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Tsilhqot'in: What Happened to the Second Half of Section 91(24) of the *Constitution Act, 1867*?

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Case commented on: *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44

The *Delgamuukw* decision of the Supreme Court of Canada, [1997] 3 SCR 1010 was an important decision both on aboriginal title and also on the division of powers under the *Constitution Act, 1867*- in particular for its robust reading of the "lands reserved" head of s.91(24) and the companion language of s.109 (provincial title subject to "any interest other than that of the province in the same"): see Bankes, "*Delgamuukw*, Division of Powers and Provincial Land and Resource Law: Some Implications for Provincial Resource Rights" (1998), 32 UBC L Rev 317-351 and Kent McNeil "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61 Sask L Rev 431-465. The *Tsilhqot'in* decision is also an important decision on both issues; but it will be remembered (if it too does not go the way of *Marshall and Bernard*, [2005] SCC 43 – read into nothingness as our colleague Jonnette Watson Hamilton points out here) on the division of powers issues as the decision that, in extended *obiter dictum* (see paras 98 and 126), eviscerated the lands reserved head of s 91(24).

The Court mentions the term "lands reserved" only twice in its entire judgement – both times as part of quoting the entire head of power "Indians and lands reserved for Indians" and never alone; most of the time the Court simply refers to the application of provincial laws to Indians (see paras 104, 140). The compelling logic of *Delgamuukw* on division of powers is now dismissed as leading to a number of "difficulties" (at para 133) and the startling conclusion that the doctrine of interjurisdictional immunity is not just out of fashion (we know that from cases like *Canadian Western Bank v Alberta*, 2007 SCC 22, although see paras 60 – 61 of that case on the application of the doctrine to the "Indian Cases"), but it has no role whatsoever to play in relation to aboriginal title lands (at para 151) and perhaps even more generally in relation to the entire head of power (see paras 140, 150). Instead, the constitutionality of provincial laws is to be resolved pursuant to the aboriginal rights framework under s 35 of the *Constitution Act 1982* and *R v Sparrow*, [1990] 1 SCR 1075 (*Tsilhqot'in* at paras 139, 151).

What are the implications of this part of the *Tsilhqot'in* decision?

1. It dramatically limits the availability of one traditional source of constitutional protection and constitutional space for aboriginal communities. It does not completely abolish that source of protection since a provincial law in relation to lands reserved will presumably still be considered *ultra vires*. Thus, a provincial law that provides that a province may dispose of standing timber on aboriginal title lands will be of no force or effect (because it singles out those lands for special treatment): *R. v Sutherland*, [1980] 2 SCR 451. There may be some doubt about that now, since the Court states that a province could amend its forestry legislation "to cover lands held under Aboriginal title" (*Tsilhqot'in* at para 116, see also para 117); would not such an amendment have

to be aimed at aboriginal title lands? But in any event a law providing that the province can dispose of standing timber on any lands in the province would under *Tsilhqot'in* be both valid and applicable (para 102) to aboriginal title lands because the Supreme Court no longer seems to care whether the power to dispose of resources on title lands is part of the core content of "lands reserved" within the exclusive jurisdiction of the federal government.

2. It casts doubt on the line of cases (even modern cases) which suggest that provincial land laws and related residential tenancy laws do not apply on Indian reserves and other First Nation lands: see e.g. *Sechelt Indian Band v. British Columbia (Manufactured Home Park Tenancy Act, Dispute Resolution Officer)*, 2013 BCCA 262. The Supreme Court reached this conclusion itself in *Derrickson v. Derrickson*, [1986] 1 SCR 285 and *Paul v. Paul*, [1986] 1 SCR 306 (finding that matrimonial property laws do not apply to Indian reserve lands).

3. It makes unnecessary the two step analysis of the applicability of provincial laws suggested by s.88 of the *Indian Act*, RSC 1985, c I-5 (at least so far as provincial laws are claimed to apply to "Indians" rather than "lands reserved") and the Court's decision in *Dick*, [1985] 2 SCR 309 – in fact we don't need s.88 any longer since there are no longer any inapplicable provincial laws that need to be made applicable by operation of a federal statute. Presumably however until s.88 withers away the statutory protection offered to treaties by the opening words of s.88 of the *Indian Act* will continue (see *R. v Sioui*, [1990] 1 SCR 1025) – leading to the anomalous situation that statutory protection of the *Indian Act* is more complete and hard edged than that offered by the Constitution.

4. By focusing on the judicially created justifiable infringement test rather than inapplicability, *Tsilhqot'in* will allow a province to argue the justifiability of the application of its provincial resource laws (e.g. forest, mining, and oil and gas legislation) to title lands in each and every case rather than dealing with applicability at a more principled level. The result is likely to be continuing uncertainty and lengthy and expensive litigation if provincial governments decide to push the envelope. Clearly the Court preferred the subjective and discretionary justifiable infringement test over the brighter line of inapplicability – but at what cost in providing certainty to all parties? And recall as well that the judicial creation of this test (to parallel the express provision in section 1 of the *Charter)* has been critiqued for being inconsistent with the structure of the *Constitution Act 1982* as well as ignoring aboriginal sovereignty and the limitations already placed on aboriginal rights by indigenous laws and traditions (see e.g. John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997/98) 22 American Indian L Rev 37 at 59).

5. The Court does acknowledge that provincial powers will continue to be subject to the doctrine of paramountcy, such that federal legislation will prevail in the case of a conflict with provincial legislation (para 130). It then confuses things by suggesting that "interjurisdictional immunity is designed to deal with conflicts between provincial powers and federal powers" (para 144). Conflicts have not traditionally been required for the interjurisdictional immunity doctrine to apply; in fact the Court acknowledged this as one of the problems with the doctrine in *Canadian Western Bank*. The Court's reference (*Tsilhqot'in* at para 136) to *R v Marshall*, [1999] 3 SCR 533 as support for the proposition that interjurisdictional immunity does not apply where provincial legislation conflicts with treaty rights is also puzzling, as the applicability of provincial law was not at issue in that case –*Marshall* involved a prosecution under federal legislation, the *Fisheries Act*. All the Court said in *Marshall* – and it is actually the rehearing decision in *Marshall* that is referenced in *Tsilhqot'in* – is that in *Marshall #1* it had been "most explicit in confirming the regulatory authority of the federal and provincial governments within their respective legislative fields to regulate the exercise of the treaty right subject to the constitutional requirement that restraints on the exercise of the treaty right have to be justified on the basis of conservation or

other compelling and substantial public objectives." (*Marshall #2* at para 24, citing *R v Marshall*, [1999] 3 SCR 456 (*Marshall #1*) at para 64). This re-reading of *Marshall* is similar to the Court's re-reading of *Marshall and Bernard*.

6. Notwithstanding several references to the customary laws of indigenous communities (see e.g. paras 31 and 35), *Tsilhqot'in* presents a view of aboriginal title as simply "Aboriginal land law" (at para 10) rather than as part of a more comprehensive normative order. We say this because the division of powers part of the judgement (commencing at para 98) is full of all sorts of references to *two* levels of government (see e.g. para 141) and similar comments about "interlocking federal and provincial schemes" that make it abundantly clear that this Court has given no thought to the space within which indigenous laws may operate within the modern constitutional order (for recognition that the law making authority of aboriginal peoples pre-dated the Crown's acquisition of sovereignty, was not extinguished by that acquisition of sovereignty and was not impaired by the division of legislative powers between the federal and provincial governments in 1982 see *Campbell v British Columbia* (2000), 189 DLR (4th) 333 (BCSC) and Justice Deschamps in *Beckman v Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103 at para 97). The Court's argument (at para 114) that "no one would have been in charge" of the forests unless the BC government intended the words "vested in the Crown" to apply to lands with pending claims of aboriginal title is further evidence of the Court's lack of acknowledgment of the possibility of indigenous laws. Thus the Court is very adept at inventing inherent limits (allegedly grounded in the indigenous laws of all communities) to aboriginal rights but less imaginative when it comes to creating a space within which indigenous laws can operate.

In sum, *Tsilhqot'in* is undoubtedly a welcome decision on aboriginal title. It is considerably less helpful on traditional division of powers issues. There is more talk than usual in this decision about what is ratio and what is obiter dictum – likely as a way of avoiding the logic of *Delgamuukw* (at para 135). Perhaps a later Court will dismiss *Tsilhqot'in* on the federalism issues as mere obiter and return us to constitutional orthodoxy – but not, one surmises, without a lot of pain and uncertainty; the sort of pain and uncertainty engendered by *Marshall and Bernard* for close to a decade. We cannot help wondering if the Court's discussion of federalism issues in this case was the price that had to be paid to get a unanimous judgement. To answer that question we will have to await a biography of Chief Justice McLachlin that draws on a set of sources that is just as rich as the marvellous biography of Brian Dickson by Robert Sharpe and Kent Roach (*Brian Dickson: A Judge's Journey*). That biography contains an insightful discussion of the story behind the Court's unanimous judgement in *Sparrow* which was co-authored by Chief Justice Dickson and Justice Laforest.