

UNIFORM LAW CONFERENCE OF CANADA

CIVIL SECTION

**THE ROLE OF THE UNIFORM LAW CONFERENCE IN
RELATION TO ABORIGINAL LAWS**

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Synopsis

Harmonization of legislation among provinces has long been perceived as a worthwhile objective, the practical need for which has only increased with developments in technology and transportation and as society has become increasingly mobile. As Aboriginal peoples take up the exercise of law-making authority, whether pursuant to an inherent right of self-government, as a result of negotiated agreements, or through the exercise of delegated powers, harmonization of the laws of Aboriginal peoples, as well as the laws of provinces, also becomes a desirable objective.

Introduction

The Uniform Law Conference of Canada originated from a recommendation by the Canadian Bar Association that each provincial government provide for the appointment of commissioners to attend conferences organized for the purpose of promoting uniformity of legislation among the provinces. The first such conference was held in 1918.

In 1995 the Conference adopted a new name in French, la Conférence pour l'harmonisation des lois au Canada, to reflect more accurately the nature of the process of harmonization in a country with two legal systems.

Now, the Conference is being asked to address the issue of harmonization to embrace and accommodate the implementation of negotiated self-government arrangements with the Aboriginal peoples of Canada and the recognition of Aboriginal laws enacted on the basis of the authority of an inherent right of self-government that is implicitly protected by section 35 of the *Constitution Act, 1982*. As well, there may be an increasing need to be concerned with the issue of harmonization even in relation to the exercise of law-making authority that results from delegated powers.

The need for uniformity and harmonization arises directly from the constitutional division of powers in Canada. The jurisdiction possessed by provinces supports the enactment of laws in many areas where uniformity and harmonization are particularly desirable, especially with an increasingly mobile

population and vastly improved telecommunication and transportation technologies. This need will be manifest both within provinces and between them.

Uniformity or Harmonization?

It is interesting to note that the Conference's English name uses the term *Uniformity* while the French name speaks of *Harmonization*. The term *uniformity* appears to imply sameness while the term *harmonization* suggests compatibility.

In the context of Aboriginal laws, if the premise of Aboriginal jurisdiction is the ability to make laws that reflect and relate to the needs and concerns of Aboriginal peoples, and, in particular, to the preservation of their culture and Aboriginal identity, then *Uniformity* is less apt to describe the need for integration¹ of systems of laws than is the term *Harmonization*. In other words, Aboriginal jurisdiction is not just a question of who gets to make the laws; it includes an assumption that if

¹The word *Integration* is used here with some trepidation. It has been described as a code word for *Assimilation* (See, for example, Kerry Wilkins, *Still Crazy After All These Years: Section 88 of the Indian Act at 50* (2000), 38 Alta. L. Rev. (No. 2) 458-503, at paragraph 9. The author identifies one of the primary motivating factors for the federal government in enacting this provision, which says, subject to some limitations, that provincial laws of general application apply to Indians, was its conviction that the provinces had a role to play in achieving the recognized long-term goal of assimilation -- or, in a later idiom, *integration* -- of the Indian peoples into mainstream society. Section 88, at a minimum, was consistent with that conviction. [citations omitted].) This is not the sense in which the word is used here. The intention is to refer to the manner in which two or even three regimes of law (federal, provincial and Aboriginal) can function in practical terms in relation to the same geography or people.

Aboriginal peoples make their own laws, the laws will both derive from and reinforce Aboriginal culture and identity. It would make no sense, then, for Aboriginal peoples to simply pass the laws that have been passed up until now by non-Aboriginal governments.

In this respect, the relationship between Aboriginal laws and federal and provincial laws is more like the relationship between two language versions of a law. As between French and English versions of a law, the literalness of the translation from one language to the other is less important than the result.

The objective is to achieve the same result from either language version of the law and there is a recognition that that result may flow from formulations of words that are not exactly the same. This focus on outcome provides equal respect to both languages by privileging neither specific version.

The situation with Aboriginal laws is similar, but not exactly the same. The need is to produce positive generic results that are generally speaking the same outcomes sought by non-Aboriginal legislation. For example, in relation to matters of education the objective of all governments is to graduate more students from high school and post-secondary education programs. The means by which this objective is achieved, and therefore the laws designed to achieve it, will, however, be different. This difference does not necessarily result from the use of a different language, but it emanates from the foundation of a different culture.

For all of these reasons, henceforth this paper will use the term *harmonization* to describe the process by which Aboriginal and non-Aboriginal laws can be made to work side by side in practical terms, while paying appropriate respect to the jurisdiction of all legislating bodies.

Jurisdiction and the Desire for Harmonization

The potential scope of Aboriginal jurisdiction overlaps the jurisdiction provided to both the federal government and to the provinces. This results from the presence of section 91(24), which provides to the federal government the ability to make laws in relation to *Indians* and their lands. Regardless of the arguments that may be made about precisely where the boundaries of jurisdiction lie, it is clear that there are some matters in respect of which Aboriginal jurisdiction could be exercised that would

result in laws similar to provincial laws and others that would result in laws similar to federal laws. Thus, for the same reasons as apply between provinces, uniformity or harmonization of Aboriginal laws with federal and provincial laws may also be desirable.

And because the potential scope of Aboriginal jurisdiction relates to the magnitude of the harmonization issue that arises in this context, it is necessary to explore in a preliminary way both the potential range of Aboriginal law-making authority and the extent to which the enactment of Aboriginal laws is likely in the foreseeable future. The purpose of such a review is to endeavour to establish the breadth and depth of the concern that uniformity and harmonization present in this context. That is to say, the extent to which harmonization is an issue is related to the extent to which Aboriginal laws can be made. The greater the range of Aboriginal laws that can be enacted, the greater will be the harmonization issue.

Potential Range of Aboriginal Laws

Aboriginal laws can result from three sources: the exercise of law-making authority as a manifestation of an inherent right of self-government, the exercise of law-making authority under agreements negotiated with Canada and the provinces, and through the ability provided under the authority of other governments to make laws or rules.

An Inherent Right of Self-Government

As of yet, there is no definitive or comprehensive pronouncement from the Supreme Court of Canada that can be said to sum up the nature and extent of Aboriginal jurisdiction. However, some general assumptions can be made. To begin with, it can be assumed that an inherent right of self-government may be protected by section 35 of the *Constitution Act, 1982*, which may support the exercise of Aboriginal law-making powers.² This is not to suggest an unlimited Aboriginal self-government

²See, for example, *R. v. Pamajewon*, [1996] 2 S.C.R. 821, where the Supreme Court considered the possibility that a claim to jurisdiction to regulate high-stakes gambling might be included in an inherent right to self-government. Lamer, C.J., writing for the majority began his analysis by stating, Assuming without deciding that s.35(1) includes self-government claims@ Even though the point is explicitly stated as an assumption and not a decision, it seems odd that the court

power. Indeed, the Supreme Court has held that self-government claims must be considered according to the same test as is applied to other Aboriginal rights claims.³ This test, the *Van der Peet* test, was articulated by the court in the following manner:

would proceed from an assumption that it thought had no likelihood of being true.

³*Ibid.*

... in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group asserting the right.⁴

As a result, it would appear that the potential scope of an Aboriginal right of self-government must be connected to those practices, customs or traditions that are integral to culture.⁵ However, the issue is only just beginning to be addressed by the courts, and it is premature to attempt to predict exactly how the scope of Aboriginal jurisdiction may expand. This will depend partly on the particular issues that are litigated and the order in which they come forward, and partly on the success of self-government negotiations.

⁴*R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 45.

⁵It must be acknowledged that the scope of possible self-government claims will be effectively determined, in a practical sense, by the manner in which the claims are characterized. Peter Hogg, in his work *Constitutional Law of Canada*, points this out in his criticism of the Supreme Court's decision in *Pamajewon*. As already noted, this case involved an issue about regulation of high-stakes gambling on reserve lands. Hogg (at page 27-21) notes that if the claim had been characterized broadly as one related to the ability to manage reserve lands, it would surely have met the *Van der Peet* test. However, the court chose to characterize the claim as one to regulate gambling and then found that the regulation of gambling was not an activity integral to the Aboriginal culture.

The issue of potential scope of Aboriginal jurisdiction has been most exhaustively addressed by the Royal Commission on Aboriginal Peoples. In the Commission's view, the inherent right of self-government is recognized and affirmed by s. 35 and generally comprises all matters relating to the good government and welfare of Aboriginal peoples and their territories.⁶ The Commission divides this sphere of jurisdiction into two parts, which it labels the "core" and the "periphery." The core of inherent Aboriginal jurisdiction includes those matters that are vital to the welfare of a people, culture and identity and that do not have a major impact on adjacent jurisdictions or otherwise are a matter of overriding federal or provincial concern. The periphery, of course, is everything else. Everything else is roughly equivalent to the scope of federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*, which provides the authority to enact laws in relation to "Indians, and Lands reserved to the Indians." Aboriginal peoples can act unilaterally to enact laws in the core of their jurisdiction, but must negotiate self-government agreements to enact laws in the periphery.

The Commission's basic conception of an inherent Aboriginal right of self-government is not so very different from the basic description of self-government that arises out of the application of the *Van der Peet* test. This is not to suggest that the courts are likely to find an inherent right of self-government to exist in the abstract. Rather, it is to suggest that if the scope of an inherent right were to be played out through litigation relating to its unilateral exercise, it would begin with the basic claim to self-determination that manifests itself through the constitution by a people of their governmental structures, the ability to determine membership in the group and the ability to transmit⁷ their language and culture to future generations so as to preserve their identity and existence. Rules to govern these aspects of their inter-relationships would fit both the RCAP concept of the core of Aboriginal jurisdiction and the *Van der Peet* test. As further amplifications of an inherent right were

⁶*Pamajewon* was decided on August 22, 1996. The Royal Commission's Final Report was released on November 21, 1996. Since that time there have been several references in the case law to the Royal Commission's report, but none of them in the context of the right of self-government or the possible scope of Aboriginal jurisdiction under such a right.

⁷The ability to teach members of the group about language and cultures was considered in *R. v. Côté*, [1996] 3 S.C.R. 139, see, for example, para. 56.

tested in particular cases this basic range of jurisdiction could be extended. However, it seems unlikely that it could possibly extend any further than the outer edges of the scope of jurisdiction provided to the federal government under section 91(24), for at that point the exercise of jurisdiction would, by definition, go beyond any possible connection to Indians or their lands and would cease to be Aboriginal.

Thus whatever the range of Aboriginal jurisdiction under an inherent right of self-government might end up comprising, it would appear that it contains at least those things that would fall in the core of jurisdiction within the framework developed by the Royal Commission and no more than what the federal government would be able to do under section 91(24).

The question about the extent to which the federal government may enact laws applicable to Indians and their lands is an unresolved one. While the usual *form and substance* analysis must be brought to bear on the consideration of the extent of the federal power, the test has usually been stated by the courts (in a not especially helpful manner) as being a question of whether or not the law is in relation to *Indians qua Indians*.

On the one hand, it is clear that 91(24) must authorize Parliament to enact laws about something other than those things that it has power to enact laws about under other heads of power, because if this were not so s. 91(24) would not have been necessary. On the other hand, it is unlikely that the section allows Parliament to make any law at all just because the law is made applicable only to Indians. According to Hogg, the likely limitation on Parliament is that any such laws must be *rationally connected to intelligible Indian policies*.

It is also clear that Parliament has the ability under 91(24) to enact laws that apply to Indians wherever they are.⁹ That is, federal laws in relation to Indians need not be restricted to Indians living

⁸At page 27-4.

⁹See *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R.

on reserves. If Aboriginal jurisdiction is constrained by the same boundaries as is the federal government in exercising its jurisdiction under 91(24), it may also, and for similar reasons, extend to Indians wherever they are, on or off reserve.

To date, the cases that have considered s. 91(24), have for the most part considered it from the other angle Bwhether or not provincial laws apply in the face of the federal jurisdiction. Even this issue has been largely academic since 1951 when the *Indian Act* was amended to provide for the application of provincial laws of general application to Indians, subject to the terms of any treaties and subject to any inconsistent federal law (including the *Indian Act* itself). The existence of section 88, as it now is, means that provincial laws always apply, either on their own (*ex proprio vigore*) or because Parliament said so in exercising its jurisdiction under s. 91(24) by enacting section 88. Now, however, the reason why the provincial law applies is important, because it determines the probable scope of Aboriginal jurisdiction and it also will have an impact on what happens in cases of conflicts between laws.

Negotiated Self-Government Agreements

Although there is a range of jurisdiction that could possibly be exercised as a result of an inherent right of self-government, it is more likely that the exercise of jurisdiction by Aboriginal peoples will occur as a result of negotiated agreements with federal and provincial governments. This does not make the preceding discussion entirely academic, because the negotiating positions of governments, and the compromises that will ultimately be accepted by the parties, are obviously influenced by their perceptions of the legal strength of their hand.

1031, where Beetz J. said, AThe power of Parliament to make laws in relation to Indians is the same whether Indians are on a reserve or off a reserve. It is not reinforced because it is exercised over Indians on reserve any more than it is weakened because it is exercised over Indians off a reserve@

A number of self-government negotiations have been concluded in Canada. An even larger number of self-government negotiations are presently on-going across the country.¹⁰ Virtually every province and territory is potentially affected by the prospect of the enactment of Aboriginal laws and the resulting desire for harmonization with the existing legal regime of federal and provincial laws. A key factor in determining the range of jurisdiction that may be provided for in self-government agreements is the extent to which Canada and the provinces are prepared to negotiate. Canada, in particular, is a key party to such negotiations and Canada's inherent right policy is therefore an important factor in considering the potential scope of Aboriginal jurisdiction under such agreements.¹¹ Canada's policy leads it to agree to undertake negotiations in respect of subject matters that it has divided into three lists.

List #1 refers to those matters that can be negotiated largely because they are internal to the group, integral to its culture and essential to its operation as a government. In many if not most cases, these topics are matters in relation to which Aboriginal laws might possibly be made whether or not a self-government agreement exists. It includes matters such as education, child and family services, health, housing, social services, justice, and hunting and matters related to the management of reserve lands.

List #2 describes matters that go beyond those that are internal to the group or integral to its culture (e.g., divorce, labour, gambling, penitentiaries). While the federal government is prepared to negotiate some Aboriginal authority in these areas, to the extent of its own jurisdiction, Canada takes the position that primary law-making authority will remain with the federal and provincial

¹⁰See <<http://www.ainc-inac.gc.ca/pr/agr/index-e.html>>

¹¹This is not to suggest that provincial/territorial negotiation policies are not also important. However, Canada, as an important player in *every* negotiation will influence *all* negotiations. Again, while the additional factor of provincial/territorial policies is potentially *more* limiting, Canada's policy is a limitation that will *always* apply.

governments@such that federal/provincial laws will prevail if they conflict with Aboriginal laws.

List #3 identifies those matters where, in Canada=s view, there are no compelling reasons for Aboriginal governments to exercise law-making authority, since they are essentially matters that go far beyond the group. This list includes matters that relate to Canadian sovereignty (such as defence) or law and order matters (such as substantive criminal law).

The federal policy thus provides a basic outline of how far Aboriginal jurisdiction will be possible through negotiated arrangements and thus, in practical terms, the extent to which Aboriginal jurisdiction will be possible at all.

The lengthy list of agreements, both at the agreement-in-principle (AIP) and at the final agreement stage (see, again, Appendix 1), suggests the presence of the potential for the exercise of Aboriginal law-making authority in many parts of the country. The AIP with Meadow Lake Tribal Council (MLTC) and the Final Agreement with the Nisga=a are two examples.

MLTC comprises a group of nine First Nations in northern Saskatchewan. Their AIP covers a comprehensive range of subject matters, including citizenship in the First Nations, lands, natural resources and the environment, culture, social services, health, economic matters, transportation, public and private works and infrastructure, justice, governmental structures, and the potential to extend negotiations to other subject matters. The initial focus of jurisdiction for the MLTC First Nations is in the exercise of their jurisdiction on their own lands, but there is a commitment to discuss issues related to traditional territories which extend significantly beyond the reserve boundaries. There is also the practical awareness that a final agreement will have to be ratified by all members of the MLTC First Nations, whether they reside on or off reserve. Section 39.01 of the AIP specifically acknowledges the potential need to harmonize federal, provincial and Meadow Lake First Nation laws, as well as to harmonize program and service delivery and to reach other co-operative arrangements.

The Nisga'a Final Agreement is an agreement between Canada, British Columbia and the Nisga'a Nation. It also deals with a broad range of Nisga'a jurisdiction over matters relating to lands and resources, government, membership or citizenship, language and culture, social services, health, child and family services, education, and justice, among many others. Existing federal and provincial laws continue to apply, even where there is Nisga'a jurisdiction, and the relationship between an among these laws is regulated by a series of paramountcy rules related to conflict and inconsistency. The Nisga'a government is required by the agreement to provide notice of its intention to make laws in various areas¹² and to consult with Canada and British Columbia in relation to a number of matters at their request. Similarly, British Columbia is required by the agreement to provide notice to the Nisga'a of its intention to alter laws that would impact significantly on Nisga'a laws¹³ and to consult with the Nisga'a in that respect.

Delegated Powers

¹²See section 27 of Chapter 11.

¹³Section 30 of Chapter 11.

Currently, the *Indian Act* provides the basic legislative framework for the election of band councils and the governance of First Nations on their lands. Only recently, the federal government has introduced a Bill in the House of Commons to alter a number of these fundamental rules.¹⁴ According to its stated purposes as set out in section 3 of the Bill, the *First Nations Governance Act*¹⁵ is intended to provide to bands more effective tools of governance. On an interim basis pending the negotiation and implementation of the inherent right of self-government, it authorizes bands to develop for adoption by their members codes relating to leadership selection, administration of government, and financial management and accountability. It allows bands to make laws applicable on reserve to a wide range of matters, including health, provision of services, use of reserve lands and activities conducted on them, resources, and language and culture and provides for the enforcement of band laws through prosecution of offences for their contravention. As a federal law, the *First Nations Governance Act* will prevail over provincial laws according to the usual paramountcy rules.

Because of the range of subject matters about which Aboriginal jurisdiction may be exercised, whether unilaterally as a result of a claim to self-government as an activity or practice that is an element of a custom integral to their distinctive culture, or as an area of jurisdiction acknowledged in a negotiated self-government agreement, or as an exercise of delegated power to make laws contained in the *First Nations Governance Act* or other acts, the potential need or desire for harmonization of laws in this new context is apparent. Another issue that will reflect on the course of harmonization, however, is the conflict or relationship of laws regime that exists in any of these situations.

Conflict of Laws

¹⁴The *Indian Act* is not being repealed by the *First Nations Governance Act*, but a number of provisions will be replaced or affected.

¹⁵Bill C-61, first reading June 14, 2002.

A brief examination of the conflict of laws issue in the federal/provincial context will be helpful to an understanding of the issue when Aboriginal jurisdiction is added to the mix.

The courts have approached the rigid division of powers between federal and provincial governments in a flexible and pragmatic manner. As a result, there are two ways in which federal and provincial governments can both enact valid laws that apparently impinge on the jurisdiction of the other.

According to the pith and substance doctrine a law is valid as long as the true character, or pith and substance, of the law is within the jurisdiction of the enacting legislating body. Where a statute or a statutory provision in pith and substance extends beyond the jurisdiction of the enacting legislature, it will be declared to be invalid. However, it is permissible for an enactment to be in pith and substance about one thing and yet have an incidental effect on matters within the exclusive jurisdiction of the other level of government. This is known as the ancillary or incidental effect doctrine.

The courts have also recognized that some laws have more than one pith and substance, both of which are roughly equal in importance, so that valid laws can be enacted by either government. This is referred to as the double aspect doctrine.

The doctrine of interjurisdictional immunity recognizes that provincial laws that go beyond an incidental effect and trench on the essential character of the federal jurisdiction must be read down. That is, the provincial laws are valid in their general application, but they are interpreted by the courts as not applying to the matter falling within the federal jurisdiction. At present, section 88 of the *Indian Act* renders the doctrine inapplicable in a practical sense.¹⁶ This is because section 88 makes applicable to Indians, provincial laws of general application that would otherwise not apply to them for the reason that the laws trench on the essential character of the federal jurisdiction under s. 91(24). That is, in the absence of section 88, such provincial laws would have been read down.

¹⁶This will not change with the enactment of the *First Nations Governance Act*.

Finally, it should be noted that otherwise valid provincial laws are inoperative if they conflict with a valid federal law. This is because, as between the federal and provincial governments, federal paramountcy is always the rule. A conflict occurs when it is not possible to obey one law without disobeying the other or where one statute substantially frustrates the policy objectives of another. In the absence of an actual operational conflict of this type, all valid laws must be complied with. It should be noted that provincial laws declared to be *Anoperative* as opposed to *Anvalid* will again apply in their entirety where federal legislation is either amended or repealed so as to remove the conflict.

It seems reasonable to assume that courts are likely to build on existing constitutional concepts that have developed in the federal/provincial context when turning their attention to Aboriginal laws. On this assumption, a number of predictions are possible:

1. An Aboriginal law that is in its pith and substance in relation to a matter within the RCAP jurisdictional core or that is recognized in a self-government agreement or authorized to be made under delegated authority will be valid, even where it may have an *Áncidental* effect or impact on subject matters that are technically outside of the jurisdictional core or the agreement and even if there is another aspect to the law that would result in another government having jurisdiction to enact it.
2. Unless an actual operational conflict occurs, all valid laws will have to be complied with. Potentially, this could include federal, provincial and Aboriginal laws.
3. Where an actual operational conflict does occur, a paramountcy rule will have to be developed. Building on the existing federal paramountcy rule, it makes sense that a provincial law that conflicts with an Aboriginal law would have to be read down, because the Aboriginal law would otherwise have fallen within the scope of s. 91(24). In the absence of the Aboriginal law, a similar law could only have been enacted by the federal government and as a

federal law it would always be paramount over a provincial law. To put this another way, if an Aboriginal law is in relation to Indians or their lands, a conflicting provincial law should yield to it. This is explicitly the result in the context of power exercised under the delegated authority provided now in the *Indian Act* or in the future in the *First Nations Governance Act*, since section 88 explicitly limits the application of the provincial laws it invigorates in this way.

4. An Aboriginal law that results from the exercise of an Aboriginal or Treaty right protected by s. 35 (this would not include a law enacted under delegated authority unless the authority is contained in a self-government agreement that amounts to a treaty within the meaning of s. 35) may only be infringed by laws that can be justified in accordance with the test enunciated by the Supreme Court of Canada in *R. v. Sparrow*.¹⁷ Arguably, a provincial law that infringes a constitutionally protected right is invalid or at least inapplicable.¹⁸ Thus, in cases involving provincial laws that have until now have applied by virtue of section 88 of the *Indian Act*, the justification question never actually arises. Provincial laws that apply by virtue of section 88 would also have to be justified in accordance with the *Sparrow* test, but presumably the federal government would have to do the justifying because it has enacted the law that incorporates the provincial law by reference.

Summary

It seems clear that the potential for a broad range of Aboriginal laws, either as an exercise of an inherent right of self government or, more likely, as a result of the negotiation of self-government agreements or delegated powers, and the complex constitutional context, together suggest that harmonization of laws would be a worthwhile objective. Indeed, harmonization is a matter that is touched on in the agreements that have been negotiated and no doubt is an important consideration in

¹⁷*R. v. Sparrow*, [1990] 1 S.C.R. 1075.

¹⁸In *Delgamuukw* Lamer C.J. stated that s. 91(24) protects a core of Indianness from provincial intrusion and that core of Indianness includes Aboriginal (and no doubt Treaty) rights.

the negotiations that are on-going.

Even constrained by the somewhat limited view of the federal government in relation to its own powers under 91(24)¹⁹ and its willingness to engage in discussions about Aboriginal jurisdiction, there is a broad range of subject areas in which Aboriginal jurisdiction may be exercised. Most, if not all these areas of jurisdiction would, if Aboriginal peoples were not involved, be the jurisdiction of the provinces. In addition, there is a possible scope of Aboriginal jurisdiction that applies to Aboriginal peoples wherever they are. In this context, questions of what laws apply to whom in what circumstances are practical questions that must be answered and which carry with them the need or desire to secure a measure of harmonization between federal, provincial and Aboriginal legal regimes.

The question then arises to what extent if any should the Uniform Law Conference of Canada concern itself with this question of harmonization and how can the Conference usefully participate in promoting harmonization, which itself is an elastic term describing a flexible concept embodying a range of measures that vary according to the context in which an issue is treated²⁰

¹⁹Canada seems on occasion to express the view that its jurisdiction under 91(24) is limited to only those things that it has already legislated in the form of provisions of the *Indian Act*. This view is clearly incorrect. Parliament's jurisdiction is not defined by Parliament; it is defined by the Constitution. However, the complicating factor that this represents is the assumption that any Aboriginal jurisdiction exercised in relation to any of the List 1 matters is provincial jurisdiction, not federal. In other words, it is not jurisdiction that can be exercised by Canada under 91(24).

²⁰R.C.C. Cuming, *Perspectives on the Harmonization of Law in Canada*, (Toronto: University of Toronto Press in co-operation with the Royal Commission on the Economic Union and Development Prospects for Canada and the Canadian Government Publishing Centre, Supply and Services Canada, 1985) at p.3.