File No. 34986

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

ROGER WILLIAM, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations Government and on behalf of all other members of the Tsilhqot'in Nation

APPELLANT

AND:

HER MAJESTY THE QUEEN in right of the Province of British Columbia and the Regional Manager of the Cariboo Forest Region and THE ATTORNEY GENERAL OF CANADA

RESPONDENTS

AND:

ATTORNEY GENERAL OF QUEBEC
ATTORNEY GENERAL OF MANITOBA
ATTORNEY GENERAL OF SASKATCHEWAN
ATTORNEY GENERAL OF ALBERTA

INTERVENERS

FACTUM OF THE INVERVENER THE ATTORNEY GENERAL OF SASKATCHEWAN

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PART I – OVERVIEW AND FACTS

1. The Attorney General for Saskatchewan has intervened in these proceedings in order to address the constitutional questions set by the Chief Justice on March 15, 2013. Those questions deal with whether British Columbia's forestry legislation is constitutionally applicable to lands subject to Aboriginal title in view of Parliament's exclusive legislative jurisdiction over "Indians and Lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867*[1] and in view of the constitutional protection accorded to existing Aboriginal and Treaty rights by section 35(1) of the *Constitution Act, 1982*.[2]

2. The Attorney General has intervened in these proceedings for two reasons. First, even though all of the land in Saskatchewan is included in Treaties pursuant to which First Nations agreed to cede their Aboriginal interests in the land to the Crown, there are several Aboriginal title claims currently before the courts in Saskatchewan. These claims fall into three broad categories. First, there are claims by First Nations who are parties to the Treaties but who assert that they did not agree to give up their Aboriginal title when they entered into the Treaties.[3] Second, there is a claim by two Sioux First Nations, who have never entered into land cession treaties with the Crown, to Aboriginal title over lands in southern Saskatchewan.[4] Third, there is a claim by the Métis Nation – Saskatchewan that it possesses Aboriginal title to lands in northwestern Saskatchewan.[5] If any of these claims are successful, the decision in this case may well determine the extent to which provincial laws can apply on these lands in the future.

3. Second, some courts have drawn analogies between Aboriginal title lands and Indian reserves in the past.[6] There are in excess of 400 Indian reserves in Saskatchewan consisting of

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[1] 30 & 31 Victoria, c .3 (U.K.), reprinted in R.S.C. 1985, Appendix II, No. 5.
[2] Schedule B to the Canada Act (UK), 1982, c. 11.
[3] *George Gordon First Nation v. Saskatchewan and Canada*, Q.B. No. 2354 of 2011, Judicial Centre of Regina; *Wood Mountain Lakota First Nation and Wahpeton Dakota Nation v. Saskatchewan and Canada*, Q.B. No. 1131 of 2009, Judicial Centre of Regina; *Waterhen Lake Cree Nation v. Saskatchewan and Canada*, Q.B. No. 158 of 2007, Judicial Centre of Saskatoon; *Buffalo River Dene Nation v. Saskatchewan and Canada*, Q.B. No. 1577 of 2006, Judicial Centre of Saskatoon; *Stoney Indian Band v. Saskatchewan and Canada*, Q.B. No. 2147 of 2003, Judicial Centre of Saskatoon.
[4] *Wood Mountain Lakota First Nation and Wahpeton Dakota Nation v. Saskatchewan and Canada*, Q.B. No. 1131 of 2009, Judicial Centre of Regina.
[5] *Métis Nation of Saskatchewan v. Saskatchewan and Canada*, Q.B. No. 619 of 1994, Judicial Centre of Saskatoon.
[6] See for example, *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at p. 379 [*Guerin*]

approximately 2,400,000 acres.[7] Issues with respect to the application of provincial laws on these Indian reserves, particularly provincial laws dealing with the use of land, frequently arise and the law in this area remains unsettled. While the Attorney General will argue that this is not an apt analogy, he recognizes the decision in this case may assist in resolving some of these issues as well.

4. The Attorney General takes no position with respect to the facts as outlined by either the Appellants or the Respondents.

5. The Attorney General's argument with respect to the Constitutional Questions can be concisely summarized as follows. The Attorney General will argue that the doctrine of interjurisdictional immunity should not be extended to Aboriginal title lands; that the core of section 91(24)'s jurisdiction over lands should be defined narrowly; that only provincial laws that impair or extinguish Aboriginal title are inapplicable; and that provincial laws which infringe Aboriginal title do not necessarily impair this core and, therefore, do not engage interjurisdictional immunity. The Attorney General will also argue that provincial laws which impair Aboriginal title can apply as federal laws through the operation of section 88 of the *Indian Act*.[8] Finally, the Attorney General will argue that the constitutional applicability of any provincial laws which are seen to infringe Aboriginal title should be determined under section 35 and the flexible considerations of the *Sparrow* justification test[9] rather than under the rigid rules of interjurisdictional immunity.

PART II – STATEMENT OF ISSUES

6. The Attorney General takes no issue with the Appellants' characterization of the issues.

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[7] Online: Aboriginal Affairs and Northern Development Canada <http://pse5-esd5.ainc-inac.gc.ca/FNP/Main/Search/RVListGrid.aspx?lang=eng>.
[8] *Indian Act*, R.S.C. 1985, c. I-5 [*Indian Act*].
[9] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at pp. 113-119.

PART III – ARGUMENT

A. Introduction

7. The Appellants argue that British Columbia's forestry legislation cannot constitutionally apply to authorize the management or sale of forestry resources on lands over which they possess Aboriginal title because those lands are "Lands reserved for the Indians" within the meaning of section 91(24) and because of the constitutional protection accorded to "existing Aboriginal and Treaty rights" by section 35(1). At the outset, the Attorney General stresses that these are two separate and distinct questions. The first step is always to determine if the provincial law applies under the division of powers. If, and only if it does, then the second step is to determine the implications of section 35.

B. Meaning of "Lands Reserved for the Indians"

8. The constitutional questions set for this case relate to whether provincial forestry legislation constitutionally applies on Aboriginal title lands. The Attorney General does not dispute that if Aboriginal title is ultimately established on some or all of the lands claimed by the Appellants, then those lands will be "Lands reserved for the Indians" for the purposes of section 91(24) and must be considered to have always been "Lands reserved for the Indians". However, it is important to note that in this case, a significant underlying issue concerns the application of provincial forestry legislation on lands over which Aboriginal title has merely been asserted, but has not yet been established.

9. It is the Attorney General's position that lands over which Aboriginal title is merely asserted should not be considered to be "Lands reserved for the Indians" for the purposes of section 91(24). An assertion of Aboriginal title may or may not be valid. A mere assertion cannot shift provincial Crown lands into a different constitutional category. This shift cannot be made until it has been determined that the lands are in fact Aboriginal title lands either by the successful completion of a Treaty or by a court declaration. The Attorney General fully recognizes that the mere assertion of Aboriginal title is relevant for the purposes of section 35 and may be sufficient in some cases to trigger the duty to consult.[10] But, that is a separate issue.

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[10] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 at para. 27 [*Haida Nation*].

For the purposes of division of powers, a mere assertion of jurisdiction is constitutionally irrelevant.

10. At paragraphs 101 and 103 of their Factum, the Appellants refer to the *Royal Proclamation, 1763*.[11] They go onto to say that the precise geographical reach of the *Proclamation* is irrelevant because its terms have been incorporated into the common law.[12]
The Attorney General does not agree that the geographical reach of the *Proclamation* is no longer relevant. The Attorney General readily accepts that the bedrock principles of the *Proclamation* such as the requirement that First Nations' Aboriginal title lands cannot be sold directly to third parties are part of the common law applicable throughout the country. However, the Attorney General submits that the *Proclamation* no more has the effect of making all unceded lands in British Columbia "Lands reserved for Indians" than it does in Nova Scotia or New Brunswick.[13] The courts have never definitively determined whether the *Proclamation* applies to lands in British Columbia[14] and given the absence of consideration of this issue in the courts below, this is not an appropriate case to do. However, this Court has previously determined in *Sigeareak*[15] that the *Proclamation* does not apply to the lands formally known as Rupert's Land. Therefore, the *Proclamation* cannot make unceded lands in the prairie provinces "Lands reserved for the Indians" within the meaning of section 91(24).

11. The Attorney General also submits that in considering the issues raised by this appeal it is important to keep in mind that section 91(24) embraces many different types of "Lands reserved for the Indians". Parliament's jurisdiction over Indian lands includes Aboriginal title lands[16], Indian reserve lands[17], conditionally surrendered Indian reserve lands[18], various categories of lands under comprehensive land claims settlements[19] and self-government agreements[20] and

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[11] R.S.C. 1985, Appendix II, No. 1.
[12] Appellant's Factum at para. 102.
[13] *R. v. Marshall; R. v. Bernard*, 2005 SCC 43 at paras. 85-96.
[14] *Calder v. British Columbia*, [1973] S.C.R. 313 at para. 323, per Judson J. and at para. 395, per Hall J.
[15] *R. v. Sigeareak*, [1966] S.C.R. 645.
[16] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 174 [*Delgamuukw*].
[17] *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285 at paras. 25-26 [*Derrickson*].
[18] *Leonard v. British Columbia*, 1984 CarswellBC 96 at para 11 (B.C.C.A.); *Surrey (District) v. Peace Arch Enterprises Ltd.*, [1970] B.C.J. No. 538 at paras. 21-28 (B.C.C.A.) [*Peace Arch Enterprises*].
[19] J. Woodward, *Native Law*, loose leaf (Toronto: Thompson Reuters Canada Ltd., 1994) at para. 3§ 220 [*Woodward*].
[20] *Sechelt Indian Band v. British Columbia (Manufactured Home Park Tenancy Act, Dispute Resolution Officer)*, 2013 BCCA 262 at para. 51.

even fee simple lands[21] in some cases. In addition, Indian reserves can be established in many different ways.[22] All of these lands are not the same. While the Court expressed the view in *Guerin*[23] that Aboriginal title and Indian reserve lands are the same, the Attorney General submits that this is not always the case. See, in particular, the comments of Gonthier J. in dissent in *Osoyoos*.[24] In some cases, Indian reserves are the remnants of a First Nation's Aboriginal title lands. In other cases, they are not. For example, in Saskatchewan, reserves were created after the surrender of Aboriginal title and the rights associated with reserves are determined by the Treaties and by the provisions of the *Indian Act*, not by the law related to Aboriginal title.

12. This point is important for two reasons. First, in defining the core of Parliament's jurisdiction over "Lands reserved for the Indians", the Court should look at the common elements of all of these various categories of land. The core should embrace only elements that are common to all of these lands. The core should not be defined differently for the different categories of lands that fall within section 91(24). It is difficult to conceptualize this core except in terms of broad notions of the use and benefit of the lands which would be contrary to the direction from *Insite*[25] and the need for bright lines. It is particularly difficult to define the core as it relates to Aboriginal title lands given that this jurisdiction has never been exercised. Second, the point highlights the fact that Indian reserves and the use and occupation of lands on Indian reserves are subject to a detailed legislative regime under the *Indian Act*. As will be argued later, it is this detailed legislative regime, through the operation of the doctrine of paramountcy, which prevents the application of many provincial laws on Indian reserves. Aboriginal title lands, on the other hand, are not subject to any federal statutory regime and a decision that interjurisdictional immunity prevents the application of provincial laws on these lands will result in a regulatory gap or vacuum. Interjurisdictional immunity should not be relied upon to create regulatory gaps or to make Aboriginal title lands into Indian reserves.

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[21] *Re Stony Plain Indian Reserve No. 135*, 1981 CarswellAlta 298 (C.A.).
[22] *Woodward*, *supra* Note 19 at paras. 233.
[23] *Guerin*, *supra* Note 6.
[24] *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746, at paras. 158-174.
[25] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at paras. 57-70 [*Insite*].

C. Doctrine of Interjurisdictional Immunity

13. Interjurisdictional immunity establishes a "basic, minimum and unassailable content"[26] of jurisdiction assigned to a head of power under the *Constitution Act, 1867*. This core of federal jurisdiction is immune from the application of valid provincial laws that impair the core, even in the absence of conflicting federal law.[27] This Court in *Canadian Western Bank* recently expressed discomfort with the doctrine of interjurisdictional immunity and significantly narrowed its reach. This was done by indicating that interjurisdictional immunity should not be extended to new areas and by increasing the threshold for its application from "affecting" to "impairing" the core. [28]

14. This Court has concluded on several occasions that an excessive reliance on the doctrine of interjurisdictional immunity should be avoided.[29] The doctrine of interjurisdictional immunity has the potential to foster uncertainty since the core of a legislative power is "difficult to define, except over time by means of judicial interpretation triggered serendipitously on a case by case basis."[30] As such, this Court confirmed that the doctrine of interjurisdictional immunity should generally be reserved for situations covered by past precedent.[31] Recently, this Court in *Insite*, refused to apply the doctrine of interjurisdictional immunity to protect "a broad and amorphous" area of provincial jurisdiction over health care for the following reasons:

> … the claimants in this case have failed to identify a delineated "core" of an exclusively provincial power. The provincial health power is broad and extensive. It extends to thousands of activities and to a host of different venues. Such a vast core would sit ill with the restrained application of the doctrine called for by the jurisprudence. To complicate the matter, Parliament has power to legislate with respect to federal matters, notably criminal law, that touch on health. For instance, it has historic jurisdiction to prohibit medical treatments that are dangerous, or that it perceives as "socially undesirable" behaviour: *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616; *R. v. Morgentaler*, [1993] 3 S.C.R. 463. The federal role in the domain of health makes it impossible to precisely define what falls in or out of the proposed provincial "core". Overlapping federal jurisdiction and the sheer size and

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[26] *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para. 33 [*Canadian Western Bank*].
[27] *Ibid.* at para. 48
[28] *Ibid.* at paras. 48-49.
[29] *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44.
[30] *Canadian Western Bank*, *supra* note 26 at para. 43.
[31] *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 at para. 26; *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53 at para. 47; *Canadian Western Bank*, *supra* note 26 at para. 77.

> diversity of provincial health power render daunting the task of drawing a bright line around a protected provincial core of health where federal legislation may not tread.[32]

15. A further reason to confine the doctrine of interjurisdictional immunity that has been identified by this Court is to avoid the risk of creating legal vacuums in areas where there is no federal legislation.[33] Since the application of interjurisdictional immunity does not require a conflict between federal and provincial law and the government benefiting from immunity does not need to exercise its jurisdiction, there is an increased possibility for legislative vacuums. These legislative vacuums have been described as being "inimical to the very concept of the division of powers."[34] Furthermore, a broad application of interjurisdictional immunity to Aboriginal title lands would necessarily render provincial laws inapplicable to non-Indians as well as Indians on those lands. This would result in an enormous legal vacuum.

16. A constrained application of the doctrine of interjurisdictional immunity is also consistent with current notions of federalism in Canada. The doctrine of interjurisdictional immunity is exceptional as it runs counter to the recognition of overlapping federal and provincial jurisdiction through the double aspects doctrine and the incidental effects rule. A narrow application of the doctrine of interjurisdictional immunity supports cooperative federalism and balances the need for national uniformity with a renewed appreciation of subsidiarity.[35]

17. The Attorney General makes three arguments in regard to the doctrine of interjurisdictional immunity and its relationship to Aboriginal title. First, the Attorney General supports the approach taken by British Columbia that interjurisdictional immunity should not be extended to prevent the application of provincial laws to Aboriginal title lands. It is the Attorney General's position that Aboriginal title receives sufficient, and indeed better, protection from provincial laws through the justification process under section 35 than with the blunt instrument of interjurisdictional immunity.

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[32] *Insite*, *supra* note 25 at para. 68.
[33] *Canadian Western Bank*, *supra* note 26 at para. 44.
[34] *Insite*, *supra* note 25 at para. 69.
[35] Dwight Newman, "Changing Division of Powers Doctrine and the Emergent Principle of Subsidiary" (2011) 74 Sask. L. Rev. 21.

18. Second, and in the alternative, the Attorney General also supports the approach taken by Canada in relation to interjurisdictional immunity and Aboriginal title. Canada argues that the core of Aboriginal title within section 91(24) is limited to its foundational elements which encompass its existence and definition. As such, provincial legislation will only impair the core of federal jurisdiction over Aboriginal title where it seeks to extinguish, redefine or alter the substance of that right.

19. Further, the Attorney General says that the core of the federal jurisdiction should not be defined in terms of any particular First Nations' Aboriginal title. To use the words of *Insite*, Aboriginal title is a "broad and amorphous"[36] subject matter. As this case readily demonstrates, the test for determining which lands are subject to Aboriginal title remains uncertain. Applying that test is even more uncertain. Aboriginal title embraces many different uses of the land.[37] It is simply impossible to draw a bright line around Aboriginal title. Furthermore, defining the core in terms of a particular First Nations' Aboriginal title would introduce great uncertainty into the law. It would be impossible to ever know in advance if a provincial disposition of an interest in Aboriginal title lands impairs/extinguishes the core of section 91(24). For example, if a First Nation has Aboriginal title over 100,000 acres of land, would a provincial disposition of all of that land impair/extinguish the core? What if compensation or some other accommodation was provided? Would the disposition of 80,000 acres of that land impair/extinguish the core? Would the disposition of 50,000 acres impair/extinguish the core? Would the disposition of 100 acres impair/extinguish the core question? What about the disposition of a single tree? These issues would have to be resolved on a case by case basis taking into account the specific characteristics of the land. It is submitted that this type of inquiry is not appropriate under interjurisdictional immunity and is better left to the justification test under section 35.

20. Third, and in the further alternative, the Attorney General takes the position that if the core of section 91(24) jurisdiction over Indian lands includes a broader conception of Aboriginal title which includes the use and benefit of particular lands by individual First Nations, then this core will only be impaired by provincial laws that have the effect of extinguishing Aboriginal

[36] *Insite*, *supra* note 25 at para 36.
[37] *Delgamuukw*, *supra* note 16 at para. 111.

title[38] or altering the law with respect to Aboriginal title by, for example, removing the cause of action for breach of Aboriginal title.[39] Provincial laws which infringe Aboriginal title do not necessarily impair title. It is the Attorney General's position that the impairment standard is higher than the infringement standard. As such, infringements should not be accorded division of powers significance. Any infringement of a particular First Nation's Aboriginal title is better dealt with through the justification process under section 35. Unlike the doctrine of interjurisdictional immunity, the justification test under section 35 is well situated to promote reconciliation, foster dialogue and balance the rights held by Aboriginal peoples with non-aboriginal interests.

21. With respect to this third point, the Attorney General acknowledges that this Court has previously considered the doctrine of interjurisdictional immunity in the context of section 91(24) and has determined that Aboriginal title, Aboriginal rights and Treaty rights all fall within the core of exclusive federal legislative jurisdiction at the heart of section 91(24).[40] However, it is the Attorney General's position that placing Aboriginal title within the core of section 91(24) does not resolve the constitutional questions in this case. The real issue is whether the application of provincial forestry laws to Aboriginal title lands will impair the core.

22. As pointed out by Canada, it is difficult to address this issue in the abstract. British Columbia's forestry legislation deals with many different things including the disposition of rights to harvest forestry resources and the regulation of forestry harvesting practices. It is the Attorney General's position that provinces can dispose of forest resources on Aboriginal title lands pursuant to their ownership of the resource and their legislative jurisdiction over that resource. While obviously this will affect matters within federal jurisdiction, even in potentially serious ways, it is submitted that for constitutional purposes the effects should be seen as incidental. As pointed out by the Court in *Kruger*, disproportionate effects alone do not render provincial laws constitutionally inapplicable.[41] In this situation, the First Nation retains its rights under the common law to sue for damages and, if appropriate, to seek an injunction to stop the

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[38] There is an analogy to the limits on "taking up" land under the Treaties as discussed in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at paras. 31-33, 47-48 [*Mikisew Cree*].
[39] See generally, *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 at para. 84.
[40] *R. v. Morris*, 2006 SCC 59 [*Morris*]; *Delgamuukw*, *supra* note 16.
[41] *R. v. Kruger*, [1978] 1 S.C.R. 104 at p. 110.

disposition. Also, since 1982, First Nations rights have been elevated to constitutional status and the Province must comply with the duty to consult as outlined by this Court in *Haida Nation* prior to disposing of any resources on lands over which Aboriginal title is asserted.

23. The Attorney General agrees with the submission of Canada that cases like *Derrickson*[42] and *Paul*[43] which dealt with the possession and occupation of reserve lands are better categorized as paramountcy cases than as interjurisdictional immunity cases. In those cases, provincial legislation could not affect possession or occupation of Indian reserve lands because of conflict with the detailed regulatory regime governing those matters under the *Indian Act*. No such regulatory regime exists with respect to Aboriginal title lands. Therefore, adopting the view that provincial legislation cannot affect the possession or occupation of Aboriginal title lands by reason of interjurisdictional immunity will simply create a legislative gap.

24. The relevant considerations with respect to the application of provincial laws which merely regulate forest harvesting practices are somewhat different. The Appellants suggest that these laws cannot apply because they deal with the use of land or, alternatively, they infringe Aboriginal title. The Attorney General submits that neither proposition is correct. The core of section 91(24) lands should not been seen as embracing all potential uses of those lands. This is inconsistent with how the core of section 91(24) has been described in relation to Indians. When dealing with the first branch of section 91(24), provincial laws will be inapplicable only if they impair "Indianess". A similar test should be applied to Indian lands. Therefore, provincial laws should be seen to be inapplicable only if they impair the "Indianess" of the land. In both cases, Indianess must relate to something that is distinctly Indian. Provincial laws which regulate ordinary commercial activities on the land do not relate to the Indianess of the land in any way. The Attorney General submits that *Peace Arch Enterprises*[44] and the cases which have followed it, which have held that provincial laws can never affect the use of lands on reserves, were wrongly decided. The preferable approach is set out in a Saskatchewan case, *Fiddler*.[45]

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[42] *Derrickson*, *supra* note 17.
[43] *Paul v. Paul*, [1986] 1 S.C.R. 306.
[44] *Supra* note 18.
[45] *R. v. Fiddler*, 1993 CarswellSask 298 (Q.B.); see also *Rempel Brothers Concrete Ltd. v. Chilliwack (District)*, 1994 CarswellBC 117 (C.A.), *Brantford (Township) v. Doctor*, 1995 CarswellOnt 790 (Gen. Div.) and *Oka (Municipalité) v. Simon*, 1998 CarswellQue 4718 (C.A.).

25. It is also submitted that the Appellants' submission that provincial laws cannot, from a division of powers perspective, infringe Aboriginal title is contrary to a number of recent decisions of this Court, most notably *Delgamuukw*.[46] At para. 268 of their factum, the Appellants suggest that the Court's conclusion in *Delgamuukw* that provinces can justifiably infringe Aboriginal title should be disregarded because this conclusion was based on *Badger*.[47] The Appellants argue that *Badger* is distinguishable because in that case the Province's authority to infringe Treaty rights was derived from the *Natural Resource Transfer Agreement*, which was confirmed by the *Constitution Act, 1930*.[48] It is submitted that the Appellants' submission misunderstands the true effect of the *Transfer Agreement*. Prior to 1930, the prairie provinces could apply their game laws to Indians even if those laws infringed Treaty rights. The true effect of the *Transfer Agreement*, as stated by Laskin J. in his dissenting judgment in *Cardinal*, was not to expand provincial legislative powers but to contract them.[49] This view of the effect of the *Transfer Agreement* was subsequently adopted by the Court in *Horseman*.[50] Therefore, *Delgamuukw* remains good law on this point.

26. It is also submitted that the recognition that valid provincial laws can infringe Aboriginal title in certain circumstances is simply a reflection of the well-established and long-standing principle of Canadian constitutional law that legislation within the jurisdiction of one level of government may impact upon or effect matters within the jurisdiction of the other level of government. This principle has been applied many times to uphold the application of provincial laws to Indians and Indian lands. Two recent examples from this Court are *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*[51] and *Paul v. British Columbia (Forest Appeals Commission)*.[52] The issue in *Kitkatla* concerned the application of British Columbia's heritage property legislation to Aboriginal artifacts. Justice LeBel, for a unanimous court, confirmed several important principles. First, the basic assumption in

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[46] *Delgmauukw*, *supra* note 16.
[47] *R. v. Badger*, [1996] 1 S.C.R.771.
[48] 20-21 George V, c. 26 (U.K.).
[49] *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695 at p. 722 [*Cardinal*] and *R. v. Horseman*, [1990] 1 S.C.R. 901 at p. 934 [*Horseman*].
[50] *Horseman* at p. 934; see also *Kruger*, *supra* note 41 at p. 111-112.
[51] [2002] 2 S.C.R. 146 [*Kitkatla*].
[52] [2003] 2 S.C.R. 585 [*Paul v. BC*].

Canadian constitutional law is that provincial laws apply to Indians and on Indian reserves.[53] Second, merely incidental effects will not disturb the constitutional applicability of an otherwise valid provincial law.[54] Third, provincial laws which treat Indians and non-Indians alike will not be rendered constitutionally inapplicable simply because they have a disproportionate effect upon Indians.[55] No issues concerning Aboriginal rights or Aboriginal title were raised in *Kitkatla*, but LeBel J. clearly suggested at paras. 71 and 74 that these issues should appropriately be dealt with under section 35 and not under the division of powers.[56]

27. The issue in *Paul* was whether a provincially appointed commission had the authority to consider Aboriginal rights in the course of its proceedings. While the Court based its decision on the distinction between legislation and adjudication, Bastarache J. clearly endorsed the view that the constitutional applicability of provincial legislation which allegedly infringed Aboriginal rights should be assessed under section 35 and not the division of powers. He said:

> 24 Further reasons persuade me to reject the respondent's general position that questions relating to aboriginal rights are untouchable by a provincially created tribunal by virtue of their falling within federal legislative competence. It is necessary to examine side by side two provisions in the Constitution. The one on which the respondent relies heavily is s. 91(24), which empowers Parliament to legislate in relation to "Indians, and Land reserved for the Indians". The other is s. 35 of the *Constitution Act, 1982*. Unless otherwise specified, such as official language rights in the *Charter* particular to New Brunswick, every right in the *Constitution Act, 1982* applies to every province as well as to the federal government. Section 35 therefore applies to both provinces and the federal government. It is also established that one part of the Constitution cannot abrogate another: *Adler v. Ontario*, 1996 CanLII 148 (SCC), [1996] 3 S.C.R. 609. By virtue of s. 35, then, laws of the province of British Columbia that conflict with protected aboriginal rights do not apply so as to limit those rights, unless the limitation is justifiable according to the test in *Sparrow*, *supra*. I find it difficult to think that the Province cannot, when administering a provincial regulatory scheme, attempt to respect its constitutional obligation by empowering an administrative tribunal to hear a defence of aboriginal rights.
>
> 25 *Sparrow* stands for the proposition that government regulation, including provincial regulation, may, by legislation, infringe an aboriginal right if that infringement is justified. Though this is not the basis of the Commission's jurisdiction, where legislation justifiably infringing rights is possible, surely adjudication by the Commission, which simply takes existing rights into account, must be permissible.[57]

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[53] See *Cardinal*, *supra* note 49.
[54] *Paul v. BC*, *supra* note 52 at pp. 597-598.
[55] *Kruger*, *supra* note 41 at pp.111-112.
[56] *Kitkatla*, *supra* note 51 at paras. 71 and 74.
[57] *Paul v. BC*, *supra* note 52 at paras. 24-25.

28. More recently, the Court once again considered interjurisdictional immunity and section 91(24) in *NIL/TU, O Child and Family Services Society v. B.C. Government and Services Employees Union*.[58] The issue in that case was whether labour relations between a First Nation child welfare agency and its employees fell within federal or provincial jurisdiction. The majority decided this case without considering interjurisdictional immunity. The minority affirmed that a narrow view of the core of section 91(24) is preferable.[59] The minority relied upon *Four B Manufacturing* for the proposition that ordinary commercial activities, like shoe manufacturing, on a reserve would not fall within the core.[60] It is submitted that these comments can be extrapolated to the proposition that interjurisdictional immunity should not be extended to prevent provincial regulation of ordinary commercial or industrial activities, like forestry operations, on section 91(24) lands.[61]

29. The Appellants place great emphasis on this Court's recent decision in *Morris*.[62] At para. 267 of their Factum, the Appellants state that this Court held in *Morris* that provincial laws cannot infringe Treaty rights by their own force because Treaty rights lay at the core of section 91(24) and this same reasoning applies to Aboriginal title. It is submitted that the Court's decision in *Morris* turned on issues related to the scope of the particular Treaty right at issue and considerations of section 88 of the *Indian Act*. The Court should be cautious about extrapolating any principles from *Morris* to the context of Aboriginal title. To begin, the majority decision was based on the view that the provincial law in issue constituted an unjustified infringement of the Treaty right, and, accordingly, the majority's discussion of the division of powers was strictly speaking *obiter dictum*. The majority went on to hold that section 88 accords statutory protection to Treaty rights and prevents the application of any provincial law which infringes Treaty rights even if that law could be justified under the *Sparrow*/*Badger* test.[63] It is submitted that there is nothing in statutory protection according to Treaty rights by section 88 which suggests that provincial laws which infringe Aboriginal rights or Aboriginal title do not apply by their own force. While it is true that some of the comments made the minority in *Morris* suggest

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[58] 2010 SCC 45 [*NIL/TU, O]*.
[59] *Ibid*. at para. 21.
[60] *NIL/TU, O*, *supra* note 58 at paras. 57-58.
[61] See also, *R. v. Marshall*, [1999] 3 S.C.R. 533 at para.24.
[62] *Morris, supra* note 40.
[63] *Ibid*. at para. 45.

that any provincial law which infringes a Treaty right is constitutionally inapplicable by virtue of interjurisdictional immunity, it must be pointed out that the minority was applying a "touching upon" test to invoke interjurisdictional immunity. This Court subsequently rejected that test in *Canadian Western Bank* and adopted the more onerous impairment test.[64]

D. Provincial Ownership

30. It is important to keep in mind that the lands and resources at issue in this appeal belong to the Province of British Columbia. The Provinces' rights should not be considered inchoate and meaningless until Aboriginal title has been ceded. Any Aboriginal title that the Appellants possess over those lands and resources is a merely an interest in those lands. It is not equivalent to fee simple ownership.[65] Similarly, any federal jurisdiction with respect to the lands flows out of section 91(24) and is merely jurisdiction with respect to the Appellant's Aboriginal title interest in the lands. It is not plenary jurisdiction over those lands.

31. The difficult issue posed by this case requires the Court to balance the Province's ownership under section 109 of the *Constitution Act, 1867* and its legislative jurisdiction over the lands and resources under section 92(5) and 92A with the First Nation's interest in those lands and resources under sections 91(24). These are unique provisions of our Constitution because ownership of the resource and legislative jurisdiction over the resource are split. It is submitted that in these circumstances the Court should apply the double aspect rule and should find constitutional space for the operation of both federal and provincial laws, subject only to the paramountcy rules.

32. There is an analogy to be drawn to fisheries. Under our constitutional framework, provinces often own the fisheries within their boundaries as an aspect of their ownership of lake and river beds. However, Canada has legislative jurisdiction over "Inland Fisheries" pursuant to section 91(12) of the *Constitution Act, 1867*. The Privy Council recognized in the *Québec Fishing Rights* case that federal power could not be exercised so as to deprive the provinces of their proprietary rights. In Saskatchewan, the Province exercised its jurisdiction over fisheries it owns after Canada agreed to vacate the field by repealing some of its regulations and this

[64] *Canadian Western Bank*, *supra* note 26 at paras. 48-49.
[65] *Delgamuukw*, *supra* note 16 at paras. 110-111.

legislation has been upheld as constitutional.[66] In the case of Aboriginal title lands, Canada has never occupied the field. It is, therefore submitted that interjurisdictional immunity and section 91(24) cannot be used to deprive provinces of their proprietary rights.[67]

33. In *St. Catherine's Milling*, the Privy Council confirmed that after the surrender of Aboriginal title, full ownership of the land and resources devolves on the Provinces and the Provinces are free to deal with the resources as they see fit, subject, of course, to respecting Treaty obligations such as the right to hunt, fish and trap.[68] The issue raised by this appeal relates to a question left unanswered by *St. Catherine's Milling* – which government has the authority to deal with the lands and resources prior to the surrender of Aboriginal title?

34. The Attorney General agrees that Canada could grant forestry dispositions to third parties prior to Aboriginal title claims being resolved, if the underlying title to the land was federal. However, where the underlying title to the land is provincial, as is the case here, it is the Attorney General's position that Canada has no constitutional authority to deal with those lands prior to the surrender of Aboriginal title. The Attorney General takes this position for two reasons. First, according to the common law and the *Proclamation*, before the lands can be disposed of to third parties, they must be surrendered to the Crown. Of course, once Aboriginal title is surrendered, and the lands are unburdened of their Aboriginal interest, they fall fully within provincial jurisdiction. Second, any attempt by Canada to dispose of the lands and resources would trench on provincial ownership rights and legislative jurisdiction. This view accords with the decision of the Privy Council in *Seybold* which that Canada could not unilaterally create Indian reserves on surrendered Aboriginal title lands when the underlying title to those lands belonged to the Province.[69]

35. Our Constitution is not intended to create legislative vacuums. Either Canada or the Province must have the constitutional authority to deal with the lands and resources subject to Aboriginal title claims before those claims have been resolved. It is the Attorney General's submission that it is the provinces that have this constitutional authority. Prior to 1982,

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[66] *R. v. Custer*, 1998 CarswellSask 564 (Q.B.).
[67] *Attorney General for Canada v. Attorney General for Québec*, 1920 CarswellQue 382 (Q.P.C.)
[68] *Mikisew Cree, supra* note 38 and *Keewatin v. Ontario (Natural Resources)*, 2013 ONCA 158 at para. 211.
[69] *Ontario Mining Company Limited v. Seybold*, [1903] A.C. 73.

provincial laws which disposed of forestry resources and which managed forestry activities on Aboriginal title lands were constitutionally applicable under the division of powers subject to the common law rights of the First Nation. The division powers did not change in 1982. However, since 1982, the common law Aboriginal title rights possessed by First Nations have been elevated to constitutional status. The Province's constitutional authority to dispose of and manage the resources on lands must now also be assessed in light of the duty to consult and section 35 of the *Constitution Act, 1982*.

E. Section 88

36. If the Court concludes, contrary to the Attorney General's earlier submissions, that British Columbia's forestry legislation does not apply to Aboriginal title lands because of the doctrine of interjurisdictional immunity, it is the Attorney General's position that those laws nevertheless apply as federal laws through the operation of section 88 of the *Indian Act*.

37. Section 88 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 Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal 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.[70]

38. The proper approach to interpretation of statutes dealing with Indians, such as the *Indian Act*, was discussed by this Court in *Mitchell v. Peguis Indian Band* where Laforest J.A., for the majority, said the following:

> …the approach must be to read the Act concerned with a view to elucidating what it was that Parliament wished to effect in enacting the particular section in question. This approach is not a jettisoning of the liberal interpretative method. As already stated, it is clear that in the interpretation of any statutory enactment dealing with Indians, and particularly the *Indian Act*, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them…
>
> At the same time, I do not accept that this salutary rule that statutory ambiguities must be resolved in favour of the Indians implies automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any other

[70] *Indian Act*, *supra* note 8 at s. 88.

> competing interpretation. It is also necessary to reconcile any given interpretation with the policies the Act seeks to promote.[71]

39. Section 88 was first included in the *Indian Act* in 1951, as section 87. It was part of a major revision and modernization of the *Indian Act*. The amendments came about after three years of hearings by a special joint committee of the Senate and the House of Commons. The legislative history behind the 1951 amendments indicates that a goal of the amendments was to integrate Indians into mainstream society and that it was contemplated that in the future Indians on their reserves and elsewhere would be engaging in "modern activities" that were not contemplated by the *Act*. A concern existed that, in absence of federal law, these activities would be unregulated. There would be a legislative gap or vacuum. Section 88 was intended to ensure that such legal gaps did not exist by incorporating provincial laws. Section 88 was crafted so as to exclude any clash between provincial laws and federal policies by ensuring that provincial laws would not be incorporated if they dealt with any matter already covered by the *Indian Act* or its subsidiary legislation, like Band Bylaws, or if they conflicted with either Treaties or other federal laws.[72]

40. The leading cases on the meaning of section 88 are *Kruger*, *Dick*, *Cote*, *Delgamuukw* and *Morris*. In *Dick*, the Court made it clear that one of the purposes of section 88 was to overcome interjurisdictional immunity.[73] In *Morris*, the Court made it clear that section 88 can be relied upon to incorporate provincial laws that impair matters at the core of section 91(24).[74] The provincial law in issue in that case was not incorporated because of the statutory protection accorded to Treaty rights by the opening words of section 88. No similar statutory protection exists with respect to Aboriginal rights or Aboriginal title.

41. The Appellants argue that section 88 cannot be relied upon to incorporate British Columbia's forestry legislation into federal law because those laws are "land laws" and they say that section 88 only provides for the incorporation of the provincial laws affecting people, not

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[71] [1990] 2 S.C.R. 85 at p. 143; *Osoyoos*, *supra* note 24 at para 49; see also *McDiarmid Lumber Ltd. v. God's Lake First Nation*, [2006] 2 S.C.R. 846 at paras. 38-41.
[72] J. Leslie & R. Maguire, The Historical Development of the Indian Act, 2nd ed. (Indian and Northern Affairs Canada, Treaties and Historical Research Centre, 1978) at p.144; Kerry Wilkins, "Still Crazy After All These Years: Section 88 of the Indian Act at Fifty" (2000), 38 Alta. Law Rev. at para. 66.
[73] *R. v Dick*, [1985] 2 R.C.S. 309 at pp. 326-328.
[74] *Morris*, supra, at para. 43.

provincial laws affecting land. It is submitted that this interpretation of section 88 should be rejected for four reasons. First is it simply untenable in light of section 88's clear purpose. Section 88 was intended to insure that legislative gaps do not exist. The Appellant's interpretation defeats this purpose. Second, section 88 specifically speaks of "all" provincial laws of general application potentially being incorporated into federal law. If only some provincial laws were contemplated for potential incorporation, then the opening words of the section would not have referred to all provincial laws. Third, it is submitted that is it unlikely that Parliament would have intended there to be a distinction drawn between provincial laws affecting people and provincial laws affecting land when there is no clear way to distinguish between the two categories of laws. The case law clearly demonstrates that considerable confusion surrounds this issue.[75] The Court should favour an interpretation of the law which removes confusion, rather than one that creates confusion. Fourth, this interpretation of section 88 will not result in an "unwarranted" extension of provincial laws on Indian lands because the provincial laws will only apply where there is a legislative gap. Canada can always legislate to set up its own regime to deal with the matter in order to eliminate the gap. The Court should not adopt an interpretation of section 88 which creates legal vacuums.

F. Section 35

42. The Attorney General emphasizes that the inquiry called for under section 35 is separate and distinct from the division of powers analysis. As outlined in the previous section, it is the Attorney General's position that provincial laws which infringe upon Aboriginal rights, including Aboriginal title, are constitutionally applicable under the division of powers. If a provincial law infringes Aboriginal rights, including Aboriginal title, it must be justified under the *Sparrow* test. If the law cannot be justified, it is constitutionally inapplicable by virtue of section 35. In *Delgamuukw*, this Court has already indicated that provinces can infringe Aboriginal title and can rely upon a wide range of potential justifications.[76] The Attorney General makes no submissions with respect to whether any particular provision of British

[75] See, for example, *Sechelt Indian Band*, *supra* note 20 and *Park Mobile Homes Sales Ltd. v. Le Greely*, 1978 CarswellBc 601 (C.A.).
[76] *Supra* note 16 at para. 166.

Columbia's *Forestry Act* or its *Forest Practices Code* infringes Tsilhqot'in Aboriginal title or can be justified.

G. Conclusion

43. The Appellants submission at para. 280 of their Factum that the challenges created by their view of Aboriginal title and interjurisdictional immunity are entirely manageable are, with respect, off the mark. The Attorney General certainly agrees that negotiated agreements and modern day Treaties provide the path to reconciliation called for by section 35. However, a decision by this Court which creates a legal vacuum over Aboriginal title lands until such times as those agreements are in place and which deprives the provinces of their ownership rights and jurisdiction over those lands is not warranted by the Constitution and does not advance the cause of reconciliation. As recently indicated by the Ontario Court of Appeal in *Keewatin,* fulfilling the duty to consult and direct dialogue between the provinces and First Nations is the key to achieving the goal of reconciliation. The Appellants' position denies the Province's role and thereby denies the goal.[77]

PART IV – COSTS

44. The Attorney General does not seek costs and submits that he should not be liable for the costs of any of the parties or the other interveners.

PART V – NATURE OF ORDER SOUGHT

45. The Attorney General requests permission to present oral argument at the hearing of the appeal.

46. The Attorney General submits that the Constitutional Questions should be answered as follows:

a. The *Forest Act* and the *Forest Practices Code* of British Columbia and their predecessor legislation are constitutionally applicable to Tsilhqot'in Aboriginal title lands under the division of powers;

[77] *Keewatin, supra* note 68 at paras. 153-154.

a. The *Forest Act* and the *Forest Practices Code* of British Columbia and their predecessor legislation are constitutionally applicable to Tsilhqot'in Aboriginal title lands under the division of powers;

b. In the alternative, the *Forest Act* and the *Forest Practices Code* and their predecessor legislation are applicable to Tsilhqot'in Aboriginal title lands as federal laws pursuant to section 88 of the *Indian Act*.

c. The *Forest Act* and the *Forest Practices Code* and their predecessor legislation are constitutionally applicable to Tsilhqot'in Aboriginal title lands under section 35 as long as those laws do not unjustifiably infringe Tsilhqot'in Aboriginal title.

d. The Attorney General takes no position with respect to whether any particular provision of the *Forest Act* or the *Forest Practices Code* and their predecessor legislation infringe Tsilhqot'in Aboriginal title or are justified.

All of which is respectfully submitted, dated at Regina, Saskatchewan this 29th day August, 2013.

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Dwight Newman, "Changing Division of Powers Doctrine and the Emergent Principle of Subsidiary" (2011) 74 Sask. L. Rev. 21.	16
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Kerry Wilkins, "Still Crazy After All These Years: Section 88 of the Indian Act at Fifty" (2000), 38 Alta. Law Rev. 458-503.	39

Part VII – STATUTORY PROVISIONS AND REGULATIONS

STATUTES

Indian Act, R.S.C. 1985, c. I-5.	5, 11, 12, 23, 29, 36, 37, 38, 39, 40, 41

of the *First Nations Fiscal Management Act*, the following property is exempt from taxation:

(*a*) the interest of an Indian or a band in reserve lands or surrendered lands; and

(*b*) the personal property of an Indian or a band situated on a reserve.

Idem

(2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(*a*) or (*b*) or is otherwise subject to taxation in respect of any such property.

Idem

(3) No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs (1)(*a*) or (*b*) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*, chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the *Estate Tax Act*, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian.

R.S., 1985, c. I-5, s. 87; 2005, c. 9, s. 150; 2012, c. 19, s. 677.

ière des premières nations, les biens suivants sont exemptés de taxation :

a) le droit d'un Indien ou d'une bande sur une réserve ou des terres cédées;

b) les biens meubles d'un Indien ou d'une bande situés sur une réserve.

Idem

(2) Nul Indien ou bande n'est assujetti à une taxation concernant la propriété, l'occupation, la possession ou l'usage d'un bien mentionné aux alinéas (1)*a*) ou *b*) ni autrement soumis à une taxation quant à l'un de ces biens.

Idem

(3) Aucun impôt sur les successions, taxe d'héritage ou droit de succession n'est exigible à la mort d'un Indien en ce qui concerne un bien de cette nature ou la succession visant un tel bien, si ce dernier est transmis à un Indien, et il ne sera tenu compte d'aucun bien de cette nature en déterminant le droit payable, en vertu de la *Loi fédérale sur les droits successoraux*, chapitre 89 des Statuts revisés du Canada de 1952, ou l'impôt payable, en vertu de la *Loi de l'impôt sur les biens transmis par décès*, chapitre E-9 des Statuts revisés du Canada de 1970, sur d'autres biens transmis à un Indien ou à l'égard de ces autres biens.

L.R. (1985), ch. I-5, art. 87; 2005, ch. 9, art. 150; 2012, ch. 19, art. 677.

LEGAL RIGHTS

General provincial laws applicable to Indians

88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal 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.

R.S., 1985, c. I-5, s. 88; 2005, c. 9, s. 151; 2012, c. 19, s. 678.

DROITS LÉGAUX

Lois provinciales d'ordre général applicables aux Indiens

88. Sous réserve des dispositions de quelque traité et de quelque autre loi fédérale, toutes les lois d'application générale et en vigueur dans une province sont applicables aux Indiens qui s'y trouvent et à leur égard, sauf dans la mesure où ces lois sont incompatibles avec la présente loi ou la *Loi sur la gestion financière des premières nations* ou quelque arrêté, ordonnance, règle, règlement ou texte législatif d'une bande pris sous leur régime, et sauf dans la mesure où ces lois provinciales contiennent des dispositions sur toute question prévue par la présente loi ou la *Loi sur la gestion financière des premières nations* ou sous leur régime.

L.R. (1985), ch. I-5, art. 88; 2005, ch. 9, art. 151; 2012, ch. 19, art. 678.

Restriction on mortgage, seizure, etc., of property on reserve

(1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

Inaliénabilité des biens situés sur une réserve

(1) Sous réserve des autres dispositions de la présente loi, les biens d'un Indien ou d'une bande situés sur une réserve ne peuvent pas faire l'objet d'un privilège, d'un nantissement, d'une hypothèque, d'une opposition, d'une réquisition, d'une saisie ou d'une exécu-