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The Uncertain Status of the Doctrine of Interjurisdictional Immunity on Reserve Lands

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Case Commented On: *Sechelt Indian Band v. British Columbia (Manufactured Home Park Tenancy Act, Dispute Resolution Officer)*, [2013 BCCA 262](#), application for leave to appeal [dismissed with costs](#), October 23, 2014

The Supreme Court of Canada has passed up the opportunity to clarify the application of the doctrine of interjurisdictional immunity (IJI) to reserve lands following its decisions in *Tsilhqot'in Nation v. British Columbia*, [2014 SCC 44](#) and *Grassy Narrows First Nation v. Ontario (Natural Resources)*, [2014 SCC 48](#) (*Keewatin*) in June 2014 by denying leave to appeal in the *Sechelt Indian Band* case. It is unusual to comment on a decision to deny leave since such decisions are never supported by reasons and the Court has warned that we cannot infer much about the status of an appellate decision on which leave was denied for the very good reason that there may be all sorts of considerations that might lead the Court to deny leave in any particular case. We are commenting on the leave issue in this case because in our view by missing the opportunity to clarify the scope of *Tsilhqot'in* and *Keewatin* the Court has left outstanding uncertainty as to the scope of these decisions that it could usefully have resolved. We also include a postscript referring to a recent decision out of Saskatchewan that seems to extend *Tsilhqot'in* to render IJI inapplicable to provincial limitations legislation applying to reserve lands.

The Significance of the Court of Appeal's decision in *Sechelt Indian Band*

The Court of Appeal's decision in *Sechelt* was significant because it demonstrated that IJI was still alive and well in relation to the lands reserved head of s.91(24) following the efforts of the Supreme Court of Canada in a series of cases including *Canadian Western Bank v Alberta*, 2007 SCC 22 and *British Columbia (Attorney General) v Lafarge Canada Inc*, 2007 SCC 23 to limit the application of the IJI doctrine. In doing so the case also confirmed that there was a core area within which Canada and the First Nation had the exclusive right to make laws that affected social and economic life on reserve; provincial laws of general application were inapplicable to the extent that they impaired this core. The provincial law of general application at issue in *Sechelt* was the *Manufactured Home Park Tenancy Act*, SBC 2002, c.77. This Act creates a Residential Tenancy Board (RTB) and empowers that Board to attempt to resolve disputes between landlords and tenants. The dispute arose in this case because the Sechelt Indian Band had significantly increased the rent on long term leases on Sechelt lands, presumably with a view to bringing them into line with market based rates (whatever that might mean on such

lands; see *Musqueam Indian Band v Glass*, [2000] 2 SCR 633). The Band was operating under the terms of self-government legislation, the *Sechelt Indian Band Self-Government Act*, SC 1986, c.27, which *inter alia* provided (s.31) that Sechelt lands, although now held in fee simple (s.23(1)), were still considered to be lands reserved for Indians within the meaning of s.91(24). The *Manufactured Home Park Tenancy Act* was held to be inapplicable to the Sechelt lands under the IJI doctrine.

Sechelt Indian Band and Tsilhqot'in

Prior to *Tsilhqot'in* we don't think that the *Sechelt Indian Band* decision would have been especially controversial. There was certainly ample support for this line of reasoning in the case law going back to *Surrey v Peace Arch Ent. Ltd* (1970), 74 WWR 380 (BCCA) and *Derrickson v Derrickson*, [1986] 1 SCR 295. But the *Tsilhqot'in* decision must at least raise questions about this line of authority, as we suggested in our [post](#) on the implications of that decision for the "lands reserved" aspect of s.91(24). Much will depend on whether it is possible to distinguish the aboriginal title situations from the Indian reserve situation (although we must acknowledge that the Sechelt lands have a unique juridical status in Canadian aboriginal law). In order to assess this issue we first examine the reasons the Court gives for not applying IJI to aboriginal title lands in *Tsilhqot'in*.

In *Tsilhqot'in* the Court's IJI analysis evidently turned on the question of whether aboriginal rights and title were part of the core content of the federal head of power:

[133] The reasoning accepted by the trial judge is essentially as follows. Aboriginal rights fall at the core of federal jurisdiction under [s. 91\(24\)](#) of the [Constitution Act, 1867](#). Interjurisdictional immunity applies to matters at the core of [s. 91\(24\)](#). Therefore, provincial governments are constitutionally prohibited from legislating in a way that limits Aboriginal rights. This reasoning leads to a number of difficulties.

[134] The critical aspect of this reasoning is the proposition that Aboriginal rights fall at the core of federal regulatory jurisdiction under [s. 91\(24\)](#) of the [Constitution Act, 1867](#) (emphasis added).

While the bulk of authority (some as the Court pointed out at para 135, *obiter dicta*, just as are its own remarks on the issue in *Tsilhqot'in*) certainly favoured the view that aboriginal and treaty rights were part of the core of s 91(24) jurisdiction (see *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 and *R v Morris*, [2006] 2 SCR 915), the Court found (at para 138) that "the ambiguous state of the jurisprudence has created unpredictability". The Court proposed to resolve this unpredictability by ruling (at para 140) that IJI had no role to play with respect to constitutionally protected aboriginal rights and title and inferentially therefore (given "the critical aspect of this reasoning") must have ruled that aboriginal rights and title cannot be part of the core content of s.91(24). The Court offered several reasons for its conclusions.

First, it suggested that IJI is unnecessary where a party is relying on constitutionally protected rights since the province would still have to justify its legislation to the extent that the legislation impaired the right. Remarkably enough the Court considered that IJI is not appropriate where, as was the case in *Tsilhqot'in* (at para 144) "the problem is not competing provincial and federal powers, but rather tension between the right of the Aboriginal title holders to use their land as they choose and the province which seeks to regulate it, like all other land in the province." Why is it so obvious that IJI should be inapplicable with respect to such a fundamental question?

Second, the Court considered that the application of IJI to aboriginal rights would (at para 145) cause “serious practical difficulties”. There would, said the Court (at para 146), be “dueling tests” directed at the same question, namely how far can a province go in regulating s.35 rights? But why are these dueling tests? If a provincial statute is held to be inapplicable that is the end of the matter. Alternatively if the law is held to be applicable it must be on the basis that it does not impair the core content of a federal head of power. If such content includes aboriginal and treaty rights and title and such law is still held to be applicable it is hard to imagine that there is an infringement of s.35 that requires engagement with the justifiable infringement analysis. Where is the duel?

Equally challenging apparently was the risk (at para 147) of a legislative vacuum and the thought that IJI is an old fashioned doctrine “at odds with modern reality” which may thwart cooperation between the “two (*sic*) levels of government” (at para 148). But is not the opposite also possible? Automatic applicability encourages provincial government unilateralism; inapplicability (without incorporation under section 88 of the *Indian Act*) might actually require and therefore foster cooperation and collaboration between First Nations and provincial governments.

Finally, said the Court in *Tsilhqot’in* (at para 148), were the IJI doctrine to apply the courts would apparently need to scrutinize *federal* legislation to ensure that it did not impair the core of the province’s power to manage the forests. So now the Court has confirmed (*en passant*) that IJI also applies to federal legislation, a question that it left open in *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 SCR 134, 2011 SCC 44. In any event, given all of these “difficulties” the Court preferred the carefully calibrated s.35 justifiable infringement test (at para 150) over the “blanket inapplicability” of IJI and ruled (at para 151):

... the doctrine of interjurisdictional immunity should not be applied in cases where lands are held under Aboriginal title. Rather, the [s. 35 Sparrow](#) approach should govern. Provincial laws of general application, including the [Forest Act](#), should apply unless they are unreasonable, impose a hardship or deny the title holders their preferred means of exercising their rights, and such restrictions cannot be justified.

As we pointed out in our earlier comment, this is calibration and uncertainty at the expense of a bright line and certainty.

In *Keewatin* the Court made it clear that IJI no longer applies to treaty rights (at para 53), presumably (given “the critical aspect of this reasoning”, although the Court does not say so) on the basis that such rights can no longer be considered to be part of the core content of s.91(24).

All of this of course begs the question of just what is left, if anything, at the core of s.91(24)? It may be argued that while IJI does not apply to aboriginal rights, aboriginal title or treaty rights it must still apply to reserves, which must still be part of the core. But does that follow? Indian reserves and aboriginal title are both categories of “lands reserved” – *St. Catherine’s Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 and *Delgamuukw* – and the Court’s reliance on *Guerin v The Queen*, [1984] 2 SCR 335 (at para 12 in *Tsilhqot’in*) suggests that it doesn’t see much conceptual difference between the two. It may further be argued that *Tsilhqot’in* only applies to make IJI inapplicable in those cases where a party relies on s.35 of the *Constitution Act, 1982*. That may indeed be all that the Court has decided in *Tsilhqot’in*, but why should some forms of “lands reserved” attract the protection of “blanket inapplicability” while others do not?

Furthermore, it may be difficult to classify some forms of argument as they apply to reserves. Take the example of limitations legislation; such legislation may be characterized as having the effect of extinguishing an aboriginal or a treaty right or as inapplicable as interfering with the core content of s.91(24).

At the end of the day, the next appellate court (or BC trial court) will be left with the question of which line of authority to follow: the ratio of the BCCA decision in *Sechelt* (binding on lower courts in that province) or the *obiter dicta* (see paras 98 & 99) of the Supreme Court in *Tsilhqot'in*. The Court could have helped us all (as well as the tenants in *Sechelt*) by granting leave in this case to allow these issues to be resolved now – thus saving the judicial time and lawyers' fees that will be incurred when this litigation is inevitably re-run in some form.

Postscript

Shortly after we had completed a draft of this comment our colleague Professor Watson Hamilton drew our attention to the decision of Justice RS Smith of the Saskatchewan Court of Queen's Bench in *Peter Ballantyne Cree Nation v Canada (Attorney General)*, [2014 SKQB 327](#). One of the issues in that case concerned the applicability of provincial limitations legislation to causes of action involving reserve lands. Rather than re-writing our comment to take account of this decision we thought that we would simply reproduce the relevant sections here as a postscript to the comment and leave it to our readers to judge just how clear the law is in this area in light of *Tsilhqot'in*.

b) Do provincial limitation periods apply?

[104] The plaintiffs submit several arguments as to why provincial limitations legislation should not apply.

(i) Interjurisdictional Immunity

[105] The doctrine of interjurisdictional immunity holds that insofar as legislation enacted by one level of government pursuant to their sphere of jurisdiction under [ss. 91](#) or [92](#) of the [Constitution Act, 1982](#), (*sic*) acts to impair the basic, unassailable core of power possessed by another level of government, it should be rendered inoperable (*sic*).

[106] The plaintiffs submit that provincial limitations legislation cannot apply so as to negatively affect possession of reserve lands or damages claimed as a result of interference with possession. They argue that possession of reserve lands lies at the core of s. 91(24) which assigns the federal government exclusive legislative power over “Indians, and Lands reserved for the Indians”. Thus, provincial limitations legislation should be rendered inoperable (*sic*) insofar as they (*sic*) impair this right.

[107] At the time of submissions, the parties did not have the benefit of the Supreme Court's ruling in *Tsilhqot'in Nation v British Columbia*, [2014 SCC 44 \(CanLII\)](#), [2014] 7 WWR 633 [*Tsilhqot'in*]. I am of the view that this decision is directly relevant to the matter at hand and greatly narrows the application of interjurisdictional immunity in the context of claims of infringement of Aboriginal rights.

[108] In *Tsilhqot'in* the court stressed the limits of interjurisdictional immunity, confirming that the doctrine should be applied with restraint so as not to thwart

cooperative federalism between the federal and provincial governments: [The Court quoted at para 149].

[109] The court also further elaborated that interjurisdictional immunity is not an appropriate analysis to determine whether provincial legislation of general application infringes Aboriginal rights: [The Court quoted at paras 140 – 144].

[110] The problem here, as in *Tsilhqot'in*, is not competing provincial and federal powers wherein interjurisdictional immunity would be invoked to carve out areas of exclusive jurisdiction. Rather the issue is in regard to the tension between the claim of a violation of a federally protected right and claim for damages, and the province which seeks to regulate recovery of damages through imposition of limitation periods.

[111] This court is bound by this proclamation by the Supreme Court and the plaintiff is precluded from claiming interjurisdictional immunity by virtue of impairment of Aboriginal or treaty rights. These rights, as included under [s. 35](#) have been deemed not to be at the “core” of federal power over “Indians” and “Lands reserved for Indians” in [s. 91\(24\)](#) of the [Canadian Charter of Rights and Freedoms](#) [the *Charter*] (*sic*).

[112] There was much correspondence from the parties to the court following the release of *Tsilhqot'in*. The plaintiffs made much out of the distinction that the lands held in *Tsilhqot'in* were under Aboriginal title and the lands held in this case are reserve lands. They argue that it is not open to this court to infer that *Tsilhqot'in* overrules such previous cases such as *Derrickson v Derrickson*, [1986 CanLII 56 \(SCC\)](#), [1986] 1 SCR 285, which expressly held that the right of possession for land held under a *reserve* is at the core of [s. 91\(24\)](#) and triggers interjurisdictional immunity.

[113] I would respond to this by first referring the plaintiffs to paras. 135-138 of *Tsilhqot'in* wherein the court acknowledges that there is inconsistency among prior cases on whether certain [s. 35](#) rights fall under the core of federal power. Such a statement surely acknowledges that there is bound to be some previous cases which are at odds with the ruling.

[114] Secondly, I would refer the plaintiffs to para. 150 [omitted]

In *Delgamuukw v British Columbia*, [1997 CanLII 302 \(SCC\)](#), [1997] 3 SCR 1010, the court held that Aboriginal title lands and lands set aside for Indian occupation, such as reserves, are both “Lands reserved for the Indians” pursuant to s. 35 of the *Constitution Act* (*sic*). The court continued in *Delgamuukw* at para. 178:

...The core of Indianness encompasses the whole range of aboriginal rights that are protected by s. 35(1). Those rights include rights in relation to land; that part of the core derives from [s. 91\(24\)](#)'s reference to “Lands reserved for the Indians”.

[115] I conclude that the courts have not drawn a distinction between Aboriginal title lands and Aboriginal reserve land when determining whether these rights are protected under s. 35. Clearly, it would be an error for me to do so now.

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