can be reserve lands in the absence of federal involvement in, and consent to, the decision to set the lands apart: see *Musqueam Holdings v. Vancouver Assessor, Area No. 09*, 2000 BCCA 299, 76 B.C.L.R. (3d) 323 (C.A.), leave to appeal to S.C.C. refused.

203. See *Delgamuukw*, *supra* note 15 at 1097-1107 (paras. 143-159). Present-day occupation of the relevant lands will count *prima facie* as evidence of occupation pre-sovereignty, but only if the claimant group can also prove sufficient continuity between its occupation of the land now and that of its ancestors before sovereignty: *ibid.* For extended discussion of this notion of continuity, see Kent McNeil, “Continuity of Aboriginal Rights” in James Guest & Kerry Wilkins, eds., *Aboriginal Issues in the Post-Delgamuukw Era* (Saskatoon: Purich, 2002) [forthcoming].

204. See *e.g.*, *Nikal v. The Queen*, [1996] 1 S.C.R. 1013 (river running through Moricetown Reserve No. 1 not part of the reserve).

205. See *e.g.*, *Chippewas of Kettle and Stony Point v. Canada (A.G.)*, [1998] 1 S.C.R. 756 (surrender valid despite third party’s efforts at surrender meeting to purchase votes in favour of surrender).

206. See *e.g.*, *Lac La Ronge Indian Band v. Canada*, [2000] 1 C.N.L.R. 245 (Sask. Q.B.) [hereinafter *Lac La Ronge (Q.B.)*], rev’d in part (2001), 206 D.L.R. (4th) 638 (Sask. C.A.) [hereinafter *Lac La Ronge (C.A.)*].

for “setting apart” certain lands as reserve lands,²⁰⁷ there remains ongoing room for dispute about whether the federal government’s intentions in particular cases were or were not to constitute reserves.²⁰⁸ As regards Aboriginal title, it may suffice here to remember that even now, more than seventeen years after initiation of the *Delgamuukw* proceedings,²⁰⁹ we still have no clear idea which, if any, of the vast lands claimed by the Gitksan and Wet’suwet’en peoples are indeed subject to Aboriginal title. This means, again, that we still do not know, for example, whether British Columbia land law applies in respect of the *Delgamuukw* claim area, described in the trial judgment as “a vast area almost the size of New Brunswick.”²¹⁰ And there are, of course, many other such claims at much earlier stages of litigation.²¹¹

Eventually, no doubt, we shall have the benefit of judicial (if not negotiated) determinations of these various issues. The pressing immediate question, however, is what we ought to say and do in the meantime, while we wait to see whether provincial land regimes apply to the various lands. Everyone relevant—including, not least, the once and future creditors and lenders invited to finance any kind of development on the lands in dispute²¹²—has a clear and legitimate interest today in knowing the relevance to those lands of provincial land measures.²¹³

One tempting way to begin is by invoking what’s often called the “presumption of constitutionality.” Plenty of authority supports the basic proposition that courts are to presume the validity of provincial legislation until someone can establish its invalidity.²¹⁴ This is why provincial laws whose effect is to regulate matters lying within the core of exclusive federal heads of power are, as a general rule, “read down” rather than struck down; both

207. See e.g., *Lac La Ronge (Q.B.)*, *ibid.* at 328 (para. 216), *aff’d* on the point by *Lac La Ronge (C.A.)*, *ibid.* at 692-701 (paras. 162-195); *Ross River Dena Council Band v. Canada*, 2002 SCC 54 [hereinafter *Ross River*].

208. In *Ross River*, *ibid.*, the Supreme Court of Canada held unanimously that a federal government department’s decision to “set aside” certain lands for establishment of an Indian village in the Yukon did not suffice to “set apart” those lands as a reserve for purposes of the *Indian Act*.

209. Proceedings in *Delgamuukw* commenced on October 23, 1984: see *Uukw*, *supra* note 49 at 409. The trial began on May 11, 1987: see *Delgamuukw v. British Columbia* (1991), 79 D.L.R. (4th) 185 (B.C. S.C.) [hereinafter *Delgamuukw (trial)*] at 199.

210. *Delgamuukw (trial)*, *ibid.* at 203.

211. Most recently, the Haida Nation’s claim to the whole of the Queen Charlotte Islands and to the surface and subsurface rights in the surrounding ocean. See note 27 above and the sources cited there.

212. For a useful initial discussion of some relevant lender issues, see Derek A. Brindle, “Aboriginal Title Claims and Private Lands—Recognition and Responses” in *Aboriginal Claims and Private Property*, *supra* note 34, 5.1 at 5.20-5.23.

213. For discussion of some of the economic consequences of uncertainty about the constitutional status of lands that are subject to Aboriginal land claims, see Owen Lippert, “Costs and Coase: A Way Forward” in *Nass Valley*, *supra* note 31, 397, esp. at 398-400; Ken Sumanik, “Potential Impact on Mining” in *Nass Valley*, *ibid.* 459, esp. at 464.

214. See e.g., *Reference re Farm Products Marketing Act*, [1957] S.C.R. 198 at 255, Fauteux J.; *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662 at 687-688, and, in the Aboriginal context, *Kruger & Manuel v. The Queen*, [1978] 1 S.C.R. 104 at 112.

orders of government are presumed (for division of powers purposes) to have intended to legislate only within the limits of their constitutional authority.²¹⁵

The difficulty here with this perfectly sensible approach is that it does not address the nature of the constitutional problem that needs our attention. So far, at least, there has rarely, if ever, been reason to doubt the *validity* of the provincial land law at issue in disputes involving section 91(24) lands; the issue almost always concerns the *application* to such lands of a clearly valid provincial measure. In these circumstances, the issue of constitutional infirmity turns on the constitutional status of the lands themselves: a determination that has nothing to do with the purity of the provincial intention animating the measure. For this reason, the usual presumption of validity is probably not a sufficient basis, from a constitutional standpoint, on which to assume in the interim that provincial land law governs lands not known for sure to be lands reserved for the Indians.

It is clear nonetheless—and reassuring, at least to the conduct of mainstream affairs—that courts, despite some early exceptions,²¹⁶ have been unwilling to suspend, on an interlocutory basis pending determination of the merits of Aboriginal claims, the application to disputed lands of provincial land law.²¹⁷ These results are hardly surprising, given the emphasis courts continue to place on “balance of convenience” in appraising applications for interlocutory relief, the length of time it takes to appraise Aboriginal land claims on their merits,²¹⁸ and the fact that the burden of proof rests on those seeking to establish Aboriginal interests in land, not on those who seek to

215. For discussion, see “Section 35 Rights,” *supra* note 12 at 206-208.

216. See *MacMillan Bloedel v. Mullin* (1985), 61 B.C.L.R. 145 (C.A.); *Pasco v. Canadian National Railway Co.* (1985), 69 B.C.L.R. 76 (S.C.), *aff’d* [1986] 1 C.N.L.R. 34 (B.C. C.A.); *Hunt v. Halcan Log Services* (1986), 15 B.C.L.R. (2d) 165 (S.C.); *Jules v. Harper Ranch*, [1989] 3 C.N.L.R. 67 (B.C. S.C.); *Westar Timber v. Ryan* (1989), 60 D.L.R. (4th) 453 (B.C. C.A.).

217. See *e.g.*, *Ontario (A.G.) v. Bear Island Foundation* (1989), 70 O.R. (2d) 574 (H.C.J.); *Wiigyet (Morrison) v. District Manager, Kispiox Forest District* (1991), 51 B.C.L.R. (2d) 73 (S.C.); *Tlowitsis Nation v. MacMillan Bloedel*, [1991] 2 C.N.L.R. 164 (B.C. S.C.), leave to appeal refused [1991] 4 W.W.R. 83 (B.C. C.A.); *Chippewas of Kettle & Stony Point v. M.M. Dillon Ltd.*, [1996] 1 C.N.L.R. 99 (Ont. G.D.); *Tsay Keh Dene Band v. British Columbia* (1997), 24 C.E.L.R. (N.S.) 66 (B.C. S.C.); *Kitkatla Band v. British Columbia (Ministry of Forests)* (1998), 162 D.L.R. (4th) 568 (B.C. C.A.); *Siska Indian Band v. British Columbia (Minister of Forests)* (No. 1) (1998), 62 B.C.L.R. (3d) 133 (S.C.); *Westbank First Nation v. British Columbia* (2000), 191 D.L.R. (4th) 180 (B.C. S.C.) [hereinafter *Westbank*]; *Council of the Haida Nation v. British Columbia (Minister of Forests)*, 2000 BCSC 1280 (21 November 2000) [hereinafter *Haida*], all cases where Aboriginal plaintiffs were unsuccessful in restraining provincially authorized activity on claimed lands. See also *British Columbia (Minister of Forests) v. Okanagan Indian Band* (2000), 187 D.L.R. (4th) 664 (B.C. C.A.) (injunction issued requiring defendants to obey provincial order to cease logging activity on certain lands despite assertion of Aboriginal title to, and logging rights on, those lands). For a helpful introduction to most of these cases, those in the previous note, and some others to similar effect, see John J.L. Hunter, “Enjoining Activities on Private Land to Protect Aboriginal Title Claims” in *Aboriginal Claims and Private Property*, *supra* note 34, 6.1.

218. For discussion of both these factors, see Hunter, *ibid.* at 6.7-6.10.

contest such claims.²¹⁹ But they do not predetermine, let alone preclude, the eventual reckoning. And if the courts uphold on the merits a claim that entails that certain lands are section 91(24) lands, then it will always have been true that such lands were beyond the reach of provincial land law.

Courts' frequent interlocutory preference for the *status quo* is not, therefore, a trustworthy basis on which to make long-term plans concerning lands (off established reserves) that are subject to Aboriginal claims.²²⁰ Confirmation that those lands are indeed section 91(24) lands may compromise retroactively the legal foundations on which such plans were based. True, such recognized legal notions as *res judicata* and the *de facto* doctrine will shelter some pre-existing settled expectations from the backward-looking impact of such determinations. But *res judicata* arises only in relation to matters already determined judicially as between particular parties. As for the *de facto*

219. See *e.g.*, *Delgamuukw*, *supra* note 15 at 1097 (para. 143), and, in the present context, *Westbank*, *supra* note 217 at 194-197 (paras. 56-64); *Haida*, *supra* note 217 at paras. 17, 27-28. For criticism of this proposition, see Kent McNeil, "The Onus of Proof of Aboriginal Title" (1999) 37 *Osgoode Hall L.J.* 775; for a critical response to McNeil, see Fred Morris & Loree Young, "Issues Regarding Aboriginal Title Claims: Proof, Process and Remedies" (Proceedings of the Second Annual Aboriginal Law Conference, Continuing Legal Education Society of B.C., 9 March 2001) [unpublished] [hereinafter *Aboriginal Law Conference*] 1.3.01 at 1.3.08-1.3.10.

220. [T]he recent cases which have refused to consider [A]boriginal rights within the context of summary proceedings should not necessarily be regarded as triumphs for industry or development, nor as furthering the cause of certainty in the regulation of resource use. Rather, what these decisions really do is postpone the moment of truth, by refusing to interfere with the decision-making process until full proof of [A]boriginal title has been given. One may ask whether it is truly desirable, in the interests of industry or of certainty, that the moment of truth should be postponed until after substantial further expense has been incurred by the proponent of development, and substantial further injury has been done to the lands for which the proponent may, ultimately, be liable:

Joanne Lysyk, "Judicial Relief in Relation to Aboriginal Rights: Recent Developments" in *Aboriginal Law Conference*, *ibid.* 1.2.01 at 1.2.09.

doctrine, it rescues, even at its broadest,²²¹ only those rights and obligations arising from the acts or decisions of officials acting under colour of authority *while* they still have colour of authority. It does not preserve any rights or obligations arising directly from inapplicable or invalid laws themselves; neither does it protect reliance on officials' acts or decisions occurring after the courts have unmasked their lack of authority.²²² It is easy to imagine arrangements, unprotected by either notion, that would be open to challenge if premised on false assumptions about the application of provincial measures to the relevant lands.

In these circumstances, one would have thought that everyone would have an interest in knowing, as efficiently and promptly as possible, which lands *might* turn out to be section 91(24) lands, and in ascertaining as efficiently as possible which claims asserting Aboriginal interests in which

221. As traditionally understood, the *de facto* doctrine operated exclusively to validate the acts of improper appointees exercising the valid authority of duly constituted legal offices, not the conduct of duly appointed officials acting beyond the scope of the power conferred upon them: see *e.g.*, *Turigan v. Alberta* (1988), 62 Alta. L.R. (2d) 1 (C.A.) at 21-26 [hereinafter *Turigan*], Harradence J.A. (concurring); *Bond v. The Queen*, 2000 HCA 13 (High Court of Australia, 9 March 2000) at paras. 32-34. On this view, the *de facto* doctrine would rarely have any application to the present situation, because the relevant determinations would arise almost always from duly constituted officials acting pursuant to powers inapplicable on lands reserved for the Indians. In the *Manitoba Language Reference*, *supra* note 121 at 755-757 and *Bilodeau v. Manitoba (A.G.)*, [1986] 1 S.C.R. 449 at 454, however, the Supreme Court appears to have broadened the doctrine's scope to encompass, in addition, acts or decisions taken by putative officials (under colour of authority) pursuant to invalid legislation: see *Turigan*, *ibid.* at 26-29, Harradence J.A. (concurring) (the majority did not address the issue). But see also *Coronation Insurance Co. v. Taku Air Transport* (1990), 48 B.C.L.R. (2d) 222 (C.A.), where Anderson J.A. (one of two judges in the majority in the result) observed (at 234) that "the judgment in the *Man. Language Rights* case must be narrowly construed and should apply only to cases where it is necessary to preserve peace and order in the community at large or where the public interest requires the application of the 'de facto' doctrine ..."

222. See *Manitoba Language Reference*, *ibid.* at 756-757.

lands have legal merit.²²³ Aboriginal peoples will want and need an effective way of giving notice of the interests they claim, in order to protect their claims—especially after *Sarnia (C.A.)*²²⁴—from the equities that often favour innocent downstream purchasers for value. And non-Aboriginal parties seeking information enough to plan their affairs and transactions rationally will want to know and take account of any grounds for doubt about what legal regime—*whose* legal regime—is to govern the lands that concern them most.²²⁵

Obvious though this may seem, recent legal developments illustrate, and in some instances aggravate, the difficulty of achieving perspicuity about the

223. It is true that the Ontario Court of Appeal, in *Sarnia (C.A.)*, *supra* note 43, declined to give effect, as against the subsequent owners and occupants of lands in Sarnia, Ontario, to the Chippewas' Aboriginal interest in those lands, despite the absence of evidence of extinguishment or proper surrender of that interest. It held that the forms of specific relief requested were in the court's discretion, and it exercised its discretion, on the facts of that case, against awarding specific relief: see *ibid.* at 714-736 (paras. 243-310). (The court left undisturbed the Chippewas' claim for damages against the federal and provincial Crowns in respect of the initial transaction.) Even so, non-Aboriginal interests have at least four reasons to be cautious about taking comfort more generally from this decision.

First, as mentioned earlier (see notes 64, 98 above), the initial Crown grant from which all the non-Aboriginal interests involved in the *Sarnia* litigation derived took place some years before Confederation. The grant, therefore, raised no issue of constitutional capacity.

Second, at least five important features specific to the *Sarnia* facts combined to dissuade the court from exercising its discretion to award specific relief: the fact that the failure to observe the formal surrender requirements was a mutual oversight; the fact that the Chippewas received fair market value for the land; the Chippewas' apparent acceptance of the finality of the transaction for several years after it was concluded; the lengthy unexplained delay on the Chippewas' part in claiming their interest in the land; and the involvement of downstream good faith purchasers for value without notice. It is clear that no one of these factors would have been enough, on its own, to ensure that result (see *ibid.* at 720-725, 734-736 (paras. 262-275, 303-309)); the court emphasized (*ibid.* at 725 (para. 275)) that it would "require exceptional circumstances for a court to withhold a remedy to protect or vindicate [A]boriginal title" and (at 721 (para. 262) that mere inconvenience to others could not be sufficient reason to refuse to vindicate valid claims. It seems doubtful that such a favourable conjunction of the equities will reoccur routinely in disputes over Aboriginal claims to land.

Third, the court in *Sarnia (C.A.)* did not say whether the unenforced but unsurrendered Aboriginal interest, once identified there, would burden interests in the lands claimed purchased *after* the court's decision. It appears from the general approach the Court of Appeal adopted there, however, that this too would be a matter for case-by-case determination in the exercise of the court's remedial discretion.

Finally, and perhaps most important for our immediate purpose, *Sarnia (C.A.)* does not decide, or even consider, whether the Chippewas' unsurrendered interest in the relevant lands means that much of Sarnia is, and always has been, s. 91(24) lands, beyond the reach of Ontario land legislation. According to previous jurisprudence, lands that are subject to a subsisting Aboriginal interest remain s. 91(24) lands until that interest is validly extinguished or surrendered absolutely: see note 29 above and the sources cited there. One cannot just assume, in other words, that the Court of Appeal's decision, based on equity principles, to protect the downstream purchasers' interests from the Chippewas' claim has changed the character of the relevant lands for constitutional purposes.

224. See previous note.

225. As Owen Lippert said recently in a related context, "precisely such confusion over who holds jurisdiction is a cause of future conflict and aborted economic exchanges": Lippert, *supra* note 213 at 411.

potential territorial scope of section 91(24). Three such developments deserve particular mention.

To begin with, courts in at least four Canadian jurisdictions—the Territories,²²⁶ B.C.,²²⁷ Saskatchewan²²⁸ and Ontario²²⁹—have refused to support Aboriginal peoples’ attempts to make use of local land registry regimes to register the Aboriginal interests they claim to have in specified lands.²³⁰ Sometimes these refusals have turned on technicalities in the relevant statutory provisions;²³¹ at other times, on the recognition that the very nature of the Aboriginal interest claimed would, once established, preclude, for constitutional reasons, the registration statute’s application to the lands at issue.²³² The effect has been to deprive Aboriginal parties claiming such interests in lands within those jurisdictions of the usual way of giving others constructive notice of their claims,²³³ and interested others of accepted places to look

226. See *Paulette v. The Queen*, [1977] 2 S.C.R. 628 [hereinafter *Paulette*].

227. See *Uukw*, *supra* note 49; *Skeetchestn*, *supra* note 101.

228. See *Lac La Ronge Indian Band v. Beckman*, [1990] 4 W.W.R. 211 (Sask. C.A.) [hereinafter *Beckman*]; *James Smith Indian Band v. Saskatchewan (Master of Titles)* (1995), 123 D.L.R. (4th) 280 (Sask. C.A.) [hereinafter *James Smith*].

229. See *Ontario (A.G.) v. Bear Island Foundation* (1984), 15 D.L.R. (4th) 321 (Ont. H.C.J.) at 448, *aff’d* on other grounds (1989), 58 D.L.R. (4th) 117 (Ont. C.A.), *aff’d* without reference to the point [1991] 2 S.C.R. 570; *Chippewas of Kettle & Stony Point v. Canada* (1994), 17 O.R. (3d) 831 (Ont. G.D.) [hereinafter *Kettle Point*].

230. According to Mary Locke Macaulay, “while interlocutory relief is at least possibly available in some cases, [A]boriginal people who have sought to preserve their claims to [A]boriginal rights or title to land pending the determination of their claims by applying for either certificates of pending litigation [*lis pendens*] or caveats [sometimes called “cautions”] have, when opposed, been unsuccessful in every case”: *Aboriginal and Treaty Rights Practice* (Toronto: Carswell, 2000) at 6-6.

231. See *e.g.*, *Paulette*, *supra* note 226 (statute does not authorize registration, after 1887, of caveats against unpatented Crown lands); *Uukw*, *supra* note 49 at 413-418, *Skeetchestn*, *supra* note 101 at 253-255 (paras. 72-83) (Aboriginal interest not “registrable” because not a “marketable” title, being alienable only to the Crown); *James Smith*, *supra* note 228 at 288 (interest claimed not a registrable interest).

232. See especially *Uukw*, *ibid.* at 417; *Beckman*, *supra* note 228 at 218-219; *James Smith*, *ibid.* at 285-287, Wakeling J.A. (concurring). Compare *Kettle Point*, *supra* note 229 at 840-841.

233. In *Uukw v. British Columbia* (1986), 28 D.L.R. (4th) 504 (B.C. S.C.), *rev’d* by *Uukw*, *ibid.*, the court had observed (at 539-540) that, apart from the option of registering their claim to the relevant lands, “the appellants would have no effective way in which to give notice of their claim, and no way to protect the lands which are the subject of their claim, from alienation. Potentially, all Crown lands could be alienated to third parties, with no option to the appellants except to sue those third parties”.

The deference recently shown by Ontario courts to the interests of downstream purchasers for value without notice (see *Sarnia (C.A.)*, *supra* note 43 at 734-736 (paras. 303-309); *Sarnia (S.C.)*, *supra* note 59 at 273-287 (paras. 680-740)) may invite reconsideration of earlier judicial assurances—see *e.g.*, *Beckman*, *ibid.* at 219; *Kettle Point*, *ibid.* at 840-841—that Aboriginal interests in land would, once established, have no need of the protection of provincial registry schemes.

for possible Aboriginal interests in lands not captured by the Reserve Land Register.²³⁴

Consider second the recent decision of the British Columbia Court of Appeal in *Thomas Paul*,²³⁵ which held that provincial legislatures have no jurisdiction whatever to authorize provincially constituted administrative tribunals (in this case, the Forest Appeals Commission) to hear and determine—and, one must therefore suppose, to consider or to entertain—questions arising from claims of Aboriginal right or title in the course of dealing with issues that are otherwise properly before them.²³⁶ Whatever conclusion one may reach about the constitutional merits of this determination, it seems, as a practical matter, almost certain, if sound, to force provincial officials and tribunals either to proceed without reference to Aboriginal peoples' unadjudicated claims to have Aboriginal interests in particular lands or to await judicial determinations about such claims (where they are relevant) before proceeding at all.

No less inconvenient, at least for the present purpose, finally, is the recent decision in *Cheslatta Carrier*.²³⁷ The court there refused to entertain the plaintiff First Nation's action for a declaration that it had an existing Aboriginal right to fish in certain waters for certain purposes, because the First Nation had not alleged that anyone was threatening or interfering with the exercise of the right it claimed; it merely had sought judicial confirmation that the right existed. No doubt it makes sense, as a general rule, for courts to discourage resort to declaratory relief to resolve purely hypothetical issues. Applied to claims involving Aboriginal interests in land, however,²³⁸

234. According to Derek Brindle, *supra* note 212 at 5.6-5.7, "[t]he B.C. Treaty Commission process requires First Nations to identify the boundaries of their traditional lands. The public now has actual, or deemed, notice of those lands over which a claim for Aboriginal title could be asserted." Unfortunately, Brindle cites no authority, and nothing I have been able to find in either the federal or the provincial legislation that constitute the B.C. Treaty Commission—*British Columbia Treaty Commission Act*, S.C. 1995, c. 45; *Treaty Commission Act*, R.S.B.C. 1996, c. 461—indicates clearly that any disclosures made in the course of the Treaty Commission process would count, as such, as notice as against third parties. No doubt this point deserves some further research.

235. *Supra* note 48.

236. See *ibid.* at 270-280 (paras. 47-86), Lambert J.A., at 281-282 (para. 92), Donald J.A. (concurring). (Huddart J.A. dissented.) The court distinguished sharply between the provinces' acknowledged power to confer such authority on a court of general jurisdiction and its capacity (or lack thereof) to confer it on a tribunal (*ibid.*, esp. at 269-270 (paras. 44-47), Lambert J.A.), and expressed doubt about provincial appointees' capacity to exercise independent judgment on Aboriginal matters (*ibid.* at 279-280 (para. 83), Lambert J.A., at 282 (paras. 94-95), Donald J.A.).

237. *Cheslatta Carrier Nation v. British Columbia*, [2000] 10 W.W.R. 426 (B.C. C.A.) [hereinafter *Cheslatta Carrier*], aff'g (1999), 38 C.P.C. (4th) 188 (B.C. S.C.), leave to appeal to S.C.C. refused.

238. See Lysyk, *supra* note 220 at 1.2.03-1.2.04 for discussion of earlier occasions in which Aboriginal parties sought declaratory relief to protect their claims of Aboriginal title, and, at 1.2.10, for brief discussion of whether *Cheslatta Carrier* should be extended to apply to claims of Aboriginal title.

the outcome in *Cheslatta Carrier* appears to make contestation over particular lands (not included within established reserves) a precondition to ascertaining whether those lands are subject to Aboriginal interests and, for that reason, beyond the reach of provincial land law. Parties that want to inform themselves, *before* commitments and costs accrue and positions crystallize, about whose legal regime is to govern the lands for which they have plans will, on this approach, have no trustworthy way of doing so.²³⁹ Given the stakes routinely riding on such determinations, one might have preferred having access to a mechanism for making them that did not give further encouragement to adversity of interest.

At present, therefore, it appears, in at least some Canadian jurisdictions, that there is no accepted way—apart from giving actual notice to anyone and everyone²⁴⁰ or bringing fresh judicial proceedings challenging every initiative that anyone takes in respect of lands they claim—in which Aboriginal parties can protect the interests they claim in off-reserve lands. Neither is there a straightforward way in which careful prospective lessees, purchasers, lenders or developers can ascertain ahead of time whether the off-reserve lands that concern them are subject to Aboriginal interests or claims. Neither set of interests, therefore, can appraise, nor protect itself against, the risk that the land law regime on which it relies to organize its involvement with the relevant lands will turn out not to have legal force or effect there. While this is so, any engagement with such lands is going to be based, perforce and irreducibly, on speculation. Making disputation over use or possession of such lands the price of certainty about their constitutional status seems, in these edgy circumstances, to be a recipe for confrontation.

V CONCLUSION

The constitution awards to the federal order of government exclusive legislative and executive power in relation to “Lands reserved for the Indians” and sets no outer limits on the territorial range that such lands might comprise. So far, the federal order has chosen to exercise this authority almost exclusively in respect of the tracts of lands it has set aside as reserves. The cases

239. Unless, of course, it happens that previous litigation has already determined the status of the relevant lands.

240. And according to some commentators, at least, Torrens land registration systems, in which the register is (fraud aside) conclusive evidence of title, leave no room for a doctrine of actual notice to operate. See *e.g.*, Paul J. Pearlman, “Aboriginal Title, Fee Simple, and the *Land Title Act*” in *Aboriginal Law Conference*, *supra* note 219, esp. at 17. There is, of course, good reason to doubt, as a matter of constitutional law, that provincially enacted Torrens land registration schemes can govern lands that turn out to be section 91(24) lands. Their very existence in several Canadian provinces, however, may complicate attempts to resort to forms of actual notice to protect the Aboriginal interests claimed in lands in those provinces, especially while the constitutional status of such lands remains uncertain.

tell us, however, that other lands too may very well qualify as lands reserved for the Indians, depending on whether they can be shown to be subject to Aboriginal title or to equivalent Aboriginal interests. The combined effect of these propositions, according to the jurisprudence, is to immunize all such lands from the application of provincially-enacted measures for land regulation or management, whether or not any federally-enacted measures happen to be in place as substitutes.

The purpose of this article has been to substantiate and to explicate this view of the federal authority over lands reserved and to point out, and begin to address, some of the profoundly important and difficult constitutional issues that, from a practical standpoint, demand attention, for everyone's sake. Land issues, at the best of times, prompt attitudes of tenacity and of protectiveness. When overlaid with the cultural difference between the typical mainstream and the traditional Aboriginal ways of engaging with the land, such attitudes are apt to intensify. Under these conditions, no one benefits from uncertainty about what kinds of provincial laws are capable of applying on section 91(24) lands or about the extent of unilateral provincial power to *authorize* entry on such lands to enforce provincial measures that do apply there. Doubt about such matters, and about what mainstream legal regime, if any, is to govern the ownership, use, possession, management, disposition and occupation of the relevant lands, can only compound the climate of estrangement and apprehensiveness. Confusion over precisely which lands attract Aboriginal claims or interests, and therefore give rise to such doubts, can reduce still further the prospect of fair and orderly resolution of such issues.

We are only barely beginning to understand the magnitude of these concerns, and we are going to need all the help we can get to resolve them civilly.