R. v. Morris:
A Shot in the Dark and Its Repercussions[†]

KERRY WILKINS[*]

The Supreme Court's decision in R. v. Morris*, [2006] 2 S.C.R. 915, 2006 SCC 59, which upheld and enforced the treaty right of Tsartlip hunters to hunt safely at night with lights, is important for the practical consequences of its somewhat surprising doctrinal pronouncements. By rejecting the assumption that hunting at night is inherently dangerous, it converted what many thought would be an all or nothing issue into a matter for case-by-case*

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† Editors' Note: This paper was published pursuant to invitation and was not subject to double-blind peer review. The ILJ will invite one author each year to provide commentary on a recent major case, usually a decision of the Supreme Court of Canada. In Volume 6, Number 2, John McEvoy discussed *R. v. Sappier*; *R. v. Gray*. We thank Mr. Kerry Wilkins for providing the following comment on *R. v. Morris* for Volume VII.

* Kerry Wilkins is a Toronto lawyer and, in 2008–09, an adjunct professor at the University of Toronto Faculty of Law. Special thanks to Kent McNeil for helpful comments on an earlier draft and for giving me pre-publication access to relevant recent work of his own.

attention. From now on, the Crown cannot succeed without proving, on the facts of each case, *that any particular means or occasion of Aboriginal hunting is, in that instance, disqualified for reasons of safety from the constitutional protection afforded to treaty rights. On the other hand, by declaring that provinces ordinarily have no power to infringe Indians' treaty rights, on grounds that should apply with equal force to Aboriginal rights, the Supreme Court turned what many thought would be a matter for determination case by case—the relationship between such rights and provincial authority—for all intents and purposes into an all or nothing issue. In doing so, the Court departed from its earlier unspoken practice of keeping its doctrinal options open as long as possible, and it made the game of treaty (and quite possibly Aboriginal) rights assertion and litigation much riskier for all sides.*

On the night of November 28, 1996, Ivan Morris and Carl Olsen, two members of the Tsartlip nation out hunting with a spotlight in the woods on Vancouver Island, came upon what looked to them like a black-tailed deer. Seizing the opportunity, they aimed and fired. As it happened, they were mistaken. It was a decoy.

That was the first in a series of surprises that pervade our story. The second was that the two of them had unexpected company that night. British Columbia conservation officers, having placed and staked out the decoy to catch night hunters, charged Morris and Olsen with several offences under B.C.'s *Wildlife Act*,[1] all of which were related to the fact that they had been hunting at night with lights. What made this particularly surprising to the defendants was that the Tsartlip thought they had a deal with the B.C. government that protected them from prosecution for hunting and fishing in accordance with their treaty rights. The Tsartlip are beneficiaries of the North Saanich Treaty of 1852, one of the Douglas treaties between the Imperial Crown and the Aboriginal peoples of Vancouver Island.[2]

In their defence, Messrs. Morris and Olsen relied on the hunting rights prescribed for the Tsartlip in the North Saanich Treaty. They chose to argue, however, not that the charges were an unjustified violation of rights protected by section 35 of the *Constitution Act, 1982*,[3] but that the division

1 S.B.C. 1982, c. 57, now R.S.B.C. 1996, c. 488.

2 See *R. v. Morris*, [2006] 2 S.C.R. 915, 2006 SCC 59 ["*Morris*"] at 922-926 (paras. 2-13), Deschamps and Abella J.J. (for the majority) and at 942 (paras. 66-69), McLachlin C.J. and Fish J. (dissenting).

3 Being Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11 ["*Constitution Act, 1982*"]. According to s. 35(1), "[t]he existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada are hereby recognized and affirmed." In Canadian constitutional law, treaty rights derive exclusively from the terms of solemn agreements consummated between the federal (or, before that, the Imperial) Crown and particular Aboriginal groups. Aboriginal rights, on the

of powers in the *Constitution Act, 1867*[4] precluded the province of British Columbia from interfering with their treaty rights. This choice of strategy, to many observers, was the third surprise. They were unsuccessful (no surprise there) in the lower courts, despite a spirited dissent from Lambert J.A. in the B.C. Court of Appeal (certainly no surprise there), principally on the basis of a long line of judicial decisions that have said that Indian treaties do not confer a right to hunt unsafely[5] and that hunting at night with lights is inherently unsafe.[6] There were, however, more surprises to come.

The fourth surprise was that the Supreme Court of Canada gave Morris and Olsen leave to appeal their convictions. At the time, *Morris* was one of only two instances[7] since the Donald Marshall decisions in 1999[8] in which the Supreme Court granted an Aboriginal party leave to appeal a decision involving a claim of treaty or Aboriginal right.

The fifth surprise was that the Supreme Court of Canada—by a narrow 4-3 majority, but a majority nonetheless—allowed their appeal. This one startled even litigators experienced in the field. At a conference that took place several months before release of *Morris*, one such barrister, from Victoria, B.C., who regularly represents Aboriginal parties in Supreme Court proceedings, told me confidently that the Court would never countenance constitutional protection for Aboriginal people hunting at night so close to Victoria. The sixth and final surprise lay in the similarities between the Court's two judgments. The *only* issue on which they disagreed was whether hunting at night with lights is indeed inherently dangerous. On the important and highly controversial constitutional issues, they were unanimous.

So many surprises in one place deserve closer attention.

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other hand, protect contemporary versions of customs, practices and traditions deemed integral to the distinctive cultures of particular Aboriginal peoples before and apart from contact with Europeans. See, e.g., *R. v. Van der Peet*, [1996] 2 S.C.R. 507 ["*Van der Peet*"].

4 30 & 31 Victoria, c. 3 (U.K.) ["*Constitution Act, 1867*"], ss. 91-95.

5 See, e.g., *Myran v. The Queen*, [1976] 2 S.C.R. 137 at 141-142; *R. v. Napoleon*, [1989] 6 W.W.R. 302 (B.C.C.A.); *R.* v. *Sundown*, [1999] 1 S.C.R. 393 ["*Sundown*"] at 414-415 (para. 41).

6 See, e.g., *R.* v. *McCoy* (1993), 109 D.L.R. (4th) 433 (N.B.C.A.); *R.* v. *Seward* (1999), 171 D.L.R. (4th) 524 (B.C.C.A.) ["*Seward*"].

7 The other was *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage*, [2005] 3 S.C.R. 388, 2005 SCC 69 ["*Mikisew*"]. To the best of my knowledge, there has been just one more such instance since the SCC gave leave to appeal in *Morris*. Claims of treaty and Aboriginal right play a part in the appeals of the Samson and Ermineskin First Nations from lower court decisions dismissing their claims for compensation for alleged federal Crown mismanagement of the oil and gas royalties to which they have been entitled. See *Ermineskin Indian Band and Nation v. Canada; Samson Indian Nation and Band v. Canada*, 2006 FCA 415, [2006] F.C.J. No. 1961 (QL), [2007] 2 C.N.L.R. 51 (F.C.A.), leave to appeal to S.C.C. granted August 30, 2007, S.C.C. Bulletin September 7, 2007 at 1186-1189.

8 *R.* v. *Marshall*, [1999] 3 S.C.R. 456 ["*Marshall I*"], application for reconsideration denied [1999] 3 S.C.R. 533 ["*Marshall II*"].

I THE SCOPE OF THE TSARTLIP TREATY RIGHT TO HUNT

On the facts of *Morris*, the two defendants—who had, after all, been caught red-handed—had no recognized defence against their *Wildlife Act* charges unless they could show that they were engaged at the relevant time in constitutionally protected activity. Not having asserted any Aboriginal right to do what they were doing on the night they were apprehended,[9] they relied, and their case depended, on their entitlement to the benefit of the North Saanich Treaty and on the protected scope of the hunting rights that treaty conferred. There was no dispute that the two of them were Tsartlip or that the Tsartlip are among those to whom the North Saanich Treaty applies.[10] The only real question concerned the reach of the rights in the treaty. Here, from the treaty's English version, is the key provision:

> The condition of or understanding of this sale is this, that our village sites and enclosed fields are to be kept for our own use, for the use of our children, and for those who follow after us; and the land shall be properly surveyed hereafter. It is understood, however, that the land itself, with these small exceptions, becomes the entire property of the white people for ever; it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.[11]

Both the majority and the dissent in *Morris* accepted that this provision entitled the Tsartlip, including the two defendants, to hunt (as well as fish) "as formerly" and that, for them, hunting "as formerly" included hunting at night.[12] Both judgments acknowledged, as well, that treaty rights are not frozen in time and agreed that the hunting right in the North Saanich Treaty had undergone some evolution since the treaty was signed.[13] They differed, however, about the nature and impact of that evolution.

The lesson the majority drew was that "changes in method do not change the essential character of the practice, namely, night hunting with illumination. What was preserved by the Treaty and brought within its protection was hunting at night with illuminating devices, not hunting at night

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9 See *Morris*, note 2 above, at 961 (para. 132), McLachlin C.J. and Fish J. (dissenting on other grounds).

10 *Ibid*. at 942 (para. 69).

11 Paragraph 2 of the North Saanich Treaty, quoted in part in *Morris*, *ibid*. at para. 102, McLachlin C.J. and Fish J. (dissenting on other grounds).

12 Compare *Morris*, *ibid*. at paras. 25-28, Deschamps and Abella J.J. (for the majority) with *ibid*. at para. 108, McLachlin C.J. and Fish J. (dissenting on other grounds) ("When the Douglas Treaty was signed, hunting at night was not uncommon .... It would not have been surprising had both the Crown and the North Saanich Aboriginals contemplated that the [A]boriginals would continue to hunt at night.").

13 See *ibid*. at 930-931 (paras. 30-33), Deschamps and Abella J.J.; *ibid*. at 954-956 (paras. 112-117), McLachlin C.J. and Fish J. (dissenting on other grounds).

with a particular *kind* of weapon and source of illumination."[14] As a result, "the use of guns, spotlights, and motor vehicles reflects the current state of the evolution of the Tsartlip's historic hunting practices"[15] and therefore comes within the range of means by which they may today exercise their right to hunt. This approach, which accords to those with treaty rights the benefit of more recent technological developments in exercising those rights, conforms, as the majority says, with earlier Supreme Court jurisprudence that held guns and modern log cabins to be acceptable contemporary substitutes for bows and arrows and traditional lean-tos, respectively, in the exercise of treaty rights to hunt.[16]

The dissent in *Morris* did not exactly disagree with this. It acknowledged expressly "that the treaty [right] protects from encroachment the means and methods of its exercise"[17] and it certainly acknowledged the relevance of modern weaponry to the task of gauging today the protected scope of this hunting right.[18] But it drew a substantially different conclusion from these developments. In its view, the availability and use of modern firepower has transformed an activity—night hunting—from one that was not, at the time of the Treaty, "particularly dangerous"[19] to one that has become "inherently dangerous." And that "when the same sort of activity carried on in the modern economy by modern means is inherently dangerous, the dangerous activity will not be a logical evolution of the treaty right."[20]

This, to the best of my knowledge, is the first occasion on which any Supreme Court of Canada judgment, dissent or majority, has suggested that intervening changes in technology or in society can *reduce*, as well as expand, the protected scope of an existing treaty or Aboriginal right. The dissenting judges noted the appellants' objection that such an approach would turn "on its head" the principle articulated in *Marshall I* rejecting "frozen rights" interpretations of treaty rights,[21] but reasoned as follows:

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14 *Ibid*. at 931 (para. 33), Deschamps and Abella J.J. Emphasis in original.

15 *Ibid*. at 931 (para. 32).

16 See *ibid*. at 930-931 (para. 31), Deschamps and Abella J.J., citing *Simon v. The Queen*, [1985] 2 S.C.R. 387 ["*Simon*"] and *Sundown*, note 5 above, respectively.

17 See *ibid*. at 956 (para. 118), McLachlin C.J. and Fish J. (dissenting).

18 *Ibid*. at 955 (paras. 114-115).

19 *Ibid*. at 953 (para. 108).

20 *Ibid*. at 956 (para. 117).

21 See *ibid*. at 954-955 (paras. 112-113), citing the ninth in the list of principles that McLachlin J. (as she then was), dissenting on other grounds, articulated in *Marshall I*, note 8 above, at 513 (para. 78): "Treaty rights are not to be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise."

> Since 1852, the dangers of night hunting have been amplified with the development of modern weaponry. In our view, treaty rights are not impervious to changes of this sort. They do not evolve in a social, environmental or technological vacuum. A right to hunt is not transformed into a right to hunt in an unsafe manner by disregarding unforeseen dangers or new risks.
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> Quite the contrary, the ninth principle [in *Marshall I*[22]] simply acknowledges that treaties must be interpreted in a manner that contemplates their exercise in modern society. Just as the methods and means of exercising the right should not be frozen in time, neither should the government's legitimate safety concerns. Adapting the exercise of treaty rights to modern weaponry without adapting the corollary legitimate safety concerns would lead to unacceptable results. One cannot reasonably focus on the former and turn a blind eye to the latter.[23]

Though no one writing in *Morris* said so, this line of reasoning has its own antecedents. When the Supreme Court first rejected, in *Sparrow*,[24] a "frozen rights" approach to treaty and Aboriginal rights,[25] it did so in reliance on Brian Slattery's earlier observation that the word "existing" in section 35(1) of the *Constitution Act, 1982* "suggests that those rights are 'affirmed in a contemporary form rather than in their primeval simplicity and vigour'."[26] In Slattery's own argument, however, this observation supported his view that recognizing unextinguished section 35 rights "in their original form, so that any regulations restricting their exercise are invalid[,] ... leads to extreme consequences."[27] Comparable concerns about the "primeval simplicity and vigour" of the Tsartlip hunting right animate the dissenting judgment in *Morris*.

I predict that we have not seen the last of this move in Supreme Court treaty and Aboriginal rights jurisprudence. The obvious danger it poses to Aboriginal interests is that courts may take it too readily as licence to disqualify from modern constitutional protection practices understood otherwise to lie within the intendment of a treaty (or Aboriginal) right.[28] It is not

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22 See previous note.

23 *Morris*, note 2 above, at 955 (para. 114-115), McLachlin C.J. and Fish J. (dissenting).

24 *R. v. Sparrow*, [1990] 1 S.C.R. 1075 ["*Sparrow*"].

25 See *ibid*. at 1093.

26 *Ibid*., citing Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 782.

27 Slattery, *ibid*. at 782. Here, in its entirety, is the paragraph from Slattery's article in which one finds the passage on which the Supreme Court relied in *Sparrow*, *ibid*.:

> An alternative approach is to hold that section 35(1) recognizes unextinguished [A]boriginal rights in their original form, so that any regulations restricting their exercise are invalid. This approach leads to extreme consequences. It suggests, for example, that regulations implementing basic safety precautions in hunting, or protecting a rare species of animal might be invalid. It seems, moreover, inconsistent with the word "existing", which suggests that the rights in question are affirmed in a contemporary form rather than in their primeval simplicity and vigour.

28 In this latter connection, recall the majority's observation, in *Van der Peet*, note 3 above, at 551 (para. 49), that "[t]he definition of an [A]boriginal right must, if it is truly to reconcile the

too early to begin developing some clear principles that both explicate and limit the range of this judicial interpretive discretion.[29] I shall return to this.[30]

Interesting and important though this difference of opinion is, it is not the difference on which the outcome turned in *Morris*. The majority, like the dissenting judges, acknowledged that treaty rights can be, and are, subject to internal limits[31] and acknowledged repeatedly that "there is no treaty right to hunt dangerously."[32] Both judgments reached this conclusion for essentially the same reason: because "the requirement to hunt safely was clearly within the common intention of the parties to the Treaty ...."[33] The issue on which the court divided was whether hunting at night with lights is, in and of itself, sufficiently dangerous today to forfeit automatically such constitutional protection as a treaty right to hunt could otherwise provide. The majority said no; the dissent said yes. And thereon hangs the outcome.

According to evidence accepted by the *Morris* majority, "the Tsartlip's practice of night hunting with illuminating devices has never been known to have resulted in an accident."[34] More important, there was "evidence that the particular night hunt for which they were charged was not dangerous .... The decoy [at which they had fired that night] was set up on unoccupied lands 20 meters off a gravel road. It was, one of the conservation officers testified, a spot chosen for its safety." There were no residences within two kilometres

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prior occupation of Canadian territory by [A]boriginal peoples with the assertion of Crown sovereignty over the territory, take into account the [A]boriginal perspective, yet do so *in terms which are cognizable to the non-*[*A*]*boriginal legal system*" (emphasis added). But see also *Marshall II*, note 8 above, at 565-566 (para. 45), where the Court explicitly rejected the submission "that [A]boriginal or treaty rights should be recognized only to the extent that such rejection would not occasion disruption or inconvenience to non-[A]boriginal people."

29 For some preliminary observations on this general issue, see chapters 4 and 5 of my LL.M. thesis *Unchartered Territory: Fundamental Canadian Values and the Inherent Right of Aboriginal Self-Government*, (University of Toronto, 1998) [unpublished].

30 See note 205 below and accompanying text.

31 See *Morris*, note 2 above, at 932 (paras. 35, 37), Deschamps and Abella J.J. (for the majority).

32 See *ibid*. at 926 (para. 14). Compare *ibid*. at 932 (para. 35) ("We agree, as stated earlier, that it could not have been within the common intention of the parties that the Tsartlip would be granted a right to hunt dangerously, since no treaty confers on its beneficiaries a right to put human lives in danger") and at 939 (para. 56) ("There is no treaty right to hunt dangerously. Thus, the prohibition against hunting 'without reasonable consideration for the lives, safety or property of other persons' set out in s. 29 of the *Wildlife Act* [a different provision from the one at issue in the *Morris* appeal itself] is a limit that does not infringe the Tsartlip's treaty right to hunt").

33 See *ibid*. at 939 (para. 56) and at 932 (para. 35). Compare *ibid*. at 953 (para. 108) ("the parties ... could not have believed that the right to hunt included a right to hunt dangerously. To impute that belief to them would do injustice to both parties and, would in addition, defy common sense") and 954 (para. 110) ("the parties to the Douglas Treaty must have understood that the right to hunt did not carry with it a right to hunt in an unsafe manner .... Hunting in an unsafe manner could not have been thought to serve the interests of the [A]boriginals any more than the interests of the Crown"), McLachlin C.J. and Fish J. (dissenting on other grounds).

34 *Ibid*. at 940 (para. 59), Deschamps and Abella J.J. (for the majority). Compare *ibid*. at 925 (para. 11).

of the decoy site and "no private property, no campers, no dwellings within the range that a bullet would travel."[35] Acceptance of this evidence invites, in my judgment, the inference that this particular hunt, at least, *was* entitled to the North Saanich Treaty's protection because it came within the initial intendment of the Treaty's hunting provision and was not unsafe.

This was not the conclusion the dissenting judges reached. In their view:

> The evidence at trial was more than sufficient to establish that one's ability to identify objects, estimate distances and observe background and surrounding items is greatly diminished in the dark, posing a real danger to other members of the public.
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> This added danger to hunting causes the risks associated with hunting at nighttime with a firearm to be unacceptably high.[36]

This being so, they continued, "[i]t does not matter that an individual might be able to hunt at night without injuring anyone, the fact is that the possibility of death or injury is increased when visibility is decreased and one or more hunters are in the woods."[37] Accordingly, "[i]f provinces can prohibit 'unsafe hunting', there is no reason why they should be precluded from identifying particular practices that are unsafe."[38] The courts need not, and should not, be "limited to case-by-case after the fact inquiries into whether a particular hunter on a particular occasion exercised the treaty right to hunt unsafely."[39]

The majority disagreed. "British Columbia," it said, "is a very large province, and it cannot plausibly be said that a night hunt with illumination is unsafe everywhere and in all circumstances, even within the treaty area at issue in this case."[40] The facts of *Morris*, in its view, "amply demonstrate that something less than an absolute prohibition on night hunting can address the concern for safety."[41] But,

> [t]he Legislature has made no attempt to prohibit only those specific aspects or geographic areas of night hunting that are unsafe by, for example, banning hunting within a specified distance from a highway or from residences. The impugned provisions are overbroad, inconsistent with the common intention of the parties to the treaties, and completely eliminate a chosen method of exercising their treaty right.[42]

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35 *Ibid*. at 924-925 (para. 10). Compare *ibid*. at 940 (para. 59).
36 *Ibid*. at 960-961 (paras. 129-130), McLachlin C.J. and Fish J. (dissenting).
37 *Ibid*. at 961 (para. 131), quoting with approval from the B.C. Court of Appeal decision in *Seward*, note 6 above, at para. 47.
38 *Morris*, *ibid*. at 961 (para. 133).
39 *Ibid*. at 958 (para. 122).
40 *Ibid*. at 932 (para. 35), Deschamps and Abella J.J. (for the majority).
41 *Ibid*. at 940 (para. 59).
42 *Ibid*. at 940 (para. 58).

As a result, they constitute a *prima facie* infringement of the Tsartlip treaty right and therefore (for reasons set out in detail below) do not apply.[43] This conclusion earned the appellants acquittals.

The remaining unanswered question is whether *any* Tsartlip hunters today are ever subject to the *Wildlife Act*'s night hunting prohibitions. It is clear enough that, at a minimum, these prohibitions cannot apply to those who, like Morris and Olsen, were hunting safely at night with lights. But imagine a different pair of Tsartlip hunters caught hunting *unsafely* at night and charged with these same offences. Could night hunting charges against those hunters stand?[44] The dissenting judges in *Morris* would have answered in the affirmative; in their view, it is "the hunting activities of Indians *that are protected by a treaty*"[45] to which provincial laws cannot apply. Unsafe hunting is not protected by treaty. The majority result, however, turns on the fact that these provisions purport, in their generality, to prohibit at least some (safe) night hunting that is, for the Tsartlip, treaty-protected activity.[46] The truth of this conclusion does not depend on the circumstances of any particular Tsartlip hunt. It is, therefore, at least open to a subsequent Tsartlip hunter to argue that she is immune from the prohibition on night hunting, *whether or not she is hunting safely*, simply because that prohibition infringes a treaty right (the right to hunt safely at night) that belongs collectively to all Tsartlip.[47]

This issue will require further thought. Its practical implications are obvious.

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43 See *ibid*. at 940-941 (para. 60).

44 Today in British Columbia, such hunters would most probably face charges instead under section 29 of the *Wildlife Act*, which prohibits hunting without reasonable consideration for the lives, safety or property of others. The majority in *Morris*, *ibid*. held specifically (at 939 (para. 56)) that section 29 "is a limit that does not infringe the Tsartlip's treaty right to hunt." (Messrs. Morris and Olsen were acquitted on charges under section 29: *ibid*. at 925 (para. 12).) But the existence of statutory provisions such as section 29 is a contingent fact. The same situation could arise in a statutory regime that prohibited hunting at night but not unsafe hunting *per se*.

45 See *Morris*, *ibid*. at 948 (para. 91), McLachlin C.J. and Fish J. (dissenting), quoted at greater length below in text at note 89. Emphasis added.

46 See generally *ibid*. at 939-941 (paras. 57-61), Deschamps and Abella J.J. (for the majority).

47 If this seems far-fetched, consider *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, which held that a person charged with an offence under a statute may challenge the constitutional soundness of the statute under which she is charged on any available ground, irrespective of whether she herself possesses—or even is capable of possessing—the constitutional right or interest in question. "It is the nature of the law, not the status of the accused, that is in issue": *ibid*. at 314. See generally *ibid*. at 313-315. There, the Court, at the behest of a corporation (!) charged under the federal *Lord's Day Act*, R.S.C. 1970, c. L-13, struck down the legislation for violating the constitutional right to freedom of religion.

II THE LEGITIMATE REACH OF PROVINCIAL LEGISLATION

The reason it matters what the treaty means, and what it protects, is, of course, that treaties afford to those to whom they apply some protection from legislation and government action. We have known since *Sparrow*,[48] for example, that section 35(1) of the *Constitution Act, 1982* protects existing Aboriginal rights and those entitled to exercise them from the effects of unjustified legislative or government interference.[49] We have known since *Badger*[50] that section 35 affords essentially the same protection to existing treaty rights,[51] because "[t]he wording of s. 35(1) ... supports a common approach to infringements of [A]boriginal and treaty rights."[52] And we have known since at least *Côté*[53] that "[t]he text and purpose of s. 35(1) do not distinguish between federal and provincial laws which restrict [A]boriginal or treaty rights, and they should both be subject to the same standard of constitutional scrutiny"; as a result, "it is quite clear that the *Sparrow* test applies where a provincial law is alleged to have infringed an [A]boriginal or treaty right in a manner which cannot be justified."[54] So it was, at a minimum, open to Messrs. Morris and Olsen to invoke section 35, to argue that the impugned provisions of the B.C. *Wildlife Act* infringe their treaty right to hunt, and to seek to throw upon the Crown the burden of justifying that infringement. Success on that basis might—but might not—have earned them outright acquittals.[55] Resort to this line of argument, at least in the alternative, would have been a safe and orthodox option.

It is not the one that these two appellants chose. They did not rely at all on section 35;[56] instead, they implied that section 35 has nothing to do with the relationship between treaty rights and provincial legislation. Their argument, based on completely different considerations, was that the province of British Columbia simply has no authority to infringe the rights in their

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48 Note 24 above.

49 See *ibid*. at 1108-1109.

50 *R. v. Badger*, [1996] 1 S.C.R. 771 ["*Badger*"].

51 See *ibid*. at 812-816 (paras. 74-85).

52 *Ibid*. at 813 (para. 79).

53 *R. v. Côté*, [1996] 3 S.C.R. 139 ["*Côté*"].

54 *Ibid*. at 185 (para. 74). Compare *Paul v. B.C. (Forest Appeals Commission)*, [2003] 2 S.C.R. 585 ["*Paul*"] at 604 (para. 24) ("Section 35 therefore applies to both provinces and the federal government").

55 Acquittal was the result in *R. v. Nikal*, [1996] 1 S.C.R. 1013 ["*Nikal*"] and in *Marshall I*, note 8 above. In *Sparrow*, note 24 above, *Badger*, note 50 above, and *R. v. Gladstone*, [1996] 2 S.C.R. 723 ["*Gladstone*"], on the other hand, the Court, having found an infringement of the relevant Aboriginal or treaty right, sent the case back to trial on the justification issue.

56 The constitutional questions in *Morris*, note 2 above, which appear there at 962 (para. 137), refer exclusively to s. 91(24) of the *Constitution Act, 1867* and s. 88 of the *Indian Act*, R.S.C. 1985, c. I-5 ["*Indian Act*"].

treaty; as a result, the question of justifying any such infringement does not, and cannot, arise. The court agreed.

To understand what happened in *Morris*, and what the implications might be, we need to proceed with some care, and in stages.

Division of Powers: The Limits of Provincial Legislative Authority

Interjurisdictional Immunity

At the heart of the *Morris* appeal are the restrictions on provincial authority that derive, before and apart from section 35 of the *Constitution Act, 1982*, from the division of governance powers between the federal and provincial orders prescribed in the *Constitution Act, 1867*.[57] Provincial authority comprises the classes of subjects listed in sections 92, 92A, 93, 94A and 95 of that Act. Provincial legislation is valid—within the permissible scope of provincial legislative authority—as long as its primary subject matter (or, in the vernacular, "pith and substance") fits within one of the classes of subjects assigned to the provincial order *and not* within any of the classes of subjects assigned in section 91 exclusively to the federal order.[58] In ascertaining the primary subject matter of legislation—what it is really about—the courts, as necessary, look past the form of the statute at its effects in order "to ascertain the *true* purpose of the legislation, as opposed to its mere stated or apparent purpose"[59] and to satisfy themselves whether the provincial legislature (or, in its turn, the federal Parliament) is seeking "to do indirectly what could not be done directly."[60] In *Morris*, the Court had no trouble concluding unanimously that section 27 of the B.C. *Wildlife Act*—the provision that includes the prohibition on hunting at night with lights—is valid provincial legislation aimed at matters appropriate to provincial, and not at any of those exclusive to federal, legislative authority.[61]

Equally familiar is the notion that, where the two conflict, valid federal legislation prevails—is "paramount"—over valid provincial legislation. Provincial legislation is inoperative—unenforceable—when and as it would

57 Note 4 above.

58 See, e.g., *Cardinal v. Alberta (A.G.)*, [1974] 2 S.C.R. 695 ["*Cardinal*"] at 703.

59 *Canadian Western Bank v. The Queen in right of Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22 ["*Canadian Western Bank*"] at 27 (para. 27). Emphasis in original.

60 See, e.g., *Ladore v. Bennett*, [1939] A.C. 468 (P.C.) at 482. "It is unnecessary," the Privy Council continued (*ibid*.), "to repeat what has been said many times by the Courts in Canada and by the Board, that the Courts will be careful to detect and invalidate any actual violation of constitutional restrictions under pretence of keeping within the statutory field. A colourable device will not avail."

61 See *Morris*, note 2 above, at 934 (para. 42), Deschamps and Abella J.J. (for the majority), at 947 (para. 87), McLachlin C.J. and Fish J. (dissenting on other grounds).

compromise the realization of valid federal legislative objectives.[62] But, as the dissenting judges in *Morris* correctly observed, "there is no conflicting federal legislation on hunting; accordingly, the paramountcy doctrine does not apply" on the facts of the case.[63] Paramountcy, therefore, did not operate to immunize the appellants in *Morris*, or the Tsartlip more generally, from the reach of B.C.'s statutory prohibition on hunting at night with lights.

The only basis (apart from section 35 of the *Constitution Act, 1982*) on which the defendants in *Morris* could plausibly seek to shield themselves from the statutory prohibitions under which they were charged was the less familiar, and more controversial, doctrine of interjurisdictional immunity. Pared to its essence, interjurisdictional immunity protects what is truly exclusive about federal legislative authority from the effects of otherwise valid provincial legislation by precluding provincial legislatures from accomplishing inadvertently what they would not have been permitted to accomplish advertently.[64] It "is an exception to the ordinary rule under which legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may, at least to a certain extent, affect matters beyond the legislature's jurisdiction without necessarily being unconstitutional."[65] Because it immunizes core federal matters altogether from provincial impairment even in the absence of any federal legislation about them, it permits the federal order to choose to leave some such matters wholly unregulated. In situations where interjurisdictional immunity governs, the court assumes that a provincial legislature's dominant intention is "to confine itself to its own sphere and ... that general words in a statute are not intended to extend its operation beyond the ... authority of the Legislature."[66] Accordingly, the

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62 See initially *Tennant v. Union Bank of Canada*, [1894] A.C. 31 (P.C.) at 45 ("sect. 91 expressly declares that, 'notwithstanding anything in this Act,' the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority"), and most recently *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13.

63 *Morris*, note 2 above, at 948 (para. 89), McLachlin C.J. and Fish J. (dissenting on other grounds). The majority did not consider the issue.

64 See, e.g., *McKay v. The Queen*, [1965] S.C.R. 798 at 806 ("Just as the legislature cannot do indirectly what it cannot do directly, it cannot by using general words affect [sic] a result which would be beyond its powers if brought about by precise words"). For a considerably more detailed explication of interjurisdictional immunity, see Kerry Wilkins, "Of Provinces and Section 35 Rights" (1999) 22 Dalhousie L.J. 185, especially at 206-208.

65 See *B.C. (A.G.) v. Lafarge Canada Inc.*, [2007] 2 S.C.R. 86, 2007 SCC 23 ["*Lafarge*"] at 112 (para. 41).

66 See *Reference re Farm Products Marketing Act*, [1957] S.C.R. 198 at 255. This assumption —that the encroachment on exclusive federal legislative authority is *inadvertent*—is what permits the court in such cases to uphold the validity of the relevant provincial law. Where the courts conclude that a province intended (perhaps surreptitiously) the intrusive effects of its legislation, they will declare it invalid, depriving it of any legal force. See notes 58-60 above and accompanying text.

relevant provincial law continues to apply full strength *except* when and as its effect is to regulate core federal matters.

Shielding Treaty Rights from Provincial Interference

To benefit from the doctrine of interjurisdictional immunity, the appellants in *Morris* had to do two things. First, they had to bring themselves within its purview: that is, to show that the treaty right on which they relied comes within the core of some class of subjects reserved to the federal order. Because the only relevant heads of exclusive federal authority are "Indians, and Lands reserved for the Indians,"[67] this task required that they establish that the treaty right belongs to them uniquely and characteristically *as* Indians:[68] that such rights relate to "Indianness."[69] Second, they had to deflect intimations that the doctrine of interjurisdictional immunity has limited, if any, application in circumstances to which section 35 of the *Constitution Act, 1982* might also apply.

Neither proposition seemed a sure thing at the outset of the *Morris* appeal. As to the first, it is true that, by the time of *Morris*, the Supreme Court had already acknowledged that "the core of Indianness encompasses the whole range of [A]boriginal rights protected by s. 35(1)" of the *Constitution Act, 1982*.[70] But this conclusion followed necessarily[71] from the court's decision, in *Van der Peet*, to define Aboriginal rights as "practices, customs and traditions that are integral to the distinctive [A]boriginal cultures ... that occupied North America prior to the arrival of Europeans."[72] If such practices, so defined, did not qualify for inclusion within the "core of Indianness," it is difficult to imagine what else could possibly have done so. It was much less obvious, however, that the core of federal power over "Indians" would include whatever rights an Indian treaty might contain; in principle, after all, almost any right of any kind could turn up in a treaty, if the parties to the treaty wanted it there.[73] Though no one in *Morris* appeared

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

68 See, e.g., *R. v. Martin* (1917), 41 O.L.R. 79 (C.A.) at 83, quoted with approval in *Cardinal*, note 58 above, at 706.

69 See, e.g., *Delgamuukw v. The Queen in right of B.C*, [1997] 3 S.C.R. 1010 ["*Delgamuukw*"] at 1119 (para. 177); *Natural Parents v. Superintendent of Child Welfare*, [[1976] 2 S.C.R. 751 at 760-761, Laskin C.J.C. (for the plurality).

70 *Delgamuukw, ibid*. at 1119 (para. 178). Compare *Paul*, note 54 above, at 608 (para. 33).

71 See *Delgamuukw*, *ibid*. at 1121 (para. 181).

72 See *Van der Peet*, note 3 above, at 549 (para. 45), and generally *ibid*. at 548-549 (paras. 44-46).

73 In the Court of Appeal decision in *Morris* (*R. v. Morris and Olsen* (2004), 237 D.L.R. (4th) 693 (B.C.C.A.)), Justice Huddart had sought to address this concern (at para. 208) by positing that the treaty protected only those rights that are "integral to the distinctive culture" of the Tsartlip. At the Supreme Court of Canada, McLachlin C.J. and Fish J., dissenting but not on this point, rejected Justice Huddart's approach because it "tends to blur the distinction between

to notice, just such a concern had prompted the Privy Council, in the *Labour Conventions* reference in 1937,[74] to hold that the federal order's power to make international treaties did not assure Parliament of legislative authority to give such treaties domestic legal effect.[75] "There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged to keep pace with enlarged functions of the Dominion executive,"[76] the Privy Council had said. Precisely analogous grounds for concern could arise in respect of Indian treaties if the federal Crown were understood to be able to immunize any Aboriginal preference or activity from the reach of provincial law by situating (or acknowledging) it in an Indian treaty.

There was comparable reason for doubt about the second proposition. Despite having affirmed in both *Delgamuukw* and *Paul* that Aboriginal rights lie squarely within the exclusive core of federal legislative authority over "Indians,"[77] the Supreme Court also said, in both those decisions, that provincial measures could infringe such rights if the province could justify the infringement.[78] Subsequently, in *Haida*,[79] the Supreme Court held unanimously that the provinces, like the federal government,[80] owe an enforceable duty to consult in good faith with, and perhaps to accommodate, Aboriginal groups whenever "the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct

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an [A]boriginal right and a treaty right": *Morris*, note 2 above, at 953 (para. 106). The Supreme Court majority in *Morris* did not consider the issue.

74 *A.G. Canada v. A.G. Ontario*, [1937] A.C. 326 (P.C.) [*Labour Conventions*].

75 See, e.g., *ibid*. at 352:

> It would be remarkable that while the Dominion could not initiate legislation, however desirable, which affected civil rights in the Provinces, yet its Government not responsible to the Provinces nor controlled by Provincial Parliaments need only agree with a foreign country to enact such legislation, and its Parliament would be forthwith clothed with authority to affect Provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of Provincial constitutional autonomy.

76 *Ibid*.

77 See note 70 above and accompanying text.

78 See *Delgamuukw*, note 69 above, at 1107 (para. 160) ("The [A]boriginal rights recognized and affirmed by s. 35(1), including [A]boriginal title, are not absolute. Those rights may be infringed, both by the federal (e.g., *Sparrow*) and provincial (e.g., *Côté*) governments"); and *Paul*, note 54 above, at 596 (para. 10) ("Once an [A]boriginal right is proven, [the relevant provincial provision] would be of no effect to the extent that it was inconsistent with that right, unless that inconsistency could be justified according to the test in *R. v. Sparrow*, [1990] 1 S.C.R. 1075") and at 604 (para. 24) ("By virtue of s. 35, then, laws of the province of British Columbia that conflict with protected [A]boriginal rights do not apply so as to limit those rights, unless the limitation is justifiable according to the test in *Sparrow*, *supra*").

79 *Haida Nation v. B.C. (Minister of Forests)*, 2004] 3 S.C.R. 511 ["*Haida*"].

80 *Ibid*. at 539-540 (paras. 57-59).

that might adversely affect it."[81] (In *Mikisew*,[82] the Court went on to hold that consultation obligations also operate where treaty rights are in play.) Imposing such an obligation on the provincial order makes little practical sense unless the provinces already have at least some authority to interfere, or to permit interference, with such Aboriginal rights as may exist. (One cannot acquire legislative authority by delegation or consent.[83]) Finally, *Morris* was not a case in which the federal and provincial orders were on opposite sides, contesting fiercely over the reach of exclusive federal authority. In *Morris*, the federal Attorney General intervened to support the view that the relevant *Wildlife Act* provisions applied to Messrs. Morris and Olsen, even if the North Saanich Treaty comprised a right to hunt at night with lights.[84] We know from *Kitkatla*[85] that federal intervention in support of provincial authority in a division of powers case, "[w]hile ... not determinative of the issue, ... does invite the Court to exercise caution before it finds that the impugned provisions of the Act are *ultra vires* the province";[86] or, presumably, that they are constitutionally inapplicable on account of the doctrine of interjurisdictional immunity.

As it turned out, none of this mattered in *Morris*. It took the *Morris* majority all of six sentences to dispose of the constitutional issue:

> where a valid provincial law impairs "an integral part of primary federal jurisdiction over Indians and Lands reserved for the Indians" (*Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031, at p. 1047), it will be inapplicable to the extent of the impairment. Thus, provincial laws of general application are precluded from impairing "Indianness." (See, for example, *Dick v. The Queen*, [1985] 2 S.C.R. 309, at p. 326.)
>
> Treaty rights to hunt lie squarely within federal jurisdiction over "Indians, and Lands reserved for the Indians." As noted by Dickson C.J. in *Simon*,[87] at p. 411:

81 See *ibid*. at 529 (para. 35).
82 Note 7 above.
83 See, e.g., *A.G.N.S. v. A.G. Canada*, [1951] S.C.R. 31 at 34-35.
84 See Factum of the Intervener the Attorney General of Canada, Ivan Morris and Carl Olsen v. Her Majesty the Queen (3 August 2005), at 13 (para. 45) ("Even if this Court were to conclude that hunting with a firearm or bow at night or with the aid of a light or illuminating device falls within the Douglas Treaty right to hunt, ss. 27(1)(d) and (e) of the B.C. *Wildlife Act* constitutionally apply of their own force to the appellants, nonetheless. Section 91(24) of the *Constitution Act, 1867* and the doctrine of interjurisdictional immunity do not prevent the application of these provincial laws of general application to the applicants" (footnote omitted)). See generally *ibid*. at 13-17 (paras. 45-63).
85 *Kitkatla Band v. B.C. (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146 ["*Kitkatla*"].
86 *Ibid*. at 180 para. 73. See generally *ibid*. at 179-180 (paras. 72-73).
87 Note 16 above.

> It has been held to be within the exclusive power of Parliament under s. 91(24) of the *Constitution Act, 1867*, to derogate from rights recognized in a treaty agreement made with the Indians.
>
> This Court has previously found that provincial laws of general application that interfere with treaty rights to hunt are inapplicable to particular Aboriginal peoples.[88]

The dissent was equally concise, to the same effect:

> Under the doctrine of interjurisdictional immunity, valid provincial legislation is constitutionally inapplicable to the extent that it intrudes or touches upon core federal legislative competence over a particular matter. Thus, exclusive federal jurisdiction under s. 91(24) protects "core Indianness" from provincial intrusion: *Delgamuukw* [note 69 above], at para. 177 ....
>
> Indian treaty rights and [A]boriginal rights have been held to fall within the protected core of federal jurisdiction: *Simon* [note 16 above], at p. 411; *Delgamuukw*, at para. 178. It follows that provincial laws of general application do not apply *ex proprio vigore* to the hunting activities of Indians that are protected by a treaty.[89]

In just this much space, as though the answer ought to have been obvious to anyone, the Court concluded unanimously that the regular constitution gives the provinces, acting as such, no power to infringe Indians' treaty rights.[90]

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88 *Morris*, note 2 above, at 934-935 (paras. 42-43), Deschamps and Abella J.J. (for the majority). The earlier authority to which the court referred in *Simon*, *ibid.*, was *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 (B.C.C.A.) at 618, Davey J.A. (for the plurality), aff'd on related grounds [1965] S.C.R. vi, 52 D.L.R. (2d) 491.

89 *Morris*, *ibid*. at 948 (paras. 90-91), McLachlin C.J. and Fish J. (dissenting on other grounds).

90 This conclusion does not affect the application of provincial "laws respecting game ... to the Indians within the boundaries" of the three prairie provinces, pursuant to s. 1 of the *Constitution Act, 1930* (U.K.), 20 & 21 Geo. V., c. 26, reprinted in R.S.C. 1985, App. II, No. 26 and the natural resources transfer agreements (NRTAs) to which it gives effect. Those arrangements themselves restrict the application of such laws as regards Indian "hunting, trapping and fishing game and fish for food" on unoccupied Crown lands and certain other lands to which the Indians have independent rights of access (see para. 12 of the Alberta and Saskatchewan NRTAs, para. 13 of the Manitoba NRTA), but ensure the application of provincial game laws to all Indian game harvesting not undertaken for food, even when such harvesting might be protected by treaty. See *R. v. Horseman*, [1990] 1 S.C.R. 901 ["*Horseman*"] and *Badger*, note 50 above, at 795-796 (para. 46) and 815 (para. 83), Cory J. (for the majority), and at 779 (para. 3), Sopinka J. (concurring). For my thoughts on this issue, see "Unseating *Horseman*: Commercial Harvesting Rights and the *Natural Resources Transfer Agreements*" (2007) 12 Rev. Const. Studies 135.

In addition, some treaties themselves may well subject some rights to provincial control. The English version of Treaty No. 8 (1899) provides that the hunting and fishing rights it preserves are "subject to such regulations as may from time to time be made by the Government of the country" and are available throughout traditional territories "excepting such tracts as may be required or taken up from time to time for settlement, mining or other purposes." In *Badger*, *ibid*., the Supreme Court held (at 810 (para. 70)) that this "government of the country" clause contemplated that "provincial game laws would be applicable to Indians." Treaties No.

Those familiar with my earlier work[91] will know that, generally speaking, I consider this conclusion to be the right one. The reason the Crown has concluded treaties with Aboriginal peoples is because of the distinctive legal interests, and at least the vestiges of autonomy, that Aboriginal peoples are understood to possess.[92] The power to conclude such treaties (post-Confederation) is exclusive to the federal order because only it has the power to extinguish, to accept surrender of, or to redefine Aboriginal rights or interests.[93] And it would, to say the least, be awkward, both functionally and doctrinally, if Aboriginal rights lay within the core of exclusive federal authority, but treaty rights did not. Such a result would create disincentives for both the federal Crown and Aboriginal parties to engage in treaty making. For the Aboriginal parties, the rights to be codified in the treaties would not benefit from the shield of interjurisdictional immunity and therefore would be less well protected from provincial incursion than the Aboriginal rights that they understood themselves already to possess. For the federal Crown, such an outcome would compromise its capacity to ensure the integrity of the negotiated arrangements it was offering in exchange for domestication of those pre-existing rights.

For all these reasons, it makes good sense to accept that Indians' treaty rights lie together with Aboriginal rights at the core of exclusive federal authority. Once there, they attract the full protection of interjurisdictional immunity. Nothing in the *Constitution Act, 1982* supports the contention that its enactment gave provinces fresh authority to regulate, even in justified ways, existing treaty or Aboriginal rights.[94] "The justification analysis does not alter the division of powers ...."[95]

So categorical a conclusion, doctrinally sound though it may be, is bound to have significant consequences, both jurisprudential and practical.

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4 (1877), 7 (1877), 9 (1905), 10 (1906) and 11 (1921) all contain similar wording. It seems reasonable, other things being equal, to suppose that the courts will construe the provisions comparably. This conclusion seems much less tenable, however, in respect of Treaties Nos. 3 (1875), 5 (1876) and 6 (1876), all of whose English versions use the phrase "Her Government of Her Dominion of Canada" instead of "the Government of the country" and limit the exception for lands that may be "required or taken up" to those required or taken up by "Her said Government of the Dominion of Canada." For the English versions of all these treaties, see <http://www.ainc-inac.gc.ca/pr/trts/hti/site/trindex_e.html>.

91 See Wilkins, note 64 above, at 201-203.

92 See, e.g., *A.G. Quebec v. Sioui*, [1990] 1 S.C.R. 1025 ["*Sioui*"] at 1049-1056.

93 See *Delgamuukw*, note 69 above, at 1117-1118 (paras. 175-176); Slattery, note 26 above, at 763-764.

94 I argue this at greater length in Wilkins, note 64 above, at 217-219. See also Kent McNeil, "The Métis and the Doctrine of Interjurisdictional Immunity: A Commentary" in Melanie Mallet & Frederica Wilson, eds., *Metis-Crown Relations: Rights, Identity, Jurisdiction and Governance* (Toronto: Irwin Law, 2008) 289-322 at 308-309.

95 *Morris*, note 2 above, at 939 para. 55, Deschamps and Abella J.J. (for the majority).

We do well to pay close attention to some of them. First, though, it is wise to consider, in light of more recent Supreme Court decisions, whether this conclusion itself is still good law today.

Then What Happened: Canadian Western Bank *and* Lafarge

In two division of powers decisions—neither involving Aboriginal claims or issues—released together a few months after *Morris*,[96] a majority of the Supreme Court endorsed, without any mention of *Morris*, a more circumscribed view than some might have expected about the proper role of interjurisdictional immunity in Canadian constitutional jurisprudence. "[A]lthough the doctrine of interjurisdictional immunity has a proper part to play in appropriate circumstances," the majority said in *Canadian Western Bank*, "we intend now to make it clear that the Court does not favour an intensive reliance on the doctrine, nor should we accept the invitation of the appellants to turn it into a doctrine of first recourse in a division of powers dispute."[97] It offered several reasons for this preference.

First, a "broad application" of the doctrine "appears inconsistent ... with the flexible federalism that the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote .... It is these doctrines that have proved to be most consistent with contemporary views of Canadian federalism, which recognize that overlapping powers are unavoidable."[98] Second, "[e]xcessive reliance on the doctrine of interjurisdictional immunity would create serious uncertainty .... The requirement to develop an abstract definition of a 'core' [of each head of legislative power] is not compatible, generally speaking, with the tradition of Canadian constitutional interpretation."[99] "Moreover, ... interjurisdictional immunity means that despite the absence of law enacted at one level of government, the laws enacted by the other level cannot have even incidental effects on the so-called 'core' of jurisdiction. This increases the risk of creating 'legal vacuums' .... Generally speaking, such 'vacuums' are not desirable."[100] Fourth,

> a broad use of the doctrine of interjurisdictional immunity runs the risk of creating an unintentional centralizing tendency in constitutional interpretation

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96 *Canadian Western Bank*, note 59 above, and *Lafarge*, note 65 above.

97 *Canadian Western Bank*, *ibid*. at 38 (para. 47).

98 *Ibid*. at 36 (para. 42). Compare *ibid*. at 33 (para. 37): "The 'dominant tide' [of constitutional interpretation] finds its principled underpinning in the concern that a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government. In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest" (emphasis in original).

99 *Ibid*. at 36 (para. 43).

100 *Ibid*. at 37 (para. 44).

> .... The "asymmetrical" application of interjurisdictional immunity is incompatible with the flexibility and co-ordination required by contemporary Canadian federalism .... The asymmetrical effect of interjurisdictional immunity can also be seen as undermining the principles of subsidiarity, i.e. that decisions "are often best [made] at a level of government that is not only effective, but also closest to the citizens affected."[101]

Fifth and finally, "the doctrine would seem as a general rule to be superfluous in that Parliament can always, if it sees fit to do so, make its legislation sufficiently precise to leave those subject to it with no doubt as to the residual or incidental application of provincial legislation."[102] After reviewing much of the relevant earlier case law (though not, again, *Morris*) pertaining to interjurisdictional immunity, the court concluded that:

> not only *should* the doctrine of interjurisdictional immunity be applied with restraint, ... with rare exceptions it *has* been so applied. Although the doctrine is in principle applicable to all federal and provincial heads of legislative authority, the case law demonstrates that its natural area of operation is in relation to those heads of legislative authority that confer on Parliament power over enumerated federal things, people, works or undertakings. In most cases, a pith and substance analysis and the application of the doctrine of paramountcy have resolved difficulties in a satisfactory manner.[103]

The correct approach, the majority suggested, is for courts to proceed "with caution on a case-by-case basis ... to define the content of the heads of power of Parliament and the legislatures, without denying the unavoidable interplay between them, always having regard to the evolution of the problems for which the division of legislative powers must now provide solutions."[104] Only the "basic, minimum and unassailable content" of a federal legislative power[105]—that which is "absolutely indispensable or necessary"[106] to what "makes [such matters] specifically of federal jurisdiction"[107]—warrants protection from the doctrine of interjurisdictional immunity, and even then it warrants such protection only when the relevant provincial legislation "impairs" the core federal matter. Merely "affecting" the relevant federal matter is not enough.[108]

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101 *Ibid*. at 37-38 (para. 45), quoting *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, S001 SCC 40, at 249 (para. 3).

102 *Canadian Western Bank*, *ibid*. at 38 (para. 46).

103 *Ibid*. at 51 (para. 67). All emphasis in original.

104 *Ibid*. at 37 (para. 43).

105 See *ibid*. at 40-41 (para. 50), citing *Commission de la santé et de la sécurité du travail v. Bell Canada*, [1988] 1 S.C.R. 749 ["*Bell 88*"] at 839.

106 See *Canadian Western Bank*, *ibid*. at 41-43 (paras. 51-53).

107 *Ibid*. at 42 (para. 51), quoting *Bell 88*, note 105 above, at 839.

108 See *Canadian Western Bank*, *ibid*. at 39-40 (para. 48):

> In our opinion, it is not enough for the provincial legislation simply to "affect" that which makes a federal subject or object of rights specifically of federal jurisdiction. The

In the result, the Court concluded that banks offering credit-related insurance are not beyond the reach of valid provincial insurance regulation.[109] In *Lafarge*,[110] the companion case, the majority, adopting this reasoning, held that otherwise valid provincial or municipal land use regulation can, in principle, govern construction and location of a ship unloading facility proposed for harbour lands owned by the federally constituted Vancouver Port Authority.[111]

The question is whether these more recent developments vitiate the Court's invocation, in *Morris*, of interjurisdictional immunity to protect completely the rights in Indian treaties from provincial infringement.

We shall, of course, have to wait and see, but I believe for several reasons that the better answer here is "no."[112] It would, in the first place, be highly unusual for the Court to change its mind, less than six months later, about a legal issue it had just decided unanimously.[113] So abrupt a change of direction could raise questions about the reliability—the stability—of Supreme Court of Canada precedent, which is a concern that the Court in the past has taken quite seriously.[114] Although the Court sometimes does and should reconsider earlier pronouncements when satisfied that they are no longer sound or appropriate,[115] we should be slow to infer that it has repudiated an earlier ruling—especially one reached unanimously, so recently—in the absence of a very clear indication that repudiation was indeed its intention.

> difference between "affects" and "impairs" is that the former does not imply any adverse consequence whereas the latter does. ... It is when the adverse impact of a law adopted by one level of government increases in severity from "affecting" to "impairing" (without necessarily "sterilizing" or "paralyzing") that the 'core' competence of the other level of government (or the vital or essential part of an undertaking it duly constitutes) is placed in jeopardy, and not before.

109 See *ibid*., esp. at 56-62 (paras. 83-97).

110 Note 65 above.

111 See *ibid*., esp. at 119-130 (paras. 54-73). The majority also held, however, that valid and applicable federal legislation rendered the relevant provincial measures inoperative on paramountcy grounds: see *ibid*. at 130-134 (paras. 74-85).

112 For a similar view on this issue, see McNeil, note 94 above, at 293-294, 315.

113 In *Badger*, note 50 above, for instance, the Supreme Court, invited to reconsider a highly controversial conclusion reached by a bare (4-3) majority six *years* earlier in *Horseman*, note 90 above, said (at 796 (para. 46) that "*Horseman* ... is a recent decision which should be accepted as resolving the issues which it considered."

114 In *Bell 88*, note 105 above, for example, a unanimous Court said (at 844) that it "would have great hesitation in overturning" an earlier decision "even if [it] had doubts" about the correctness of that decision, because of the reliance that litigants and others had placed on that earlier decision in planning their affairs.

115 For a recent example, and discussion, see *R. v. Henry*, [2005] 3 S.C.R. 609, 2005 SCC 76, esp. at 623-638 (paras. 22-51).

Such caution seems especially prudent in the present situation. Both *Canadian Western Bank* and *Lafarge* were before the Court at the very time that it was considering and deciding *Morris*.[116] Five of the seven justices who heard and decided the *Morris* appeal[117] also sat on the seven-judge panels that heard and decided both of these other cases; each of the other two *Morris* justices took part in one of them.[118] It is simply inconceivable that the Court decided *Morris* without knowing at least the general direction of the reasoning that it would use in the other two decisions, or that it developed its reasoning in *Canadian Western Bank* and *Lafarge* without knowing how it would decide the constitutional issue in *Morris*. If its eventual approach to interjurisdictional immunity in *Canadian Western Bank* had been meant to preclude the conclusion it reached in *Morris* on that issue, the *Morris* panel would have had ample opportunity before releasing its reasons for judgment to adapt those reasons accordingly. This circumstance strengthens the presumption that the Court understood its decisions in these three cases to be consistent with one another.

Nothing in the Court's reasons in *Canadian Western Bank* or *Lafarge* discourages that inference. Neither decision repudiates any of the Court's earlier determinations on interjurisdictional immunity. Indeed, the Court acknowledged that "the doctrine of interjurisdictional immunity has a proper part to play in appropriate circumstances";[119] it located the doctrine's "natural area of operation" as "in relation to those heads of legislative authority that confer on Parliament power over enumerated federal things, people, works or undertakings."[120] It identified "Aboriginal lands" as exemplars of the "things" to which, and "Aboriginal peoples" as exemplars of the "persons" to whom, the doctrine, used appropriately, has been applied.[121] It relied upon and reaffirmed "the Indian cases"—though not, again, *Morris* specifically—in reviewing and refashioning interjurisdictional immunity for future applications.[122]

Most important, perhaps, the Court reached its conclusions in *Morris* in a manner fully consistent with the "more restricted approach" to interjurisdictional immunity prescribed in *Canadian Western Bank* and applied in

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116 The Court heard argument in *Morris*, note 2 above, on October 14, 2005; in *Lafarge*, note 65 above, on November 8, 2005; and in *Canadian Western Bank*, note 59 above, on April 11, 2006. It released its reasons for judgment in *Morris*, *ibid*. on December 21, 2006.

117 Bastarache, Binnie, Fish, Abella and Charron J.J.

118 McLachlin C.J. presided in *Canadian Western Bank*, note 59 above; Deschamps J. was on the seven-judge panel in *Lafarge*, note 65 above.

119 *Canadian Western Bank*, note 59 above, at 38 (para. 47), quoted at greater length in text above accompanying note 97.

120 *Ibid*. at 51 (para. 67), quoted at greater length in text above accompanying note 103.

121 See *ibid*. at 35 (para. 41).

122 See *ibid*. at 46-48 (paras. 60-61).

Lafarge. It has been clear since at least 1988 that interjurisdictional immunity is about protecting "the basic, minimum and unassailable content" of federal legislative authority "in what makes [it] specifically of federal jurisdiction."[123] In concluding that the core of federal legislative authority over "Indians, and Lands reserved for the Indians"[124] includes Indians' treaty rights, neither the majority nor the dissenting judgment in *Morris* sought "to develop an abstract definition of a 'core'"[125] of that head of power; instead, both proceeded incrementally, case by case,[126] relying specifically and all but exclusively on precedent to substantiate that conclusion.[127] Finally, the *Morris* majority spoke expressly of *impairment* of "Indianness"—of *interference with* treaty rights—as the thresholds that trigger constitutional inapplicability, or interjurisdictional immunity,[128] exactly as the Court instructed later in *Canadian Western Bank*.[129] And if one accepts, as the *Morris* majority did, that the Tsartlip treaty right includes the right to hunt safely at night with lights, it follows that the impugned provisions of the B.C. *Wildlife Act*, which prohibit such hunting outright, "completely eliminate a chosen method of exercising their treaty right."[130] This is not mere incidental effect; this is impairment.[131]

For all these reasons, the better view appears to be that *Morris* is still good law on treaty rights and provincial authority; and that the Court's resort there to interjurisdictional immunity has survived the subsequent constraints imposed on the doctrine in *Canadian Western Bank* and *Lafarge*.[132] And if that is right, it is at least arguable that these later decisions have strengthened

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123 These phrases, again, originated in *Bell 88*, note 105 above. See notes 105 and 107 above and accompanying text.

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

125 See *Canadian Western Bank*, note 59 above, at 36 (para. 43), quoted at greater length above in text accompanying note 99.

126 See *ibid*. at 36-37 (para. 43).

127 See *Morris*, note 2 above, at 934 (paras. 42-43), Deschamps and Abella J.J. (for the majority), and at 948 (paras. 90-91), McLachlin C.J. and Fish J. (dissenting on other grounds).

128 *Ibid*. at 934-935 (paras. 42-43), Deschamps and Abella J.J. The dissenting judgment in *Morris* did not, but did not need to, consider the issue, having concluded that the two defendants were not engaged in treaty-protected activity.

129 See *Canadian Western Bank*, note 59 above, at 39-40 (paras. 48-49) and especially the quotation above at note 108.

130 See *Morris*, note 2 above, at 940 (para. 58), Deschamps and Abella J.J. (for the majority).

131 "A categorical prohibition clearly constitutes more than an insignificant interference with a treaty right": *ibid*. at 940 (para. 60).

132 If this proves correct, Canadian constitutional law will resemble quite closely the arrangement that Bruce Ryder advocated in 1990: flexible federalism arrangements that maximize provincial autonomy except where classical division of powers doctrine is needed to maximize First Nations' autonomy from provincial interference. See "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 309.

Morris's value as constitutional precedent by confirming its credentials for inclusion in the new, more restricted domain prescribed for interjurisdictional immunity. We really do, then, need to reckon with *Morris*'s constitutional consequences.

What This Means

One place to start is with the possible impact of *Morris* (a case only about treaty rights) on Canadian Aboriginal rights jurisprudence. As mentioned above,[133] the Supreme Court has already acknowledged more than once that Indians' Aboriginal rights lie within the core of exclusive federal authority over "Indians, and Lands reserved for the Indians."[134] It is for this reason that the provinces do not have, and never have had, capacity to extinguish Aboriginal rights or Aboriginal title.[135] So far, however, the Court has been coy about other practical implications of this conclusion, intimating, again as mentioned above,[136] that Aboriginal rights are subject nonetheless to justified provincial infringement.[137] Perhaps the Court, now having held unanimously in *Morris* that provinces, as such, have no power to infringe treaty rights,[138] is ready to acknowledge that Aboriginal rights derive the same full protection from interjurisdictional immunity.[139]

At least one lower court has already drawn that conclusion from *Morris*. In *Tsilhqot'in*,[140] the B.C. Supreme Court, having observed that it "is clear from the decision in *Morris* that provincial laws found to infringe upon Aboriginal treaty rights are constitutionally inapplicable due to the operation

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133 See notes 70-72 above and accompanying text.

134 *Constitution Act, 1867*, note 4 above, s. 91(24).

135 See *Delgamuukw*, note 69 above, at 1116 (para. 173).

136 See notes 77-82 above and accompanying text.

137 I have criticized elsewhere the (unarticulated) reasoning that could have led to this conclusion: see Wilkins, note 64 above, at 213-219.

138 See *Morris*, note 2 above, at 934-935 (paras. 42-43), Deschamps and Abella J.J. (for the majority) and at 948-949 (paras. 90-92), McLachlin C.J. and Fish J. (dissenting on other grounds), quoted in text above at notes 88-89.

139 The dissent in *Morris* came very close to doing so in this passage, quoted at slightly greater length in text above at note 89: "Indian treaty rights and [A]boriginal rights have been held to fall within the protected core of federal jurisdiction [citing authority]. *It follows that* provincial laws of general application do not apply *ex proprio vigore* to the hunting activities of Indians that are protected by treaty": *Morris*, *ibid*. at 948 (para. 91). First emphasis added. Compare this from the majority judgment: "The purpose of the *Sparrow/Badger* analysis is to determine whether an infringement by a government *acting within its constitutionally mandated powers* [emphasis added] can be justified. This justification analysis does not alter the division of powers . . .": *ibid*. at 939 (para. 55), quoted at greater length below at note 165.

140 *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 ["*Tsilhqot'in*"].

of the doctrine of interjurisdictional immunity,"[141] added (correctly, in my judgment)[142] that:

> [b]oth the majority and dissent in *Morris* approached the question of whether provincial legislation is valid or applicable under the constitutional division of powers (ss. 91 and 92) as a separate and distinct inquiry from the question of whether such legislation can be justified under the s. 35 framework. It appears there is no disagreement between the majority and the minority judges as to the analytical approach to be followed.[143]

"I do not believe," Justice Vickers went on, that "there can there [*sic*] be any principled reason for treating Aboriginal rights, including title, protected by s. 35 [of the *Constitution Act, 1982*], any differently than Aboriginal treaty rights."[144] In the result, he held that the British Columbia *Forest Act* "is inapplicable where it intrudes or touches upon forest resources located on Aboriginal title lands."[145]

It is indeed difficult to imagine a principled basis on which to privilege treaty rights over Aboriginal rights in division of powers jurisprudence.

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141 *Ibid*. at para. 1021. Boldface emphasis in original.

142 See note 139 above.

143 *Tsilhqot'in*, note 140 above, at para. 1023.

144 *Ibid*. at para. 1022. Compare *ibid*. at para. 1032: "Section 35 Aboriginal rights, including title, go to the core of Indianness and are protected under s. 91(24). On principle, they cannot be viewed any differently than Aboriginal treaty rights in this respect."

145 *Ibid*. at para. 1032. It is true that the Court in *Tsilhqot'in*, *ibid*., elsewhere concludes that forest harvesting activities authorized by the B.C. *Forest Act* "would injuriously affect the Tsilhqot'in right to hunt and trap in the Claim Area" and constitute "an unreasonable limitation on that right" (see *ibid*. at para. 1288) but that the legislation is nonetheless "constitutionally applicable to land over which the Tsilhqot'in people have Aboriginal rights to hunt, trap and trade" and is eligible for justification (*ibid*. at para. 1289). This follows, apparently, from the court's conclusion (*ibid*. at para. 1043) that "the provisions of the *Forest Act* do not go to the core of 'Indianness' or to the core of these two Tsilhqot'in Aboriginal rights." It is frustrating that in a judgment of this length (458 pages, when released, and 1382 paragraphs), the Court could not take time to explain the basis for this latter conclusion, or what it is that permits differentiation among Aboriginal rights, all of which the court said lie at the core of exclusive federal authority, such that only some derive protection from interjurisdictional immunity. All the court says that may assist is that "[t]his case differs from *Sparrow* [note 24 above] in that it does not involve a regulatory restriction on a harvesting right. Here, the issue is whether forest harvesting activities and forest silviculture activities [authorized by the *Forest Act*] are or might be an infringement of Tsilhqot'in Aboriginal hunting and trapping rights in the Claim Area": *ibid*. at para. 1274. The suggestion here appears to be that infringements resulting from permissive provincial measures differ from infringements that result from compulsory measures. This proposition itself stands in need of support. On its face, it appears contrary to the Court's conclusion in *R. v. Adams*, [1996] 3 S.C.R. 101 ["*Adams*"] at 132 (para. 54), that infringement of section 35 rights results from an "unstructured discretionary administrative regime which risks infringing [A]boriginal rights in a substantial number of applications in the absence of some explicit guidance" on when and how to "accommodate the existence of [A]borginal rights."

Indians'[146] Aboriginal rights, after all, lie at the core of exclusive federal authority under section 91(24) by definition; they exist as rights in Canadian law only because they are deemed constitutive of the cultures of the Indigenous communities to which they belong. Treaty rights lie there, in the worst case, purely by the happenstance of treaty negotiations. If anything, one would have thought that Aboriginal rights had the stronger claim to the benefit of interjurisdictional immunity. From a functional standpoint, there are good reasons not to give treaty rights greater protection from provincial measures than Aboriginal rights. Any such arrangement would give the provinces strong incentive to discourage conclusion of treaties with Aboriginal peoples[147] and thereby create potential for unnecessary tension between them and a federal government eager to resolve outstanding claims. Given the Supreme Court's reiterated preference for negotiated over litigated solutions to Aboriginal issues,[148] that would be a most unhappy result.

Regardless of its ultimate effect on Canadian Aboriginal rights jurisprudence, however, the Court's conclusion on the constitutional issue in *Morris* is of potentially monumental significance. It means that, as a general rule,[149] there is nothing coercive[150] that a province, acting as such, can do to prevent or disrupt the exercise of a right prescribed or preserved in an Indian treaty. It makes no difference how inconvenient or inconsequential a treaty right is or how salutary—how justifiable—the provincial measure constraining it might be. The treaty right wins; the provincial measure loses. And there is nothing that the province, acting as such, can do about this predicament. This brings us, inevitably, to section 88 of the *Indian Act*.

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146 The Aboriginal rights of Métis may require separate attention, depending on whether Métis turn out to be "Indians" for purposes of section 91(24) of the *Constitution Act, 1867*, note 4 above. We know from *R. v. Blais*, [2003] 2 S.C.R. 236, 2003 SCC 44 that Métis are not "Indians" for purposes of the Manitoba NRTA, note 90 above, but the issue in respect of section 91(24) remains, at this writing, unresolved. For detailed discussion of interjurisdictional immunity and Métis' rights, see McNeil, note 94 above, and the other essays to which he refers in Mallet & Wilson, eds., note 112 above.

147 From the provinces' standpoint, unascertained rights susceptible to at least some provincial control and infringement are preferable to rights ascertained in a treaty and, once there, immune from provincial impairment.

148 See, e.g., *Delgamuukw*, note 69 above, at 1123 (para. 186): "Ultimately it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve ... reconciliation .... Let us face it, we are all here to stay."

149 I mean here to acknowledge again the exception to this general proposition created by the prairie provinces' NRTAs and the possible exception that results from the inclusion of "government of the country" and "taking up" clauses in certain numbered treaties. See note 90 above and accompanying text.

150 I mean here to acknowledge the fact that provinces have greater constitutional latitude to purchase results they desire through resort to their spending power than to compel them through resort to valid legislative authority. Compare, e.g., *Union Colliery Co. v. Bryden*, [1899] A.C. 580 (P.C.) with *Brooks-Bidlake and Whittall, Ltd. v. A.G.B.C.*, [1923] A.C. 450 (P.C.).

Section 88 of the *Indian Act*

Section 88 of the *Indian Act*[151] has been in force since 1951.[152] We have known since the *Dick* decision in 1985[153] that section 88 pertains exclusively to valid[154] provincial[155] laws of general application that interjurisdictional immunity precludes from applying, *as* provincial laws, to Indians:[156] to provisions, in other words, such as those in the B.C. *Wildlife Act* that prohibit hunting at night. Section 88's effect, we now know, is to incorporate such laws by reference[157] and to apply them as federal—not provincial—law, subject to the limiting conditions set out in the section itself.[158] Section 88 operates to circumvent the effects of the doctrine of interjurisdictional immunity not by extending the reach of provincial legislative authority—Parliament itself has no power to do that—but by adopting as Parliament's own, for application to Indians, certain otherwise valid

151 R.S.C. 1985, c. I-5, as amended [*Indian Act*]. Section 88 now reads as follows:

> 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 the Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal and Statistical Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

152 See originally *The Indian Act*, S.C. 1951, c. 29, s. 87.

153 *Dick v. The Queen*, [1985] 2 S.C.R. 309 ["*Dick*"].

154 See *ibid*. at 321-322.

155 Although the words "all laws of general application in force in any province" are broad enough on their face to reach both federal and provincial laws of general application, we have known since *R. v. George* [1966] 2 S.C.R. 267 [*George*] that section 88 pertains only to provincial legislation. See *ibid*. at 281 and *Kruger & Manuel v. The Queen*, [1978] 1 S.C.R. 104 ["*Kruger & Manuel*"] at 109. Section 88's current wording, thanks to 2005 amendments that speak expressly of "provincial laws," removes any lingering doubt.

156 See *Dick*, note 153 above, at 326-327:

> I believe that a distinction should be drawn between two categories of provincial laws[:] ... provincial laws which can be applied to Indians without touching their Indianness, like traffic legislation[, and] provincial laws which cannot apply to Indians without regulating them *qua* Indians.
>
> Laws of the first category, in my opinion, continue to apply to Indians *ex proprio vigore* as they always did before the enactment of s. 88 in 1951 ... quite apart from s. 88.
>
> I have come to the view that it is to the laws of the second category that s. 88 refers.

157 See *ibid*. at 327-328. For discussion of the controversy about s. 88's operation in the jurisprudence before *Dick*, and the consequences of *Dick*'s resolution of the controversy, see Kerry Wilkins, "Still Crazy After All These Years: Section 88 of the *Indian Act* at Fifty" (2000) 38 Alberta L. Rev. 458 at 465-472.

158 See, e.g., *Wewaykum Indian Band v. Canada* (1999), 27 R.P.R. (3d) 157 (F.C.A.), aff'd [2002] 4 S.C.R. 245, at para. 28: "when Parliament incorporates the law of another legislative jurisdiction by reference in its own legislation, the law so incorporated becomes Federal law and is to be applied as such, provided that all the conditions precedent to incorporation have been satisfied."

provincial standards that could not apply on their own. The question is whether the relevant *Wildlife Act* provisions are among those it incorporates.

Mystery surrounds section 88's origins. I found no antecedent to it in the extensive legislative preparations, going back to 1946, that led to the 1950–51 revisions to the *Indian Act*. It attracted no attention in discussion of the Indian bills in Cabinet during those years and next to none in the legislative debates about those bills.[159] So we really do not know why section 88 is there, or much about the work that it was meant to do. If anything is clear about its history, however, it is that section 88 exists to protect from provincial law the provisions in Indian treaties. One's first clue here is the text of section 88 itself: the section's operation is expressly "[s]ubject to the terms of any treaty."[160] The legislative record contains assurances from the minister responsible for Indian affairs to the Indian representatives convened to consider the bill "that provincial laws would not apply if they contravened any treaty"[161] and to the members of the special House of Commons committee that considered the bill in detail that section 87, as it then was, "does not affect their treaty rights at all."[162] A clear line of Supreme Court authority has supported and reflected this understanding.[163]

It was something of a surprise, therefore, to find Chief Justice Lamer observing, in *obiter* in *Côté*, that:

> on the face of s. 88, treaty rights appear to enjoy a broader protection from contrary provincial law under the *Indian Act* than under the *Constitution Act, 1982*. Once it has been demonstrated that a provincial law infringes "the terms

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159 For documentation of my own efforts to penetrate the mystery of section 88's provenance, see Wilkins, note 157 above, at 460-465 and 501. In fairness, certain National Archives of Canada documents that might have shed light on this issue—NAC, RG13, Series A-8, vol. 2737, file 97 ("Indian Act, 1948") and vol. 2759, file 31 ("Indian Act, 1952"), and the early years of DIAND file 1/1-8-3 ("Amendments to the Indian Act"), now catalogued at NAC, RG10, Acc. 1997-98/191, Boxes 2, 3 and 4—were unavailable (labelled "missing") at the time of my research. Your luck today might be better.

160 See note 151 above for the text of section 88. We have known since *Francis v. The Queen*, [1956] S.C.R. 618 at 631 that "any treaty" means only treaties between Indians and the Crown, not international treaties, even when they contain provisions pertaining specifically to Indians.

161 See *House of Commons Debates* (16 March 1951) at 1367, which set out "A Summary of the Proceedings of a Conference with Representative Indians Held in Ottawa, February 28-March 3, 1951." See especially para. 55 of that summary.

162 See Canada, H.C., Special Committee appointed to consider Bill No. 79: An Act respecting Indians, *Minutes of Proceedings and Evidence* (Ottawa: Queen's Printer, April 1951) at 168 (23 April 1951).

163 See, e.g., *George*, note 155 above, at 281; *Kruger & Manuel*, note 155 above, at 114-115; *Simon*, note 16 above, at 410-414; *Sioui*, note 92 above, at 1065; *Sundown*, note 5 above, at 418 (para. 47). See also *Chippewas of Sarnia Band v. A.G. Canada* (1999), 40 R.P.R. (3d) 49 (Ont. S.C.J.) ["*Sarnia*"] at 22 (para. 484) rev'd in part by (2000), 51 O.R. (3d) 641 (C.A.). The *Sarnia* appellants did not pursue the section 88 issue before the Court of Appeal: see *ibid*. at 709 (para. 223), 51 O.R. (3d) 641 (C.A.) at para. 484.

> of [a] treaty," the treaty would arguably prevail under s. 88 even in the presence of a well-grounded justification. The statutory provision does not expressly incorporate a justification requirement analogous to the justification stage included in the *Sparrow* framework. But the precise boundaries of the protection of s. 88 remains [*sic*] a topic for future consideration. I know of no case which has authoritatively discounted the potential existence of an implicit justification stage under s. 88.[164]

Morris put an end to such speculation. According to the majority,

> Where a *prima facie* infringement of a treaty right is found, a province cannot rely on s. 88 by using the justification test from *Sparrow* and *Badger* in the context of s. 35(1) of the *Constitution Act, 1982*, as alluded to by Lamer C.J. in *Côté*, at para. 87. The purpose of the *Sparrow/Badger* analysis is to determine whether an infringement by a government acting within its constitutionally mandated powers can be justified. This justification analysis does not alter the division of powers, which is dealt with in s. 88. Therefore, ... the framework set out in those cases for determining whether an infringement is justified does not offer any guidance for the question at issue here.[165]

The dissenting judges agreed.[166] "Section 88," they pointed out, "was adopted in 1951 (S.C. 1951, c. 29), more than 30 years before the emergence of the concepts of justification associated with s. 35 of the *Constitution Act, 1982* were introduced."[167]

It made no difference, therefore, whether anyone could justify the application to the Tsartlip of the relevant *Wildlife Act* provisions. The only question was what it meant for those provisions—which, on anyone's reckoning, were otherwise eligible for adoption as federal law pursuant to section 88—to be "[s]ubject to the terms of any treaty."

On this, the majority and the dissent in *Morris* were, again, in substantial agreement.[168] Both agreed that an "[i]nsignificant interference with a

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164 *Côté*, note 53 above, at 191-192 (para. 87). All emphasis in original.

165 *Morris*, note 2 above, at 939 (para. 55).

166 See *ibid*. at 950 (para. 98).

167 *Ibid*.

168 I see only one point of difference here between the two judgments in *Morris*, *ibid*. The majority felt compelled to take at least some account of an observation, made in the Supreme Court's reasons for refusing to rehear the appeal in *Marshall I*, note 8 above, that supported "the regulatory authority of the federal and provincial governments within their respective legislative fields to regulate the exercise of the treaty right subject to the constitutional requirement that restraints on the exercise of the treaty right have to be justified": see *Marshall II*, note 8 above, at 551-552 (para. 24), quoted in *Morris*, *ibid*. at 935-936 (para. 46). The *Morris* majority took this as a reason to reserve judgment on the relationships among provincial legislation, section 88 and treaty rights to engage in *commercial* harvesting activity—"[f]urther consideration of the Court's position with respect to treaty rights of a commercial nature should be left for a case where it is directly in issue": *ibid*.—and confined its analysis to instances where the treaty rights in issue are non-commercial: *ibid*. at 936 (para. 47). The dissenting judges drew no such distinction. For my own view of the significance, or

treaty right will not engage the protection afforded by s. 88 of the *Indian Act*."[169] Both agreed as well, however, that section 88's treaty proviso would screen out any provincial measure (whose application to Indians depended upon incorporation by reference into federal law) that constituted a *prima facie* infringement of a treaty right.[170] "*Prima facie* infringement" has the same meaning here as it has in the jurisprudence under section 35(1) of the *Constitution Act, 1982*.[171] Or, as the majority put it, "[e]ssentially, therefore, a *prima facie* infringement requires a 'meaningful diminution' of a treaty right. This includes anything but an insignificant interference with that right."[172]

The effect of this reasoning—though the court in *Morris* does not say so—is to render all but absolute the protection conferred by the treaty proviso in section 88.[173] For today, in the wake of *Canadian Western Bank*,[174] we know that interjurisdictional immunity cannot protect treaty rights from those provincial measures whose only flaw is to affect such rights insignificantly. Only adverse consequences that amount to impairment count to disqualify otherwise valid provincial measures from applying to matters at the core of exclusive federal legislative authority.[175] In virtually every case, therefore, provincial standards whose application to Indians using treaty rights depends on section 88 will be standards that result in *prima facie*

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lack thereof, of the passage cited from *Marshall II*, *ibid*., see Wilkins, note 157 above, at 475-476, n. 86. Compare McNeil, note 94 above, at 304, n. 59.

169 *Morris*, *ibid*. at 937 (para. 50), Deschamps and Abella J.J. (for the majority), a paragraph that also uses the phrase "modest burden" as an alternative. See generally *ibid*. at 936-937 (paras. 47-50), 938 (para. 53). According to the dissenting judges, "an insignificant burden on a treaty right is not enough" to "engage the treaty exception's protection": *ibid*. at 950 (para. 98), McLachlin C.J. and Fish J. (dissenting).

170 According to the majority, "[t]he protection of treaty rights in s. 88 of the *Indian Act* applies where a conflict between a provincial law of general application and a treaty is such that it amounts to a *prima facie* infringement. Where a provincial law of general application is found to conflict with a treaty in a way that constitutes a *prima facie* infringement, the protection of treaty rights prevails and the provincial law cannot be incorporated under s. 88": *ibid*. at 938-939 (para. 54), Deschamps and Abella J.J. According to the dissent, "a *prima facie* infringement test best characterizes the degree of conflict required to engage the protection of the treaty exception": *ibid*. at 950 (para. 99).

171 See *ibid*. at 937-938 (paras. 49-52), Deschamps and Abella J.J., citing in aid passages from *Sparrow*, note 24 above, *Badger*, note 50 above, *Nikal*, note 55 above, and *Gladstone*, note 55 above.

172 *Morris*, *ibid*. at 938 (para. 53).

173 I say "*all but* absolute" here partly to leave some room for subsequent Supreme Court jurisprudence on provincial law and treaty rights to engage in commercial activity (see note 168 above) and partly to acknowledge that there may be rare occasions when a provincial measure whose impact on a treaty right is insignificant cannot, for other reasons, apply as such to Indians.

174 Note 59 above.

175 See note 108 above and accompanying text.

infringement of such rights. In every such case, according to *Morris*, the opening words of section 88—the treaty proviso—will preclude such standards from having effect as adopted federal law.

This means that section 88 itself can never facilitate real infringement of a treaty right. And that means, in turn, that the courts need never consider whether section 88's impact on treaty rights can be justified under section 35 of the *Constitution Act, 1982*.

The same cannot be said of section 88's impact on Aboriginal rights. It is true that the Supreme Court once suggested that section 88 protects Aboriginal rights, as well as treaty rights, from provincial law,[176] but it did so in a case in which no Aboriginal rights were in play and in which, therefore, nothing turned on the suggestion.[177] And nothing in the text or in the legislative history, such as it is,[178] of section 88 suggests an intention to protect Aboriginal rights from the effects of incorporated provincial standards.

Sooner or later, therefore, the Supreme Court is going to have to decide what happens when infringement of an Aboriginal right results from a provincial measure given federal effect pursuant to section 88. How might the Court, faced with such a case, address and decide the question of justification?

Two provincial courts of appeal have held that the justification inquiry focuses, even there, on the incorporated provincial measure: that section 88 itself stands in no need of justification.[179] *Morris*, however, gives fresh support to the contrary view. For *Morris* shows that section 35(1) of the *Constitution Act, 1982*[180] does not deprive the rights it protects of the benefits available to them as core federal matters[181] under the doctrine of interjurisdictional immunity.[182] Given that Aboriginal rights lie alongside Indians' treaty rights at the core of exclusive federal authority over "Indians,

176 See *Badger*, note 50 above, at 809 (para. 69): "Pursuant to the provisions of s. 88 of the *Indian Act*, provincial laws of general application will apply to Indians. This is so except where they conflict with [A]boriginal or treaty rights, in which case the latter must prevail: ..."

177 One could, to be frank, say the same thing about the passage from *Marshall II*, note 8 above, quoted above in note 168, which prompted the *Morris* majority to reserve judgment on section 88's impact on treaty rights to harvest for commercial purposes. No provincial law was in issue in *Marshall I*, also note 8 above.

178 See notes 159-163 above and accompanying text.

179 See *R. v. Alphonse*, [1993] 5 W.W.R. 401 (B.C.C.A.) at 421-423 (paras. 62-65); *R. v. Dick*, [1993] 5 W.W.R. 446 (B.C.C.A.) at 453 (paras. 17-18); *R. v. Sundown*, [1997] 8 W.W.R. 379 (Sask. C.A.) at 400 (para. 61), aff'd without reference to the point by *Sundown*, note 5 above.

180 Note 3 above.

181 See, e.g., note 139 above and the sources cited there.

182 See, e.g., *Delgamuukw*, note 69 above, at 1119 (para. 177): "s. 91(24) [of the *Constitution Act, 1867*] protects a 'core' of Indianness from provincial intrusion, through the doctrine of interjurisdictional immunity."

and Lands reserved for the Indians,"[183] it follows that no provincial measure, considered on its own, can have an impact on Aboriginal rights that amounts to infringement. Any constitutionally permissible infringement of an Aboriginal right results, therefore, exclusively from section 88's intercession. But for section 88, no infringement could occur. Accordingly, the burden of justification properly falls on section 88, not on the impotent provincial measure it incorporates into federal law.[184] And my view is still that section 88 cannot meet the test of justification under section 35[185] because section 88's operation takes no account of the existence of Aboriginal rights. It is the legislative analogue of the kind of "unstructured discretionary administrative regime" that the Supreme Court condemned in *Adams*,[186] "which risks infringing [A]boriginal rights in a substantial number of applications in the absence of some explicit guidance" on when and how to "accommodate the existence of [A]boriginal rights."[187] A statutory mechanism that gives effect wholesale to certain impugned provincial measures *because* those measures would have the effect of infringing Aboriginal rights, and without regard for the impact of, or the reasons for, any such infringement, can hardly be said to result in "as little infringement as possible in order to effect the desired result" or to demonstrate sufficient "sensitivity to and respect for the rights of [A]boriginal peoples."[188]

III SOME CONSEQUENCES

It has long been my impression that the Supreme Court's approach to treaty and Aboriginal rights cases, at least since such rights have received explicit constitutional protection, has been, doctrinally speaking, to keep the ball in play: to take care to preserve sufficient flexibility in the jurisprudence to permit it to reach, in each case, the result it considered most appropriate. This flexibility gives the Court the freedom, and the doctrinal means by which, to discipline the aspirations of Aboriginal claimants it considers to be

183 See notes 70, and 133-135 above and accompanying text.

184 I first developed this argument some years ago, without at the time the benefit of *Morris*, note 2 above. See Wilkins, note 64 above, at 226-232.

185 Others have reached this same conclusion, sometimes but not always on the basis of similar reasoning. See, e.g., Kent McNeil, "Aboriginal Peoples and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61 Sask. L. Rev. 431 at 440-441; Kent McNeil, "Aboriginal Title and Section 88 of the *Indian Act*" (2000) 34 U.B.C. L. Rev. 159 at 164-170; and Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261 at 285-286.

186 Note 145 above.

187 See *ibid*. at 132 (para. 54).

188 See *Sparrow*, note 24 above, at 1119. For a more detailed version of this argument, see Wilkins, note 64 above, esp. at 229-233.

overreaching and the presumptions of governments it considers to be acting insensitive or imperious.[189]

Morris, in my judgment, bespeaks a departure from this pattern, closing the door, decisively and deliberately, on certain doctrinal options. Except in a few highly specialized circumstances not in play in *Morris*,[190] provincial standards, regardless of their merits or public importance, have no application in circumstances where their effect would impair or infringe an Indian treaty right.[191] As a result, it is now a good deal more difficult than before to argue that provincial standards, considered as such, can operate, either, to infringe Indians' Aboriginal rights.[192] Any capacity to deploy such standards in ways that infringe such rights is apt now to depend on section 88 of the *Indian Act* and on whether, in these circumstances, Canada, or anyone, can justify resort to section 88's incorporation mechanism.[193]

The Supreme Court could have avoided, perhaps for quite some time, restricting thus its field of operations. It was under no obligation to grant the *Morris* appellants leave to appeal; such largesse, as mentioned,[194] has been extremely rare, since *Marshall I*, for Aboriginal appellants seeking accreditation or enforcement of treaty or Aboriginal rights. Having granted leave to appeal, it could have avoided the constitutional issue altogether by affirming the lower courts' conclusion that hunting at night with lights is inherently dangerous and therefore not entitled to the protection of either the North Saanich Treaty or the constitution.[195] The three dissenting judges in *Morris* would have done exactly that, but chose voluntarily nonetheless to express themselves in general agreement with the majority on the constitutional issue.[196] In doing so, both they and the majority judges could have chosen to give more weight to—or at least to have mentioned—the Court's previous Aboriginal rights jurisprudence, which appeared at least to contemplate

189 I make this argument in greater detail in "Conclusion: Judicial Aesthetics and Aboriginal Claims," in Kerry Wilkins, ed., *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing, 2004) 288-312, especially at 291-300.

190 See note 90 above.

191 See, again, *Morris*, note 2 above, at 933-939 (paras. 41-55), Deschamps and Abella J.J. (for the majority), and at 946-951 (paras. 83-100), McLachlin C.J. and Fish J. (dissenting).

192 See notes 133-148 above and accompanying text.

193 See notes 176-188 above and accompanying text.

194 See note 7 above and accompanying text.

195 See notes 5-6 above and accompanying text.

196 Contrast, for example, *R. v. Kapp*, 2008 SCC 41, where the majority of the Court declined (at para. 65) to pronounce upon the relationship between ss. 15 and 25 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, note 3 above, because "[t]hese issues raise complex questions of the utmost importance to the peaceful reconciliation of [A]boriginal entitlements with the interests of all Canadians" and because "prudence suggests that these issues are best left for resolution on a case-by-case basis as they arise before the Court."

justified provincial interference with section 35 rights,[197] to the combined support the relevant B.C. *Wildlife Act* provisions received from both the provincial and federal Crowns,[198] or to the more restrictive approach to interjurisdictional immunity the Court was already developing for release in *Canadian Western Bank.*[199]

At none of these junctures did the Court choose what might well have seemed the path of least resistance. Its choices, taken together, invite the inference that the Court felt strongly that the law required clarification and certainty on this issue, and that it meant for the rest of us to take its determination in *Morris*—and, in Aboriginal cases, the division of powers—seriously. What are the consequences of doing so?

For the Tsartlip hunters, *Morris* is an unqualified victory. It confirms that hunting at night with illumination is indeed a practice in which they had engaged since time immemorial, that the North Saanich Treaty protects their right to continue to engage in it and with modern means of hunting, transport and illumination, as long they do so safely,[200] and that they are not subject to hunting standards enacted by and for British Columbia when application of those standards could result in meaningful diminution of their hunting right.[201]

It is a significant victory too for other Indians whose (non-commercial)[202] treaty rights are already ascertained and defined—especially in respect of those rights that are not subject to prairie provinces' natural resources transfer agreements or perhaps, by their terms, to "taking up" or "government of the country" clauses.[203] They too will reap the full benefit of the reasoning in *Morris* on the constitutional issue. So too, quite possibly, will those Indians whose Aboriginal rights have already been ascertained and fully defined.

But there is a potential dark side to *Morris* for other claimant Indian peoples that it would be unwise to overlook. The long-term effect of the *Morris* decision—especially those parts of it in which the court was unanimous—will be to raise considerably the stakes in future litigation over claims of treaty, and quite possibly Aboriginal, right. Deprived of the opportunity to justify the legislation it seeks to enforce or implement despite a claim of treaty right, and at meaningful risk of losing that same

197 See notes 77-82 above and accompanying text.
198 See notes 84-86 above and accompanying text.
199 See notes 116-118 above and accompanying text.
200 See *Morris*, note 2 above, at 929-933 (paras. 24-40), Deschamps and Abella J.J. (for the majority).
201 See notes 88-93, 159-167 above and accompanying text.
202 See note 168 above.
203 See note 90 above.

opportunity when confronted with a claim of Aboriginal right, a province will have compelling reason, in every instance where the facts permit it, to contest the right's very existence, to urge that any rights that do exist be given the narrowest possible scope, and to seek to render more difficult the task of proving infringement.[204] (So too, for its part, will the federal Crown when it is disposed to be solicitous and supportive of provincial authority.) In these circumstances, one can expect to see in argument more regular resort to the kind of position that found favour with the dissent in *Morris*: that changing circumstances have rendered inhospitable, and therefore unsuitable for constitutional protection, well-grounded Aboriginal practices (or ways of carrying them out) that, at the time of contact, sovereignty or treaty, may well have been quite benign.[205]

Now consider this same scenario from the standpoint of a reviewing court. Deprived of the opportunity to adjust on a case-by-case basis the proper balance between treaty rights (at least) and provincial authority, the court must decide, once and for all, whether—to be blunt—it is safe to release such a right, or a right with the dimensions claimed, into the Canadian legal and constitutional framework,[206] and to afford it such sweeping protection from provincial infringement when the threshold for infringement is so low.[207] It would hardly be surprising if courts faced with this predicament were disposed, as a general rule, to err on the side of caution.[208]

A consequence of *Morris*, therefore, may very well be that fewer, narrower Aboriginal practices or interests obtain judicial accreditation as treaty or Aboriginal rights, that proof of infringement of those that do is about to become more difficult, or both.[209] If this proves true, it follows necessarily that less of what Aboriginal communities do and care about will

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204 Interference deemed insignificant with a treaty right, again, will trigger neither the doctrine of interjurisdictional immunity nor the treaty right proviso in section 88 of the *Indian Act*. See *Morris*, note 2 above, at 934-935 (paras. 42-43), 936-939 (paras. 47-55), Deschamps and Abella J.J. (for the majority) and at 950-951 (paras. 97-99), McLachlin C.J. and Fish J. (dissenting).

205 See *Morris*, *ibid*. at 956 (para. 117), McLachlin C.J. and Fish J. (dissenting) and generally *ibid*. at 954-956 (paras. 109-119), discussed above in the text accompanying notes 19-29.

206 In *Delgamuukw*, note 69 above, for instance, the court cautioned (at 1066 (para. 82)) against accommodations that might "strain the Canadian legal and constitutional structure." (Original internal quotation marks omitted.)

207 In a justly famous article published shortly after the Supreme Court released its decision in *Sparrow*, note 24 above, Ian Binnie argued that conferring "too much immunity" on section 35 rights would make the courts much more cautious about accrediting [A]boriginal rights of self-government. See W.I.C. Binnie, "The *Sparrow* Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 Queen's L.J. 217, especially at 218, 225, 234.

208 It is true that the majority in *Morris*, *ibid*. appeared not to do so. It did, however, take pains to make clear (at 939 (para. 56)) that an alternative statutory provision—section 29 of the B.C. *Wildlife Act*–remained in force and sufficed to deal with dangerous hunting *per se*.

209 I make a similar argument, at a little greater length, in Wilkins, note 189 above, at 300-303.

receive constitutional protection from unjustifiable federal interference.[210] This, from an Aboriginal standpoint, would hardly be a good thing. I do not say that *Morris* makes such a result inevitable. I do say, though, that Aboriginal claimants would be wise now to be careful—and to be strategic—in deciding which claims of right to assert, and when and how to assert and argue them, if they wish to reduce the risk of confronting it.[211]

IV A FINAL, UNEXPLORED ISSUE

I want before closing to mention a final issue disclosed by the facts of *Morris* but not addressed further in the Court's reasoning or, to the best of my knowledge, in argument before the Court in the case.

Consider the following passage from the beginning of the majority judgment in *Morris*:

> The backdrop to the prosecution of Morris and Olsen was a change of administrative policy on the part of the provincial Crown, acting through conservation officers. The evidence is that the Tsartlip had hunted at night for generations until the charges were laid in this case. They had received confirmation from the Minister of Forests, David Zirnhelt, that there would be no prosecutions in connection with the exercise of hunting and fishing rights pursuant to the Treaty. On the basis of this assurance, the Tsartlip entered into an arrangement with Doug Turner, Chief Enforcement Officer of the Conservation Officer Service for Vancouver Island, whereby any treaty beneficiary charged in relation to night hunting was instructed to phone Mr. Turner. Once Mr. Turner received confirmation that the hunter in question was a member of the Saanich Nation, the hunter would be released. This arrangement, it appears, ended with Mr. Turner's retirement in 1996.
>
> In November of that year, not long after Mr. Turner's retirement, a conservation officer was invited to speak at a "rod and gun" club meeting where members expressed dissatisfaction about Indians engaged in night hunting. A decoy operation was promptly organized to trap night hunters, as a result of which Morris and Olsen were arrested and charged. The Tsartlip were not forewarned of the operation and no discussion took place after the charges were laid.[212]

Missing altogether from this episode, as described, was any effort at consultation about the sudden change in the B.C. government's enforcement policy in respect of night hunting incidents involving Tsartlip or other Saanich hunters. From this description, surprise appears to have been the

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210 See notes 48-52 above and accompanying text.

211 For some thoughts of mine on this issue, see Wilkins, note 189 above, at 296-304 and Kerry Wilkins, "Take Your Time and Do It Right: *Delgamuukw*, Self-Government Rights and the Pragmatics of Advocacy" (2000) 27 Manitoba L.J. 241 at 263-271.

212 *Morris*, note 2 above, at 923-924 (paras. 7-8).

very point of the operation. Yet we have known since *Haida*[213] that governments, and the government of British Columbia in particular, have a legal duty to consult with Aboriginal peoples and that "the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[214] We have known since *Mikisew*[215] that the same is true when the Crown is contemplating a measure that could adversely affect conduct that may come within the protected scope of a treaty right.

It is easy to imagine why the consultation issue did not arise for decision in *Morris*. The Supreme Court's decision in *Haida* (November 18, 2004) did not arrive till several months after the Court of Appeal decision in *Morris* (March 4, 2004),[216] and *Mikisew* (November 24, 2005) did not come out till after the Court had heard oral argument in the *Morris* appeal (October 14, 2005). Supreme Court thinking on consultation was not available to the parties till very late in the process of dealing with the *Morris* case, so it is hardly surprising that the issues on appeal in *Morris* crystallized without reference to the consultation question.[217]

In retrospect, however, the facts of *Morris* seem to disclose at least a *prima facie* breach of the B.C. government's duty to consult with the Tsartlip about its night hunting enforcement policy. Taken together, Minister Zirnhelt's assurance and Mr. Turner's initiative in response to it[218] disclose an awareness at least that the Tsartlip themselves understood their treaty to entitle them to hunt, most likely with light, at night. One would think that such awareness would constitute "real or constructive" knowledge in the Crown "of the potential existence" of the relevant treaty entitlement.[219] And it seems difficult now to dispute that such unannounced "sting" operations as the one that led to the charges in *Morris* "might," and were meant to, "adversely affect"[220] the exercise of what at the time was still a putative right.

As I write this, I know of no jurisprudence that has addressed the relationship between the discretion available to enforcement officials and prosecutors and the duty on governments aware of believable Aboriginal claims to consult with the claimant peoples about them. To date, to the best of my knowledge, most consultation jurisprudence has dealt with instances

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213 Note 79 above.
214 *Ibid*. at 529 (para. 35).
215 Note 7 above.
216 See *R. v. Morris and Olsen* (2004), 237 D.L.R. (4th) 693 (B.C.C.A.).
217 The fact that the majority judgment in *Morris*, note 2 above, even mentioned these events suggests, however, that they may have had some unstated influence on the result. It was not necessary to the analysis that it do so.
218 See text at note 212 above.
219 See quotation at note 214 above.
220 See *ibid*.

in which a government's action has authorized private activity that affects adversely some claimed Aboriginal interest. But nothing in *Haida*,[221] in *Taku*, its companion case,[222] or in *Mikisew*[223] suggests that routine enforcement activity is exempt from a government's obligation to consult when such activity might disrupt or chill the exercise of an asserted treaty or Aboriginal right. If there is a basis for such an exemption, the burden of establishing it appears to lie on those who would assert it.

V CONCLUSION

Morris is important in the canon of Supreme Court Aboriginal law jurisprudence, in part because it departs from so many prior expectations.

By rejecting the assumption that hunting at night is inherently dangerous, it converted what many thought would be an all or nothing issue into a matter for case-by-case attention. From now on, it seems, the Crown will have to prove on the facts of each case that any particular means or occasion of Aboriginal hunting is, in that instance, disqualified for reasons of safety from the constitutional protection afforded to treaty rights. And even that, perhaps, may not be enough.[224]

On the other hand, by declaring that provinces ordinarily have no power to infringe Indians' treaty rights, on grounds that should apply with equal force to Aboriginal rights, the Supreme Court turned what many thought would be a matter for determination case by case—the relationship between such rights and provincial authority—for all intents and purposes into an all or nothing issue. In doing so, especially when it could have avoided deciding the issue, the court diverged from its earlier unspoken practice of keeping its doctrinal options open as long as possible, and it made the game of treaty (and quite possibly Aboriginal) rights assertion and litigation much riskier for all sides.

We are going to require prudence, care, generosity and grace to find our way forward together responsibly under these new conditions.

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221 Note 79 above.

222 *Taku River Tlingit First Nation v. B.C. Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74 ["*Taku*"].

223 Note 7 above.

224 See notes 44-47 above and accompanying text.