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## The Authority of s. 91(24)

The precise nature of the legal authority conferred on the federal Parliament by s. 91(24) of the *Constitution Act, 1867* is, much like the *Indian Act*, neither simple nor direct. On a plain reading of the provision itself it seems clear: Par- liament has the exclusive jurisdiction to make laws in relation to “Indians, and lands reserved for Indians.” But even in venturing this far, we have complica- tions that need to be accounted for. First, there is the fact that the provision contains two heads of power, namely “Indians” and “lands reserved for Indians.” Second, there is the question of the purpose or nature of this section. Its posi- tion within the *Constitution Act, 1867* is unique, as it is a power to make laws in relation to a specific category of people who, unlike “aliens” in s. 91(25),17 are racially defined and have proprietary claims to land that pre-exist those of the state.18 This adds a higher than normal degree of concern regarding the limits

1. Laskin J. made this point (minus the racial determination) very directly in his dissent in *Cardinal v. Alberta (AG)*, [1974] SCR 695 at 728: “It was contended by the respondent Attorney-General of Alberta that federal power in relation to ‘Indians’ was akin to its power in relation to aliens (s. 91(25)) and that Indians like aliens were subject to provincial laws of general application. I do not pursue the analogy because it breaks down completely

when regard is had to the fact that we are dealing here not only with Indians but with ‘lands reserved for the Indians.’”

1. I use the term “proprietary claim” here to indicate how the settler legal system interprets the claims of Aboriginal peoples. This claim has been characterized in different ways within the common law over time (e.g., as a “mere burden” on title that exists at the pleasure of the

sovereign to a sui generis right that is derived from prior occupation), but it is always tied to the question of land. It is not simply a dispute over land. It is a dispute over sovereignty and the right of self-government. My position is that the confusing system of rights and title that has been developed is predicated on the unquestioned sovereignty of the Crown (within this system judges, much like blind men confronting an elephant, discover what they believe to be separate and distinct rights from something that is, when seen from another perspective,

actually coherent only as parts of a whole). This has led to an asymmetry that the legal system cannot (or rather will not) investigate. It can and does qualify sovereignty by adding terms such as *de facto* or *assertion* or substitutions like *suzerainty*, but as long as the Crown retains the unilateral right to infringe Aboriginal right and title, the asymmetry remains firmly in place (an asymmetry whose sheer and unquestionable degree brings to mind Job’s position in relation to God in the Old Testament). This unilateral right of infringement is not unlimited. Rather, the exercise of the Crown’s (unquestioned) sovereignty and legislative power is subject to judicial scrutiny via a justification requirement that is analogous to the Court’s s.

1 analysis in *R v. Oakes,* [1986] 1 SCR 103. The Court itself points to the analogy between its

s. 1 *Oakes* analysis and the justification requirement for s. 35 in *Sparrow* at 1102). While I do not suggest that this requirement is without value, the constitutional assumptions that inform the s. 1 *Oakes* analysis (i.e., a sovereign–subjects relationship judicially mediated by a written charter of rights) are different in kind from those that have informed the interpretation of

s. 91(24) (i.e., a sovereign–wards relationship with a limited form of judicial mediation via a shifting set principles borrowed from the law of trusts, human rights, contracts, property, etc. and then cobbled together into sui generis and sometimes contradictory forms) and the

of the legislative authority that it confers. As Peter Hogg states, “The federal Parliament has taken the broad view that it may legislate for Indians on matters which otherwise lie outside its legislative competence, and on which it could not legislate for non-Indians.”19

What is the basis of this “broad view” and what limits does it have?20 If we read s. 91(24) in line with British imperial policy prior to Confederation, it seems that the primary purpose would be to protect the Indians from the inter- ests of local settlers and other European powers via the establishment of trea- ties. This point is reinforced by the fact that Aboriginal peoples did not consent to or participate in the enactment of the *Constitution Act, 1867*. This means that the imperial Parliament would have no legitimate basis for changing the spe- cial horizontal relationship between Aboriginal peoples and the Crown. And so, by conferring this power on the federal Parliament, the imperial Crown could ensure that there was a clear successor to its responsibilities under both the treaties and the *Royal Proclamation of 1763*.21 This relationship between the Crown and the Aboriginal peoples is best described by the terms *suzerainty* or

Indigenous perspectives that have consistently argued for self-determination and mutual recognition as nations (i.e., a multi- or pluri-national federal relationship). By opting to build the s. 35 analysis by analogy with s. 1 of the *Charter*, characterizing the claims of Aboriginal peoples as sui generis right of occupancy, confining the Aboriginal perspective to the rules

of evidence, and establishing a complicated and costly system of adjudicating these disputes, the Court simply articulates a new doctrine of constructive conquest under the banner of reconciliation and thereby reduces the law to “the most vital and effective instrument of empire.” See Williams Jr, *American Indian in Western Legal Thought* at 6.

1. Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007) at 618.
2. As John Borrows notes, the basis cannot simply be the wording of the provision itself, as “the technical wording of powers granted by section 91 is *‘in relation to*’ matters not assigned exclusively to provincial legislatures. In particular, the exclusive federal legislative authority in section 91(24) only *‘extends to*’ Indians and lands reserved for Indians. There should be a vast difference between legislation *extending to* or *in relation* to a subject matter and exercising legislative power over a particular group of people.” See Borrows,“Unextinguished,” at 11.
3. This is Lord Watson’s position in *St Catherine’s Milling and Lumber Company v. R* (1888), 14 App. Cas. 46 at 59. The decision – which serves as the conceptual model for the relationship between the Crown and Aboriginal peoples in Canada until *Calder* – holds that Aboriginal title is “a personal and usufructuary right, dependent upon the good will of the Sovereign” (ibid. at 54). As Lord Watson states,“The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the union, land vested in the Crown” (ibid. at 58). Crown sovereignty is taken as a given. The conceptual picture of the relationship between the Crown and Aboriginal peoples is puzzling. The only source of Aboriginal title is the power of the Crown (as expressed by the proclamation), and so the “burden” is inherited (via the doctrine of continuity, which holds that pre-existing rights and legal arrangements survive the Crown’s acquisition of sovereignty), but its continued existence is self-imposed, and the Crown retains the unilateral power to extinguish this “burden.” The problem here is where this asymmetry derives from. Is it to be found in the terms of the treaties? What about unceded territory? And if it has no

*treaty federalism*.22 This form of relationship is categorically distinct from that of sovereignty in that both parties maintain their internal autonomy (as graphi- cally illustrated by the separation between the rows in the *Two Row Wampum Treaty Belt* in 1613).23 This interpretation places specific limits on“the exclusive power of legislation and administration” that was vested in Parliament with

s. 91(24), which affect both its legislative capacity and the place of Aboriginal peoples within the federal structure.24

1 The conflict between this interpretation of Canadian constitutional his- tory and the *Indian Act* is obvious. The *Indian Act* unilaterally governs every aspect of the lives of those it determines to be Indians and leaves no possible space for Aboriginal self-government.25 Simply put, the conflict between the two possible interpretations of s. 91(24) is a conflict between two categorically distinct constitutional relationships. The “broad view” version of s. 91(24) that serves as the constitutional grounding for the *Indian Act* is predicated on the (unquestioned) assumption that the Crown

basis in these texts and historical records, what are we left with? Can the Crown acquire title to lands by unilateral proclamation?

1. For the term *suzerainty*, refer to Slattery,“Making Sense” at 198, 201, 209–10. It appears in the case law in Lamer J.’s (as he was then) decision in *R v. Sioui*, [1990] 1 SCR 1025, and again

in Binnie J.’s concurring decision in *Mitchell* at 142, where he cites Slattery’s article while attempting to square the Crown’s circular reasoning on the issue of sovereignty by providing an account of “merged sovereignty” (for more, see my engagement with this case in the Introduction to this book). For more on the concept of treaty federalism, refer to Barsh and Henderson, *Road* and, more recently, Asch, *On Being Here to Stay*.

1. The history of the Two-Row Wampum Treaty or Tawagonshi Treaty of 1613 between the Haudenosaunee and the Dutch has been subject to long-standing debates. For a recent and helpful analysis of the documentary record of the Haudenosaunee oral tradition regarding the two-row wampum belt (*kaswentha*), see Jon Parmenter,“The Meaning of *Kaswentha* and the Two Row Wampum Belt in Haudenosaunee (Iroquois) History: Can Indigenous Oral Tradition Be Reconciled with the Documentary Record?” *Journal of Early American History* 3 (2013): 82–109.
2. *St Catherine’s Milling* at 59.
3. The conceptual disjunction between the *Royal Proclamation of 1763* and the *Indian Act, 1873* is even more evident when one takes into consideration the *Quebec Act of 1774*. The proclamation recognized and protected Indian Nations, but did not do so for the *Canadiens*.

They protested, and their resistance led to the passing of the *Quebec Act*, which provided them similar protections (e.g., restoring the use of the civil law, guaranteeing the free practice of Catholicism, etc.). How is it that they were treated as legally similar in 1763 and 1774 (even though Quebec was technically conquered) yet different in kind in 1867 (when the *Quebec Act* was used to protect the rights of provinces against the central government)? In 1867 Quebec is granted a clear position in the division of powers, whereas Aboriginal peoples are placed under the exceptional jurisdiction of s. 91(24) and then in 1873 the administrative despotism of the *Indian Act*. There is a sea change that needs to be accounted for here. I would like to thank James Tully for drawing my attention to this important contrast.

has sovereignty, legislative power, and underlying title. This necessarily places Aboriginal peoples *under* the sovereign legislative power of Parlia- ment (i.e., it presumes a *power-over* or sovereign-to-subject relationship).26 The version of s. 91(24) that is consistent with the pre-existing relationship of suzerainty or treaty federalism necessarily *shares power* between the par- ties as nations (viz. Crown sovereignty is *not bundled* with either legislative power or underlying title, as those components are subject to mutually negotiated constitutional agreements). And so, if s. 91(24) is to be read in the light of the relationship between the imperial Crown and Aboriginal peoples prior to Confederation, then the vast majority of the *Indian Act* is simply and utterly *ultra vires* (the exception being those protections that are consistent with the *Proclamation*).27

1. The precise form of this power-over relationship has gradually changed. The introduction of s. 35 has subjected the *Indian Act* (and the explicitly colonial sovereign-to-wards administrative despotism it set in motion) to judicially mediated standards of justification.

This has served as a kind of benchmark in the last 150 years of the constitutional relationship between the Crown and Aboriginal peoples, as the remaining vestiges of wardship have been reframed into the *Charter*-like sovereign–subjects relationship (albeit of a sui generis variety). Again, I stress that this move – despite the beneficial changes it has offered – is predicated on the *same* unquestioned presumption of Crown sovereignty (which bundles it with legislative power and underlying title) that gave rise to the *Indian Act* and its despotic sovereign-to- wards system of governance.

1. A further consequence is that the current *Sparrow* framework of s. 35 collapses as its interpretation of federal “power” under s. 91(24) requires the Crown to be in possession of sovereignty, legislative power, and underlying title. Once this presumption is questioned, this bundle of qualities unravels and with it the Courts rationale for applying a s. 1 analysis to s. 35, which, we must remember, is constitutional provision that is not within the *Charter*. While the Court cannot question the sovereignty of the Crown, it has a constitutional responsibility to determine the sources of the legal consequences that flow from sovereignty.

Legislative power and underlying title are not necessarily bound to sovereignty. If they are removed from the bundle, then the character or type of the constitutional relationship that is possible between the Crown and Aboriginal peoples changes from the *power-over*

sovereign–subjects relationship to a *power-with* multinational federal relationship. This may seem to be a bridge too far for the Court, but it provides them with an opportunity to step away from the unhappy double bind that the *Sparrow* framework has placed them in (i.e., by starting from the presumption of Crown sovereignty, legislative power, and underlying title, the Court is confined to making determinations within a constitutional framework that presumes a sovereign–subjects relationship whose very existence cannot be explained without recourse to the legal fictions of discovery and *terra nullius*) and occupy the more familiar judicial position that they so clearly articulated in the *Secession Reference* (i.e., “clarify the legal framework within which political decisions are to be taken ‘under the Constitution,’ not to usurp the prerogatives of the political forces that operate within that

framework”; see *Reference re Secession of Quebec* at para. 153). It seems to me that if the Court carries on fashioning the planks and timbers of reconciliation in accordance with a colonial constitutional framework, it has undertaken a task whose only outcome can be paradox. Is

a ship whose “historic elements of wood, iron and canvas” (to borrow Binnie J.’s words from

2 The second limitation that this reading of s. 91(24) necessarily implies relates to the division of powers. The horizontal nation-to-nation relation- ship between Aboriginal peoples and the Crown gives the federal govern- ment exclusive (but not plenary) jurisdiction to pass laws dealing with “Indians and lands reserved for Indians.”28 Its purpose, as Bruce Ryder rightly states, is to guarantee “political spaces to the founding cultural groups in which they could define their own policies and preserve their institutions.”29 This adds a unique emphasis to the references to “exclu- sivity” throughout ss. 91 and 92 of the *Constitution Act, 1867* and places hard limits on the theory of federalism that is applicable. This means that when the courts are faced with a division-of-powers question relating to s. 91(24), the only appropriate model of federalism is the so-called classical paradigm.30 Its use of watertight jurisdictional compartments is consis- tent with the purpose of s. 91(24), which is necessarily different from any other head of power.31 The classical paradigm provides the courts with the necessary interpretive tools to limit the scope and application of provin- cial laws, thereby preserving space for Aboriginal self-government. These tools include a more robust version of the doctrine of interjurisdictional

*Mitchell* at para. 130) have been meticulously removed and replaced at sea the same ship when it returns to port? Put differently, attempting to use the *Sparrow* framework to move beyond Canada’s colonial constitutional history has led us to try to build our way out of a problem using the same plans; the reconciliation that this framework can offer is little more than a colonial Ship of Theseus.

1. Borrows,“Durability of Terra Nullius” at 734–8.
2. Bruce Ryder,“The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations,” *McGill Law Journal* 36 (1991): 362. This seminal article provides a clear and consistent “autonomist” approach to interpreting both s. 91(24) and s. 88 of the *Indian Act*. It bases this in the elements of

Canadian constitutional history that I have outlined here (i.e., the special constitutional status of Aboriginal peoples as recognized in the treaty-making process and the *Royal Proclamation of 1763*, the exclusive jurisdiction that s. 91(24) grants to the federal government, and the fact that Aboriginal peoples did not consent to or participate in the enactment of the *Constitution Act, 1867*). My own approach to s. 91(24) and s. 88 takes its lead from Ryder’s “autonomist approach.” My contribution is to expose the necessary assumptions that ground the argument for applying the “modern approach” to this area (i.e., it depends on unquestioned and unexplained Crown sovereignty, legislative power, and underlying title).

1. For a summary of the “classical paradigm,” see note 39.
2. This is directly against the longstanding (and unexplained) position that the Supreme Court has taken in regards to s. 91(24), which Abella J articulates in *NIL/TU,O Child and Family Services Society v. BC Government and Service Employees’ Union*, [2010] 2 SCR 696 at para. 20: “There is no reason why, as a matter of principle, the jurisdiction of an entity’s labour relations should be approached differently when s. 91(24) is at issue. The fundamental nature of the inquiry is – and should be – the same as for any other head of power.”

immunity32 that supports an “enclave” theory of jurisdiction over Indian lands; a broader “covering the field” approach to paramountcy; and the prohibition on federal inter-delegation. This is the only approach to the division of powers that respects the purpose of the imperial Parliament’s division of legislative authority of the *Constitution Act, 1867* into two lists of “exclusive” spheres and its pre-existing responsibilities under the trea- ties and the *Royal Proclamation of 1763*. In contrast, the modern principle with its overlapping spheres of concurrent jurisdiction and more flexible double aspect and paramountcy doctrines is utterly inconsistent with the purpose of s. 91(24).33 In order for it to it to gain the appearance of coher- ence within the four corners of the constitution, it endeavours to treat s. 91(24) as in no way different from any other head of power.34 While this may appear attractive for the purposes of administrative efficiency for both levels of government to enjoy concurrent jurisdiction it raises the question of where this jurisdiction is derived from and where the space for Aborigi- nal self-government went.

The only possible explanation for how s. 91(24) could be understood to con- fer the authority necessary to the support the *Indian Act* without the expressed consent of Aboriginal peoples is absolute sovereignty (i.e., a form of sover- eignty that would be immune to both *q.o.t.* and the basic principles of natural justice35), which itself can be based only in the legal fictions of *terra nullius* and discovery.36 And yet, in *Tsilhqot’in Nation* the Court has informed us that

1. I agree with Robin Elliot’s argument that the term *interjurisdictional immunity* is an unhappy one, as it encourages the misconception that the purpose of the doctrine is to protect

the interests of particular entities rather than jurisdictional exclusivity. We should follow his suggestion and rename it the “doctrine of jurisdictional exclusivity.” See Robin Elliot, “Interjurisdictional Immunity after Canadian Western Bank and Lafarge Canada Inc.: The Supreme Court Muddies the Doctrinal Waters – Again,” (2008) 43 SCLR (2d) at 495.

1. Borrows, *Durability of Terra Nullius* at 734–8.
2. Hogg presents a version this argument in *Constitutional Law* at 624. See note 62 in this chapter as well.
3. I am referring, of course, to *audi alteram partem* and *nemo judex in causa sua*.
4. An example of this reasoning can be seen in *Kruger et al. v. R*, [1978] 1 SCR 104 at 107, when Dickson J. (as he was then) cites Robertson J. from the BCCA decision: “The Proclamation of 1763 was entirely unilateral and was not, and cannot be described as, a treaty. Assuming (without expressing any opinion) that the Proclamation has the force of a statute, it cannot be said to be an act of the Parliament of Canada: there was no Parliament of Canada before

1867 and by no stretch of the imagination can a proclamation made by the Sovereign in 1763 be said to be an act of a legislative body which was not created until more than a hundred years later.” A number of necessary assumptions undergird this interpretation. First, in

order to maintain the logic that the unilateral nature of the *Proclamation of 1763* reflects unilateral Crown sovereignty, it is necessary to ignore the treaties and imperial policy towards

“the doctrine of terra nullius (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the Royal Proclamation of 1763.”37 This claim raises the question of the legal basis for Parliament’s “broad view” of its own legislative powers under s. 91(24) and the Court’s ability to interpret it as a double-aspect matter.38 So we must ask, what

Aboriginal peoples prior to Confederation. Second, Aboriginal peoples would have had to consent to this unilateral sovereignty or be subjected to it via conquest without conditions. Third, this unilateral sovereignty is then passed on to the colonial Parliament with the *British North America Act, 1867*, and from that point forward it has the seemingly unlimited capacity to despotically govern Aboriginal peoples (the only qualification on their power being clear and plain legislative intent, and the division of powers). If these assumptions are accepted, then it explains why Dickson J. asserts that “claims to aboriginal title are woven with history, legend, politics and moral obligations” (ibid. at 109). It is curious that this position requires the interchangeability of history and legend; how else can the Crown move from a set of horizontal nation-to-nation treaties to the kind of unilateral sovereignty that it would need to give the colonial Parliament absolute sovereignty over them in s. 91(24)? It is as if the court had taken a page from *The Surprising Adventures of Baron Munchausen*, as the Crown is seemingly able to lift itself out of the swamp of its contested historical and legal obligations by pulling its own hair. No wonder that Dickson CJC will later state in *Sparrow*, at 1103,“There was from the outset never any doubt that sovereignty and legislative power, and indeed

the underlying title, to such lands vested in the Crown.” The sovereignty of the Crown is a fact by virtue of having never been doubted. Its only authority is the fiction that the Crown could obtain sovereignty over Aboriginal peoples simply by virtue of legislating it. This requires the unstated premise that lies at the root of both Crown sovereignty and the process of reconciliation: *terra nullius*. Dickson CJC effectively admits this by citing CJ Marshall’s *Johnson v. M’Intosh* (1823), 8 Wheaton 543 (USSC) as authority for his undoubtable concept of Crown sovereignty.

1. *Tsilhqot’in Nation v. British Columbia*, [2014] 2 SCR 257, 2014 SCC 44 at para. 69; Hamilton, “After Tsilhqot’In Nation.” For an investigation into this claim, see Borrows,“Durability of Terra Nullius”; and Gordon Christie,“Who Makes Decisions over Aboriginal Lands?” *UBC Law Review* 48, no. 3 (2015): 743–92.
2. The Court has recognized the varying scope of different heads of powers. In *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, [2005] 2 SCR 669 at para. 11, the Court states, “Some heads that set forth narrow powers leave little room for interpretation. Other, broader, heads result in legislation that can have several aspects.” But, the “broad view” that Parliament has taken to s. 91(24) has an even more tenuous claim to authority, following the passage of

s. 35(1) of the *Constitution Act, 1982*. In *Sparrow* at 1109 the Court held,“Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.” This attempt to reconcile the juridico- historical gulf between s. 35(1) and s. 91(24) was the first sense of reconciliation within the jurisprudence. It is a task that has still barely begun. Contrary to the Court in *Sparrow*, the best way to achieve reconciliation is not through a justificatory test for infringement (a test that – unlike the *Oakes* test that it is based on – has no basis within the *Constitution Act, 1982*, as neither s. 1 nor s. 33 applies to s. 35), but rather, it is through asking how legislation

determines the limit of Parliament’s authority over “Indians, and lands reserved for Indians”?

This question brings us to our aim in this section.We will investigate the legal nature of the authority granted in s. 91(24) by following how the courts have read this provision. Since *St Catherine’s Milling*, this body of jurisprudence has been developed in and through the question of how s. 91(24) affects provincial legis- lative power.39 In *Tsilhqot’in Nation* the Supreme Court has made a significant

*extending to* or *in relation* to Indians and lands reserved for Indians became the kind of *power over* a particular group of people that could support the despotism of the *Indian Act*.

1. The fact that the case law on s. 91(24) develops out of a conflict over jurisdiction between two branches of the Crown and not between the Crown and Aboriginal peoples is a symptom of the implicit premise that provides the Crown with unquestionable sovereignty (*terra nullius*). A set of cases following passage of the *Canadian Bill of Rights*, SC 1960, c. 44, attempted to use its guarantee of “equality before the law” and its prohibition on “discrimination by race” against the *Indian Act*. The first such case is *R v. Drybones*, [1970] SCR 282. In this case the Court held that the use of the racial classification “Indian” in s. 95 of the Act (a provision that made it illegal to be intoxicated on a reserve) violated the equality guarantee in the *Canadian Bill of Rights*. The majority does not touch on the problem that this finding could pose to

the entire *Indian Act* and s. 91(24). Pigeon J notes this issue in his dissent and provides an argument for retention of the *Indian Act* (despite its obvious conflict with the *Canadian Bill of Rights*), based on s. 91(24) and the division of powers at 303: “In the instant case, the question whether all existing legislation should be considered as in accordance with the non-discrimination principle cannot fail to come immediately to mind seeing that it arises directly out of head 24 of s. 91 of the *BNA Act* whereby Parliament has exclusive legislative authority over ‘Indians, and Lands reserved for the Indians.’” As was pointed out by Riddell

J. in *Rex v. Martin*, this provision confers legislative authority over the Indians qua Indians and not otherwise. Its very object insofar as it relates to Indians, as opposed to lands reserved for the Indians, is to enable the Parliament of Canada to make legislation applicable only to Indians as such, and therefore not applicable to Canadian citizens generally. This legislative authority is obviously intended to be exercised over matters that are, as regards persons other than Indians, within the exclusive legislative authority of the provinces. Complete uniformity in provincial legislation is clearly not to be expected, not to mention the fact that further diversity must also result from special legislation for the territories. Equality before the law, in the sense in which it was understood in the Courts below, would require the Indians to

be subject in every province to the same rules of law as all others in every particular, not merely on the question of drunkenness. Outside the territories, provincial jurisdiction over education and health facilities would make it very difficult for federal authorities to provide such facilities to Indians without “discrimination” as understood in the Courts below. This argument provides the constitutional insulation necessary to immunize the *Indian Act* against further challenges stemming from the *Canadian Bill of Rights* in *AG of Canada v. Lavell*, and *AG of Canada et al. v. Canard*, [1976] 1 SCR 170. In short, it repeats the “broad view” of s.

91(24) that we find in the division of powers cases, and it uses this to override the *Canadian Bill of Rights.* This leads to Sandra Lovelace taking her case to the United Nations Human Rights Committee in 1977; in 1981, the committee reached its decision that, inter alia, found Canada to be in breach of Article 27 of the *International Covenant on Civil and Political Rights* (*Lovelace v. Canada*, Communication no. R.6/24, UN Doc. Supp. No. 40 (A/36/40)).

change to this jurisprudence by holding that there is no longer any role for “the doctrine of interjurisdictional immunity and the idea that Aboriginal rights are at the core of the federal power *over* “Indians” under s. 91(24) of the *Constitu- tion Act, 1867*.”40 The Court has thus followed Dickson CJ’s (as he was then) view that “the history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers. It is true that doctrines like interjurisdictional and Crown immunity and concepts like ‘watertight compartments’ qualify the extent of that interplay. But it must be recognized that these doctrines and concepts have not been the dominant tide of constitutional doctrines; rather they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues.”41

1. *Tsilhqot’in Nation* at para. 140 (emphasis added).
2. *OPSEU v. Ontario (AG)*, [1987] 2 SCR 2 at para. 17. The contrast that the Court is outlining here is between two competing juridical responses to constitutional interpretation in the division of powers in s. 91 to s. 95 of the *Constitution Act, 1867*. Ryder provides us with an instructive overview of the main point of distinction between the two: “The classical and modern paradigms represent different judicial approaches to defining ‘exclusivity’ of federal and provincial powers, and thus of preserving provincial autonomy.” Ryder,“Demise and Rise” at 312. The classical paradigm adopts a “strong” interpretation of exclusivity. It refuses the possibility of overlap between federal and provincial heads of power. It works to retain “watertight compartments” of jurisdiction by taking a strong position on paramountcy (i.e., when there is federal legislation in place it “covers the field” and prevents the effect of provincial law), interjurisdictional immunity (which, as we have seen, address the issue of valid laws passed by one body that affect the jurisdiction of another), and a prohibition on inter-delegation (the delegation of federal power to the provinces, or vice versa, which was ruled against in *Nova Scotia (AG) v. Canada (AG)*, [1951] SCR 31). In contrast, the modern paradigm allows for interplay and overlap. Once again, Ryder provides the overview: “The

modern paradigm, on the other hand, is premised on a weaker understanding of exclusivity. Instead of seeking to prohibit as much overlap as possible between provincial and federal powers, the modem approach to exclusivity simply prohibits each level of government

from enacting laws whose dominant characteristic (“pith and substance”) is the regulation of a subject matter within the other level of government’s jurisdiction. Exclusivity, on this approach, means the exclusive ability to pass laws that deal predominantly with a subject

matter within the enacting government’s catalogue of powers. If a law is in pith and substance within the enacting legislature’s jurisdiction, it will be upheld notwithstanding that it might have spillover effects on the other level of government’s jurisdiction.” Ryder,“Demise and Rise” at 312. Ryder has clearly explained the function of the “pith and substance” approach, and this leaves us to briefly address the aspect or double aspect doctrine and the restrained approach to paramountcy. The aspect doctrine is an interpretive tool that is used when both levels of government have equally valid constitutional rights to legislate on an issue (i.e., each has the capacity to legislate, depending on the aspect from which the subject is approached). This approach rejects the idea of the “watertight compartments” and moves towards the overlap and interplay that characterizes the modern or flexible approach to federalism.

The classic example of this doctrine at work is *Multiple Access Ltd. v. McCutcheon*, [1982] 2 SCR 161 at 181–3. Finally, the modern approach to paramountcy is to move to requiring an

My position is that in the case of s. 91(24) the “dominant tide” (i.e., the mod- ern paradigm of federalism) and the “undertow” (i.e., the classical paradigm of federalism) necessarily entail two categorically distinct models of the relation- ship between the Crown and Aboriginal peoples. By following the “strong pull” of the modern approach to federalism, the Court has altered the meaning of the “exclusive authority” of s. 91(24) and thereby overlooked the distinct constitu- tional status and history of Aboriginal peoples.42 But because the explicit word- ing in *Tsilhqot’in Nation* relates to only one head of s. 91(24) (“Indians”), this sea change in this jurisprudence is not complete.43 The question of the applica- tion of interjurisdictional immunity to “lands reserved for Indians” (aside from Aboriginal rights and title subject to s. 3544) remains open. This small opening offers us the opportunity to urge the Court to reconsider what the “strong pull” of co-operative federalism necessarily implies in the context of s. 91(24).45 We will do this by tracing its course through the jurisprudence on the relationship between s. 91(24) and valid provincial laws of general application.

“express conflict” between the federal and provincial legislation before finding the latter to be *ultra vires* or reading it down (for more on the how the courts have applied the express conflict standard, see note 55).

1. Borrows,“Durability of Terra Nullius” at 734–8.
2. Kerry Wilkins has reminded me it is by no means clear that this is the case, as the Court in *Delgamuukw* at paras. 174–6 holds that Aboriginal title lands are “Lands reserved for Indians” (unsurprisingly the authority they cite for this is the judgment of the Privy Council in *St Catherine’s Milling*). But, on the off chance that indeed the specific wording in *Tsilhqot’in Nation* at para. 140 applies only to the first head of s. 91(24), then it could still hold open the possibility of most of Ryder’s autonomist approach (depending, of course, on what approach it takes to questions of paramountcy regarding “Indians”). As Ryder states,“While autonomy for First Nations people would be furthered by interpreting federal jurisdiction over ‘Indian lands’ as creating ‘constitutional reserves’ immune from provincial legislation, it is not a plausible alternative to similarly interpret federal jurisdiction over the first branch of s. 91(24) (‘Indians’) as creating an ‘enclave’ around all First Nations people that would shield them from the application of provincial laws off reserves.… At the same time, subjecting First Nations people to the full operation of provincial laws off reserves in the same manner as other Canadian citizens ignores their distinct constitutional status.” See Ryder,“Demise and Rise”

at 368. This is by no means certain as the wording at paras. 150–1 state that the doctrine will not be applied in cases where lands are held under Aboriginal title, which seems to suggest that “lands” in s. 91(24) is being restricted to reserve and treaty lands. If this is the case the possibility of the autonomist approach has been narrowed to the point of insignificance.

1. *Tsilhqot’in Nation* at paras 150–1.
2. Robin Elliot points out that when courts attribute wide purviews of overlapping legislative authority it does not necessarily lead to co-operation (after all, it is obvious that overlapping powers do not *necessarily* lead to co-operation; they can just as easily lead to legislative duplication and/or competition) and that clearly defined and distinct compartments

of legislative authority are more likely to promote co-operation. See Robin Elliot, “Interjurisdictional Immunity after Canadian Western Bank and Lafarge Canada Inc.: The Supreme Court Muddies the Doctrinal Waters – Again,” (2008) 43 SCLR (2d) at 433–98.

* 1. St Catherine’s Milling*, s. 91(24), and the Division of Powers*

It is telling that *St Catherine’s Milling* – a case where there is no Aboriginal party to plead its case before the Privy Council – forms the first chapter in both the judicial interpretation of s. 91(24) and Aboriginal title. The case establishes two connected points:

1. Lord Watson interprets the *Royal Proclamation, 1763* as showing that “the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign.”46 He adds that “the Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden.”47
2. Section 91(24) confers upon the Parliament of Canada power to make laws for “Indians, and lands reserved for the Indians.” The wording of the provision is “sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation.”48 But this legislative power does not carry with it a proprietary right over the subject matter. This means that Parliament has “the power of legislating for Indians, and for lands which are reserved to their use,” and the provinces retain the underlying title to the land.49

With this interpretation the *Proclamation* is effectively reversed: it moves from the Crown formally recognizing and protecting Indian nations to a docu- ment that grants absolute sovereignty over them.50 This is done without even

1. *St Catherine’s Milling* at 54.
2. Ibid. at 58.
3. Ibid. at 59.
4. Ibid*.* The provincial claim to underlying title did not apply to the Prairie provinces until Parliament passed the three *Natural Resource Transfer Acts*, 1930*.* Prior to that, Parliament had exercised jurisdiction over Crown lands and natural resources in the region that it purchased from the Hudson’s Bay Company in 1870. These three Acts turned that jurisdiction over to the provinces of Manitoba, Saskatchewan, and Alberta.
5. While on its face the proclamation could accommodate either interpretive approach, it is difficult to fit the *St Catherine’s Milling* interpretation to the actual history of the legal and political relationships that existed between the British imperial Crown and Aboriginal nations. In order for it to be consistent we have to either square this *power-over* interpretation of the proclamation with the treaties that the Crown made with Aboriginal nations (i.e., shoring up the claim to legitimacy by constructing Aboriginal consent, which requires interpretive acrobatics that quickly veer into absurdity) or by relying on the legal fictions of discovery and *terra nullius* to attribute magical properties to the British imperial Crown (i.e., an ability to excuse itself from the legal and moral obligations that structure its own political architecture and social imaginary). Lord Watson’s reading retains whatever plausibility it can (in my view, it is a thin veneer at best) by strictly avoiding any engagement with the history

a passing reference to the actual pre-Confederation relationship between the imperial Crown and Aboriginal Peoples. It is as if Lord Watson reads the *Procla- mation* through the lens of the wording of s. 91(24), when he could have just as easily used the *Proclamation* to restrict the seemingly limitless grant of author- ity that the words of the provision itself seem to grant.51 He could have done so by using the history of the relationship to explicitly define what the lim- its of legislation *extending to* or *in relation* to “Indians, and lands reserved for Indians” are. Instead we are told that Indian title is a “mere burden” under the exclusive jurisdiction of Parliament; this will remain authoritative until *Calder* in 1973.52 From this basis the only question concerning s. 91(24) left to resolve was how this exceptionally broad or even unlimited provision fits within the division of powers.53

This question has led to a number of cases that have formed a general rule, which holds that provincial laws apply to both“Indians” and“lands reserved for Indians.”54 Sanders summarized this trend in the case law by stating, “‘Indians’

and context of the proclamation. I engage with the history of the proclamation in greater detail in part 3.

1. As Kerry Wilkins rightly points out,“Section 129 of the *Constitution Act, 1867* continues pre- Confederation laws, including the Proclamation, in force until they are superseded by valid legislation enacted by the order of government having legislative authority over their subject matter. Because it was Parliament that acquired exclusive legislative authority over ‘Indians, and Lands reserved for the Indians,’ the relevant parts of the Proclamation continue as federal law, with priority over conflicting provincial law; only Parliament now has authority to amend or to repeal them.” Kerry Wilkins,“‘Still Crazy after All These Years’: Section 88 of the Indian Act,” *Alberta Law Review* 38, no. 2 (2000): 478; cf. Brian Slattery,“Understanding Aboriginal Rights,” *Canadian Bar Review* 66 (1987): 773, 777–8. Even if we were to concede that the proclamation was susceptible to supersession by subsequent imperial legislation

(a view that does conform to common law procedures and principles, but also jumps over the inter-national character of the proclamation, the effect of the treaties and thus requires a strong or absolute version of Crown sovereignty, which brings us back to the legitimation problem), the wording of s. 91(24) of the *British North America Act, 1867*, does not necessarily supersede it. It seems to me that even a minimal clear and plain intent standard would preserve the terms of the proclamation.

1. *Calder et al. v. AG of British Columbia*, [1973] SCR 313.
2. This not to say that Aboriginal peoples did not attempt to use the courts to challenge the nature of the Crown’s authority (e.g., the Six Nations Status Case detailed in part 3). In fact, in 1927 Parliament made use of its seemingly unlimited legislative authority to make it illegal for Indians to hire a lawyer by adding s. 141 to the *Indian Act*. This provision made it a summary offence to receive any payment or promise of payment from an Indian for the prosecution of a claim without the written consent of the superintendent general. See *Indian Act* SC 1927, c. 32, s. 6, consolidated as s. 141 of RSC 1927, c. 98.
3. Hogg, *Constitutional Law* at 623. Examples of cases that establish this rule include *R v. Hill* (1907) 15 OLR 406 (CA); *Four B Manufacturing v. United Garment Workers*, [1980] 1 SCR 1031; *R v. Francis* [1988] 1 SCR 1025; and *Paul v. British Columbia* [2003] 2 SCR 585.

fall into a ‘double aspect’ area in which provincial laws will always apply in the absence of special federal legislation. No case states this proposition bluntly.”55 The basis for treating s. 91(24) as a double aspect matter (despite its obvious uniqueness) has not been explored by the courts. Nonetheless, in the jurispru- dence that has developed there are a number of exceptions.Some of these excep- tions are relatively uncomplicated, as they concern cases where there is a clear violation of the division of powers (i.e., those that would be caught on a pith and substance analysis of the matter).56 For example, provincial laws that explicitly single out Indians or lands reserved for Indians are invalid, as that power is within s. 91.57 Likewise the doctrine of federal paramountcy holds that where there is an inconsistency between provincial and federal law, the federal law trumps it (the question being whether the Court takes the classical“covering the field” or modern “express conflict” standard).58 The most serious complications arise when an otherwise valid provincial law of general application affects the

1. Douglas Sanders,“The Application of Provincial Laws,” in *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, ed. B.W. Morse (Ottawa: Carleton University Press, 1984) at 452–3. Kerry Wilkins notes that while it is true that Indians are not immune from valid provincial legislation unless it has the effect of impairing “Indianness” (or conflicts with valid federal law), this exception counts for something. The potential shielding effect

of these exceptions is limited by the uncertain process of determining both the measure of “Indianness.” As Wilkins points out,“One cannot always tell at a glance whether a given provincial measure applies, as such, to Indians or whether its application to them depends on s. 88 because its effect is to regulate them ‘qua Indians.’ Such determinations are often

profoundly difficult.” See Wilkins,“‘Still Crazy,’” at 471. He further argues that the core of the “lands reserved” power is a more secure shield, as it is (or at least should be) broad enough to exclude most provincial land law. He deals with the (dizzying) intricacies involved in the

s. 91(24) lands question and s. 88 of the *Indian Act* in the aforementioned article from 483 to 497.

1. For a recent (but ultimately unsuccessful) example of this type of division of powers argument, see *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 SCR 146 at paras 51–78.
2. For cases that deal with what counts as “singling out,” see ibid.; *R v. Sutherland* [1980] 2 SCR 451; *Four B*; *Dick v. R*, [1985] 2 SCR 309; and *Leighton v. British Columbia* (1989) 57 DLR (4th) 657 (BCCA).
3. The language that the Court has used to determine if there is an “express conflict” that requires the neutralization of provincial legislation (paramountcy) is that there is either a “practical and functional incompatibility” between the two schemes (*Bell Canada v. Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749 at paras 866–7) or where the federal regulations “display a sufficient intent that [the federal government] wished to cover the field exclusively” (*Francis* at 10). Also, there is a similar limitation on provincial legislative powers in Manitoba, Saskatchewan, and Alberta as the *Natural Resource Transfer Agreements* (which have constitutional status by virtue of a constitutional amendment passed in 1930) contain a clause that provides for subsistence hunting and fishing rights for Indians. In *R v. Badger*, [1996] 1 SCR 771 the Court held that provincial infringement of those rights can be justified, in accordance with *Sparrow*.

essential aspects of federal responsibility and there is no competing federal law in existence. In this case the courts are faced with the difficulty of deciding what *exclusive* means in the case of s. 91(24) by treating it as a double aspect matter, limiting provincial jurisdiction via the doctrine of interjurisdictional immunity or referential incorporation via s. 88 of the *Indian Act*.59 This decision is par- ticularly significant, as it necessarily implies very different conceptions of both federalism and the constitutional status of Aboriginal peoples.

I believe that this penumbra of cases offers us the most detailed account of how the courts have attempted to interpret both the scope of s. 91(24) and how it fits into the broader constitutional framework. We will begin by reviewing how the courts have applied the doctrine of interjurisdictional immunity in relation to s. 91(24). Here our focus will be on Laskin J’s (as he was in *Cardinal*; he was the chief justice by the time of *Natural Parents*) articulation of the the- ory of federal “enclaves” in his dissenting judgment in *Cardinal*, his concurring decision in *Natural Parents*, and the Court’s rejection of it in favour of the more flexible concept of “Indianness” in *Four B* and *Francis*.60 From there we will review the shift in the Court’s interpretation of s. 88 of the *Indian Act* from the declaratory theory put forward in *Kruger* to the theory of referential incorpora- tion in *Dick v. R.*61 We will then consider how the definition of *Indians* and *bands* (from its nineteenth-century legislative foundations) fits within the picture of federalism that the Court has formulated in and through its interpretation of

s. 91(24). Finally, we will conclude the chapter by reconsidering the implica- tions of the Court’s rejection of the doctrine of interjurisdictional immunity in *Tsilhqot’in Nation* for both federalism and the future of reconciliation.62

[…]

## Tsilhqot’in Nation and the Meaning of s. 91(24)

We have travelled over a wide field of jurisprudence criss-crossing in every direction in search of some arrangement of perspectives or set of reminders that could begin to loosen the grip of the current picture of federalism that is holding the Supreme Court captive. The sections of this chapter offer a number of “sketches of landscapes” in which “the same or almost the same points were always being approached afresh from different directions.”311

Now that we have come to the end of these “long and involved journeyings,” how can we arrange them so as to get a more perspicuous picture of the land- scape? I believe that the best vantage point is to return to *Tsilhqot’in Nation* and

1. *Chief Mountain* at para. 51.
2. *Beckman* at para. 10.
3. *Daniels* at para. 25; *Daniels I* at para. 353; *Daniels II* at para. 36.
4. I defined what I mean by the term *Bluebeard logic* in note 78 of the introduction.
5. Borrows, “Sovereignty’s Alchemy.”
6. Wittgenstein, *Philosophical Investigations* at preface.

reconsider the *basis for* and *significance of* the removal of interjurisdictional immunity from issues characterized as involving treaty or Aboriginal rights.

In the opening paragraphs the chief justice offers a summary of the six conclusions she reaches in the case, but we will focus on one of them: “Once Aboriginal title is established, s. 35 of the *Constitution Act, 1982* permits incur- sions on it only with the consent of the Aboriginal group *or if they are justified by a compelling and substantial public purpose and are not inconsistent with the Crown’s fiduciary duty to the Aboriginal group; for purposes of determining the validity of provincial legislative incursions on lands held under Aboriginal title,*  this framework displaces the doctrine of interjurisdictional immunity*.*”312

The reasoning here connects the“framework” of s. 35 to the place of s. 91(24) in the division of powers. My question is simple and direct: what is the basis of this displacement? The chief justice’s response to this is split. Part of the response can be found in how the s. 35 framework is set out. The subsection on the justification of infringement is particularly relevant in this regard. The second, and more direct, part of the response is found in the closing subsection of the decision, which is on the division of powers. This subsection is part of the Court’s response to the question of whether or not the *Forest Act* (as provincial legislation) is ousted by the *Constitution*.313

The first subsection that responds to this question provides a short outline of the s. 35 test for infringement and maintains that“this framework permits a prin- cipled reconciliation of Aboriginal rights with the interests of all Canadians.”314 This is, to my mind, the justification for the displacement of the doctrine of interjurisdictional immunity. This justification can be rephrased as follows: the framework of s. 35 permits a “principled reconciliation” that makes the limited protections offered by the “exclusive” nature of federal jurisdiction over Indians and their lands unnecessary. This means that in order to explain the basis for this displacement – and the resulting alteration of the picture of federalism – we will need to turn our attention to this “principled reconciliation.”

This articulation of reconciliation poses some serious problems. First, the use of reconciliation here is *unilateral*. This is because *Aboriginal rights* do not speak for themselves. They are “recognized and affirmed” only *after* they have been subjected to the legal tests that have been designed (again unilaterally) to determine whether or not they can be said to “exist.” Only those rights that can pass through the alchemical processes of crystallization (simply another term for the magical effects of discovery) and the “integral/distinctive” test can be placed in the curatorial collection of Aboriginal rights that have constitutional

1. *Tsilhqot’in Nation* (emphasis added).
2. *Forest Act,* RSBC 1996, c. 157.
3. *Tsilhqot’in Nation* at para. 125.

protection. Once they have been subjected to this process, the Court can begin reconciling them as legally defined rights. This brings us to the second problem: on the other side of this process of justification, the Court places “the inter- ests of all Canadians.” This can only ever be an amalgam of what the provin- cial legislatures and federal Parliament say this interest is and how the Court interprets it. Furthermore, in *Sparrow* the Court held that “the Court of Appeal below held, at p. 331, that regulations could be valid if reasonably justified as ‘necessary for the proper management and conservation of the resource *or in the public interest*.’ We find the ‘public interest’ justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.”315

Why is the Supreme Court using a justification that it previously found effec- tively meaningless and unworkable? In this model of reconciliation, one party is restrained by a series of deeply restrictive standards (whose only possible justification is the presumption of Crown sovereignty, legislative power, and underlying title, which, in turn, can be grounded only on the legal fictions of discovery and *terra nullius*) that determine the possible significance of their perspective, while the other party enjoys the unquestioned presumption of both sovereignty and underlying title as well as the ability to cloak its perspec- tive in the “public interest.” How can this be a part of the framework that is supposed to make reconciliation possible?

Part of the response is, I would assume, found in *Gladstone.* In this case Lamer CJC attempts to deal with a right that extends beyond the limits of “moderate livelihood”316 and food, social, and ceremonial purposes (i.e., purposes that can be said to have the “internal limitation,” as they are not “unlimited” commer- cial rights). As he put it, “The only circumstance contemplated by *Sparrow* was where the aboriginal right was internally limited; the judgment simply does not consider how the priority standard should be applied in circumstances where the right has no such internal limitation.”317

From this he goes on to argue that “under *Sparrow*’s priority doctrine, where the aboriginal right to be given priority is one without internal limitation, courts should assess the government’s actions not to see whether the government has

1. *Sparrow* at 1113. Emphasis added.
2. A standard from the United States Supreme Court in *State of Washington v. Washington State Commercial, Passenger, Fishing Vessel Association*, 443 US 658 (1979) (known as the *Boldt* decision) introduced into the Canadian case law by Lambert J. in *R v. Van der Peet* (1993) 80 BC L. Rev. (2d) 75 at 126. The majority at the BCCA disagreed and found the standard irrelevant. At the Supreme Court Lamer CJ rejected this standard; see *R v. Van der Peet*, [1996] 2 SCR 507 at para. 279. It was later recognized in a treaty context in *R v. Marshall*, [1999] 3 SCR 456 at para. 59.
3. *Gladstone* at para. 60.

given exclusivity to that right (the least drastic means) but rather to determine whether the government has taken into account the existence and importance of such rights.”318

What kind of standard can the Court apply to determine whether or not one party to a conflict is “taking into account the existence and importance” of the other’s rights? Is this not simply bypassing the need for the other party to consent? After all, it seems that in a normal situation the determination of the “importance” of a given right is, and must be, mutually agreed upon (i.e., thus offering a secure basis for judicial determinations). If it is not, then it is not a form of reconciliation that relies on the mutual consent of the parties involved. This means that it can be only a unilateral reconciliation of *judicial concepts*. Lamer CJC clearly sets out the framework for dealing with “unlimited” rights:

Aboriginal rights are recognized and affirmed by s. 35(1) in order to reconcile the existence of distinctive aboriginal societies prior to the arrival of Europeans in North America with the assertion of Crown sovereignty over that territory; they are the means by which the critical and integral aspects of those societies are maintained. Because, however, distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, *equally* necessary part of that reconciliation.319

The key move here – which cloaks this version of reconciliation with the appearance of legitimacy – is the claim that “distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic commu- nity, over which the Crown is sovereign.” In what sense can Aboriginal peoples be said to be “a part of” the broader community? If this is simply a kind of factual statement – along the lines of his statement in *Delgamuukw* that “we are all here to stay”320 – then the claim concerning Crown sovereignty would not necessarily flow from it. But even if we attempt to interpret this as a descrip- tion of a factual situation, the prepositions do not make sense (i.e.“exist within,

1. Ibid. at para. 63.
2. Ibid. at para. 73.
3. *Delgamuukw* at para. 186.

and are a part of”). It is these unilaterally determined prepositions that make it appear as if the Crown’s claim to sovereignty, legislative power and underlying title is simply a matter of fact. It does so in much the same manner as Binnie J’s reinterpretation of the Two-Row Wampum in *Mitchell* or as McLachlin CJ’s use of the concept of translation in *Marshall; Bernard*.321 By this reasoning, the inherent rights of Aboriginal peoples – those rights that exist by virtue of the fact that when the colonists arrived they were “organized in societies and occu- pying the land as their forefathers had done for centuries”322 – are suddenly and entirely absorbed by the Crown. Here the entire 150-year project of coloniza- tion and assimilation is realized and legitimated by judicial fiat. Lamer CJC clearly recognizes this and hedges the position slightly: “The objectives which can be said to be compelling and substantial will be those directed at either the recognition of the prior occupation of North America by aboriginal peoples or – and at the level of justification it is this purpose which may well be most relevant – at the reconciliation of aboriginal prior occupation with the asser- tion of the sovereignty of the Crown.”323

The problem here, once again, is that the Court is *reconciling* the parties by and through a process that it determines in order to arrive at a resolution that it assigns. The only element of consent it can attempt to lay claim to is the fact that the Aboriginal claimant brought the dispute before the court. But submitting a claim before an adjudicative body cannot be transmuted – no matter what legal alchemy is employed – into a consent to the sovereignty of the state that grants that body jurisdiction. This reasoning would fundamentally confuse the concept of dispute with that of surrender. It is the Court – as the “guardian of the constitution”324 – that is unilaterally determining whether the infringement that the Crown is proposing either *recognizes* “the prior occupation of North America by aboriginal peoples” or *reconciles* that occupation with the assertion of Crown sovereignty.325 This necessarily implies that this process can take place entirely *within* the bounds of the constitution. Only those rights that the Court can *hear* and *translate* into the common law will receive protection, because only those rights can be *recognized and affirmed* as “existing.” But if this is the case, then the form of reconciliation that the Court is referring to can only be the *internal process* of reconciling the *federal power* with *federal duty*.326 This

1. *Mitchell* at para. 130; *Marshall; Bernard* at para. 48.
2. *Calder* at 328.
3. *Gladstone* at para. 60; cited in *Tsilhqot’in Nation* at para. 81.
4. *Hunter v. Southam Inc.,* [1984] 2 SCR 145 at paras 16, 44.
5. *Gladstone* at para. 60; cited in *Tsilhqot’in Nation* at para. 81.
6. This was how the Court first characterized reconciliation in *Sparrow* at 1109: “Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read

was, after all, how the Court first characterized reconciliation in *Sparrow*. It is based on the “broad view” of s. 91(24) and the unquestioned assumption of the Crown’s power *over* Aboriginal peoples. It is – despite the Court’s explicit claims to the contrary in *Tsilhqot’in Nation*327 *– necessarily* reliant on the doc- trine of discovery and *terra nullius*. This explains how the Court can maintain that “there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.”328 The only possible basis for the nexus between Crown sovereignty and underly- ing title is *legal fiction* – this is “what is left when Aboriginal title is subtracted from it.”329 And it is this that explains how the Court can unilaterally determine that provincial laws apply to land held under Aboriginal title.330

The removal of the doctrine of interjurisdictional immunity from disputes involving s. 35 rights fundamentally alters the picture of federalism in Canada. It does so without addressing the history of Aboriginal peoples or listening to their perspectives. It is a unilateral assertion that has the same degree of legitimacy as the introduction of s. 88 of the *Indian Act* when it was introduced (without meaningful consultation or consent) in 1951. The effect of this change is substan- tial and must not be understood as a *diminution* of the Crown’s powers under s. 91(24). It is certainly a reduction of the *limited protections* that “exclusive” federal jurisdiction under s. 91(24) offered to Aboriginal peoples. But it is also a funda- mental expansion of the“broad view” of s. 91(24). The Court has stated that it will treat Aboriginal title as a double aspect matter.331 Now that the limited shielding of Indians qua Indians has been removed, the ground has been cleared for the provinces to draft legislation of general application for Aboriginal title lands (the modern approach at least restricts the legislatures from singling out Indians in this legislation). A picture of federalism that has been in place – even if only in limited forms – for 250 years has been unilaterally altered.332

So how does the Court explain this change? The chief justice briefly sum- marizes the s. 35 framework: “As discussed, s. 35 of the *Constitution Act, 1982* imposes limits on how both the federal and provincial governments can deal with land under Aboriginal title. Neither level of government is permitted to legislate in a way that results in a meaningful diminution of an Aboriginal or

together with s. 35(1). In other words, federal power must be reconciled with federal duty.” After *Tsilhqot’in Nation* it seems that what is being reconciled is the double aspect of federal and provincial power in s. 91(24) with the Crown’s duty under s. 35.

1. *Tsilhqot’in Nation* at para. 69.
2. *Sparrow* at 1103.
3. *Tsilhqot’in Nation* at para. 70; Borrows,“Durability of Terra Nullius” at 742.
4. *Tsilhqot’in Nation* at para. 101.
5. Ibid. at para. 129.
6. Borrows,“Durability of Terra Nullius” at 735–7.

treaty right, unless such an infringement is justified in the broader public inter- est and is consistent with the Crown’s fiduciary duty owed to the Aboriginal group. The result is to protect Aboriginal and treaty rights while also allowing the reconciliation of Aboriginal interests with those of the broader society.”333

The logic here is, as we have already detailed, puzzling. What constitutes a “meaningful diminution” of an Aboriginal or treaty right? It seems that this is what the Court believes it is determining by applying this framework. It allows it to distinguish between what is a “meaningful diminution” and what is simply consistent with the standard of recognition that it feels to be appropriate. How can the Court hope to possibly make this determination have any significance whatsoever when it is using the “public interest” as a unit of measure in its justification analysis? What kind of reconciliation is this? It seems to be one in which a solitary accountant balances the books. The Aboriginal perspective is reduced to a curated collection of crystalline legal objects that can be weighed and measured. Wittgenstein aptly points out the kind of disguised nonsense at work here: “I want to say: We use judgments as principles of judgment.”334 But this constellation of unilateral judgments is passed off as a “framework.” This leads the Court to state, “What role then is left for the application of the doc- trine of interjurisdictional immunity and the idea that Aboriginal rights are at the core of the federal power over ‘Indians’ under s. 91(24) of the *Constitution Act, 1867*? The answer is none.… The doctrine of interjurisdictional immunity is directed to ensuring that the two levels of government are able to operate without interference in their core areas of exclusive jurisdiction. This goal is not implicated in cases such as this. Aboriginal rights are a limit on both federal and provincial jurisdiction.”335

It is difficult to fully appreciate the significance of this statement. It is a sea change in the jurisprudence. John Borrows clearly articulates the stakes of this change:

The court’s conclusion cuts against a two-hundred-fifty year constitutional principle first outlined in the *Royal Proclamation of 1763*, and accepted by many First Nations in central Canada in the 1764 Treaty of Niagara. These principles prevented local colonial governments from molesting or disturbing First Nations in their use and occupation of land. Governments who are the closest to First Nations have the greatest incentive to benefit from Indigenous lands. For example, British Columbia stands to gain the most from infringing Aboriginal title; any diminishment of Aboriginal title accrues to their benefit. Therefore, the law in

1. *Tsilhqot’in Nation* at para. 139.
2. Wittgenstein, *On Certainty* at §124.
3. *Tsilhqot’in Nation* at paras 140–1.

North America developed to ensure that local governments had substantial obstacles placed in their path in dealing with First Nations. The *Royal Proclamation* and 250 years of Canadian law, as affirmed in section 91(24) of the *Constitution Act, 1867*, interposed a more distant imperial or federal power between First Nations and colonial/state/local/provincial governments. The exclusion of the provinces from dealing with First Nations was one of the few checks and balances Indigenous peoples enjoyed under Canadian law throughout history. In fact, our country was partially formed on this basis.While the 13 former American Colonies rebelled against this principle in the American War of Independence, governments north of the border have largely upheld the Proclamation and Treaty of Niagara’s principles – that is until June 26, 2014 when the *Tsilhqot’in* decision was released. With the *Tsilhqot’in* decision the Supreme Court of Canada has overturned First Nations’ *Marta Carta*.336

By relying on the framework of s. 35 and ignoring the history of s. 91(24), the Court follows the unquestioned assumption of Crown sovereignty as articu- lated by Lord Watson in *St Catherine’s Milling* and repeated by Dickson CJ in *Sparrow*. It highlights the fact that the s. 35 framework and the “broad view”

s. 91(24) share a common foundation. Both rely on *terra nullius* and discov- ery to diminish Aboriginal peoples to such a degree that the Crown was able to acquire sovereignty, legislative power, and underlying title to their lands by assertion alone. As Borrows argues, “The assertion of radical title retroactively affirms the Crown’s appropriation of Indigenous legal interests without their knowledge or consent. In most other contexts this would be called stealing.”337 The Court concludes that“applying the doctrine of interjurisdictional immu- nity to exclude provincial regulation of forests on Aboriginal title lands would produce uneven, undesirable results and may lead to legislative vacuums.”338 This clearly shows the picture of federalism that the Court has adopted. It fore- closes on the very idea that Aboriginal peoples – who have always had their own legal and political systems – form a part of the federal structure of Canada.

Borrows drives this point home:

A legal vacuum would not be created if the Court recognized the pre-existing and continuing nature of Indigenous jurisdiction along with Aboriginal title. Indigenous law exists in Canada. The recognition of Aboriginal title is contingent on the recognition of Aboriginal social organization and its continuity down to the present day. Thus, as noted, the very existence of Tsilhqot’in title recognizes

1. Borrows,“Durability of Terra Nullius” at 735–7.
2. Ibid. at 724.
3. *Tsilhqot’in Nation* at para. 147; Borrows,“Durability of Terra Nullius” at 738–9.

that Aboriginal peoples effectively occupied land at the time sovereignty was asserted; it affirms that they have continuously retained such control, exclusive of other Aboriginal groups, down to the present day. The Court’s own reasoning presupposes a legal presence, rather than a vacuum, when it recognizes Aboriginal title.339

Simply put, the legal vacuum that it fears is its own creation. Overall by declar- ing that the s. 91(24) allows for provincial laws of general application, the Court has fully adopted the modern approach to federalism. This, as we have already seen, relies on the idea that s. 91(24) is *in no way different* from any other head of power in the *Constitution Act, 1867*. It is an approach that ignores the special constitutional status of Aboriginal peoples as recognized in the treaty-making process, the *Royal Proclamation of 1763*, and the fact that Aboriginal peoples did not consent to or participate in the enactment of the *Constitution Act, 1867*. It assumes that the exclusive jurisdiction that s. 91(24) grants to the federal government is unlimited power *over* Indians and their lands (what I have been referring to as the “broad view”) and unilaterally broadens this power in favour of the provincial Crown by interpreting it as a double aspect matter. This sub- jects Aboriginal peoples to a confused system of concurrent provincial and fed- eral jurisdiction and continues the implicit use of the doctrine of discovery in Canadian law.

This decision did not have to take this form. Aboriginal title is not unlimited in the same way that Lamer CJC was so concerned about in *Gladstone*. It is by definition geographically limited. The Court could have used this oppor- tunity to revive the “enclaves” theory of s. 91(24) and adopt the “autonomist” approach to the division of powers that Bruce Ryder mapped out in 1991.340 This approach would offer the benefit of protecting Aboriginal title lands from pro- vincial incursion. It would open the space required for the Tsilhqot’in Nation to govern their lands by their laws in a nation-to-nation relationship. This would clarify the purpose of and limits to s. 91(24) by reading it as a “treaty power” and finally ending the colonial “broad view” with its legacy of control, assimi- lation, and extinguishment.341 This would open up a space where Aboriginal peoples could negotiate with the Crown on more even constitutional ground (one that *does not* begin with the presumption of Crown power *over* Aborigi- nal peoples) – a space that could be used to move towards the equal federal relationship that the Royal Commission of 1664 recommended (viz. Aborigi- nal nations would be equal “partners in confederation”).342 This more diverse

1. Borrows,“Durability of Terra Nullius” at 738–9.
2. Ryder, “Demise and Rise.”
3. Chartrand,“Failure of the Daniels Case” at 185.
4. Cited in Tully,“Strange Multiplicity” at 137.

picture of federalism would have constituted a step towards actually honouring the obligations that the dominion inherited from the imperial Parliament.343 It would also offer a clear and reasonable solution to the problem of “unlimited rights” (which remains an ongoing jurisdictional bugbear for the provinces), as territorial boundaries would provide areas in which First Nations have the authority to effectively co-manage the land base.344 This would put the bugbear of “unlimited” rights (a curious fear, as it is precisely the nature of the right the Crown claims over Aboriginal peoples and their lands) to bed and with it this use of the “public interest” standard of justification in *Gladstone* and *Tsilhqot’in Nation*. This approach offers an opportunity to move towards a model of feder- alism that would meaningfully share power *with* Aboriginal peoples.

Instead, the Court has opted to continue (or, at a minimum, not question) the “extravagant and absurd idea” that the Crown acquired sovereignty, legisla- tive power, and underlying title by unilaterally proclaiming it.345 This can be seen, as Borrows maintains, in the Court’s reasoning on the test for determin- ing the existence of Aboriginal title, the test for infringement, the rejection of interjurisdictional immunity, and its remarks on legal vacuums.346 It is, to my mind, also the basis of its framework of reconciliation, which it has used to con- tinue to expand a picture of federalism that constitutively excludes Aboriginal

1. What I have in mind here is the obligations of the imperial Parliament under the historical treaties and the *Royal Proclamation, 1763.* What it cannot simply pass on is the unquestioned presumption that it was in possession of sovereignty, legislative power, and underlying title. Rather, the concept of sovereignty that the dominion inherited was one in

which legislative power and underlying title were subject to negotiated agreements between *all* members of the federation. This means that s. 91(24) should be limited to a power to make negotiated agreements with Indians concerning jurisdiction over their lands. By taking the “broad view” of s. 91(24) and acting as if the non-justiciable nature of the Crown’s claim to sovereignty extends to legislative power and underlying title, the judiciary abandons its constitutional responsibilities and compromises the integrity of the rule of law.

1. This is the main problem in both *Gladstone* and the more recent – and far reaching, as it is not limited to a single species – *Ahousaht* (see note 258) decision: the federal and provincial regulatory agencies refuse to co-manage the resource and claim that they cannot fit an “unlimited right” into their management model. They continue to argue that an “unlimited right” for Aboriginal fisheries is both unfair and unworkable (the logic that justifies the “public interest” justification for infringement). The solution is to grant Aboriginal fisheries priority within their territory and work with them to co-manage the resource within those areas. But the resistance to this approach is, I would imagine, that it would constitute Crown recognition of title and compromise its general approach of treating Aboriginal rights as extinguished until litigated.
2. John Marshall CJ stated that the doctrine of discovery was based on the “extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea.” *Worcester v. Georgia*, 6 Pet. 515 (US 1832) at 544–5.
3. Borrows,“Durability of Terra Nullius.”

peoples. In order to see the actual form of this framework, it must be considered from the Aboriginal perspective. Here the undefined and unchecked powers of

s. 91(24) continue the work of legislatively defining Indians so that the Court can legally evacuate their lands and transform the Crown’s *fictional* claims to underlying title to full and unburdened title. Bill C-31 continues to reduce the number of Indians as if status “were simply a statutory definition pertaining to eligibility for some program or benefit.”347 At the same time, the *Indian Act* defines and determines the governing powers of band councils (either directly or by judicially interpreted *resemblance*). The Courts work to close off any action that could depart from this “administrative despotism” by using its alchemy to determine the rights that the Court can *hear* and what it cannot under the guise of judicial discretion or factual inquiry. It has ushered Aboriginal peoples towards negotiation with the Crown that has resulted in little but crippling debt and modern treaties whose place within the federal order is *seemingly* much the same as the “simple municipal institutions” that were set in place over 150 years ago.348 The process of reconciling s. 91(24) with s. 35, which began in *Spar- row,* has now assumed a discernible systemic shape. The power to unilaterally infringe on Aboriginal title, rights, and treaties all stems from the unquestioned presumption of Crown sovereignty, legislative power, and underlying title. This presumption is the real basis of the “broad view” of s. 91(24). It is a power with- out positive definition or justifiable basis. The era of reconciliation has changed the procedures, but it has not even begun to address the issue of the *historical warrant* of the Crown’s mechanism of government. This means that in every case in which the Court uses s. 91(24) it is repeating the content of the doctrine of discovery and *terra nullius* (which, despite their differences, all maintain the ability of one party to determine the rights of the other without seeking their consent). While s. 35 does introduce a measure of judicial mediation into this picture, it is one that presumes that one party has the capacity to unilaterally infringe the rights of the other. It is subjecting Aboriginal peoples to a picture of federalism they never consented to. And it is doing it under the aegis of “reconciliation.” In the words of the chief justice in *Hiada Nation*: “This is not reconciliation. Nor is it honourable.”349 This is *indirect rule*.

1. *McIvor BCSC* at para 193. As noted earlier, the *Indian Act* amendments enacted in response to *McIvor* and *Descheneaux* do little to address or mitigate this problem.
2. It is true that Indigenous communities operating under governance arrangements set out in modern treaties have considerably more authority than band councils operating exclusively under the *Indian Act*. But the lack of clarity concerning their actual place within the division of powers leaves them confined to the same sui generis municipal level and dependent on the same “uncertain measures” of reconciliation under s. 35.
3. *Haida Nation* at para. 33.

Before we move on, we will pause here and review the ground we have cov- ered in this chapter. I began by investigating the way in which the courts have interpreted s. 91(24). This line took us from *St Catherine’s Milling* to a series of cases dealing with the doctrine of interjurisdictional immunity in relation to s. 91(24) and s. 88 of the *Indian Act*. It showed us that the current interpretation of

s. 91(24) has remained largely constant since 1888, and it unilaterally subjects Indians and their lands to an undetermined and unquestioned administrative despotism (viz. as objects of a head of power within this picture of federalism, such that the only possible form of self-government is via devolved municipal powers). It also showed that, despite this, there have been a number of dissents that held open the possibility of changing this interpretative framework and thereby altering the current model of federalism. From this, I moved on to a consideration of how the definitions of *Indians* and *bands* fit within the picture of federalism that the Court has formulated in and through its interpretation of s. 91(24). This involved two subsections. In the first, I reviewed the defini- tion of *Indians* from the nineteenth-century legislation through to the judicial interpretation of it in cases from the *Eskimo Reference* in 1939 to more recent cases of *Lovelace*, *McIvor*, *Descheneaux*, and *Daniels*. In the second subsection, I provided a similar review of the definition of *bands*, from the earliest legisla- tion through to the modern case law. This showed how the current set of self- government forms remain locked within the municipal confines put in place by the current interpretation of s. 91(24). I then closed the chapter by recon- sidering the implications of the Court’s rejection of the doctrine of interjuris- dictional immunity in *Tsilhqot’in Nation* for both federalism and the future of reconciliation. My purpose was to show that the Court’s s. 35 framework and the current interpretation of s. 91(24) share a common foundation. Both rely on *terra nullius,* discovery, and the civilization thesis to diminish Aboriginal peoples to such a degree that the Crown was able to acquire sovereignty and radical or underlying title to their lands by assertion alone. With this in mind we can now move forward to the final chapter.