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Reconciling the Application of the Interjurisdictional Immunity Doctrine to Aboriginal Title and Lands Reserved

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Case Commented On: *McCaleb v Rose*, 2017 BCCA 318 (CanLII)

It is a challenge to teach the interjurisdictional immunity (IJI) doctrine these days, in part because the Supreme Court of Canada has been sending mixed, incomplete, and frankly off the cuff messages about the use of this doctrine. IJI has predominantly been applied so as to render provincial laws inapplicable to federal works, undertakings and other federally regulated persons and entities when they impair the core of the federal power over those entities (although the Supreme Court of Canada left the door open for IJI to apply to federal laws that impair provincial entities in *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 (CanLII)). The Court signalled in *Canadian Western Bank v Alberta*, 2007 SCC 22 (CanLII), that generally the use of the doctrine should be minimized since it is redolent of more rigid approaches to constitutional law that favour "watertight compartments" rather than the more modern cooperative federalism approach. *Canadian Western Bank* tells us that IJI issues are to be analysed only if the case can't be resolved on the basis of validity or paramountcy, although the Court has often neglected that progression in cases subsequent to *Canadian Western Bank* (see e.g. *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39 (CanLII)).

To make matters more complicated, the Court eschewed the use of the IJI doctrine in the case of Aboriginal title claims in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 (CanLII). Although it was not necessary for the resolution of the issues in the case, the Court stated that provincial exercises of power that impact rights flowing from Aboriginal title should be analysed under section 35 of the *Constitution Act, 1982*, in particular by assessing whether the violation of Aboriginal rights can be justified by the province (at paras 140-152). The implication of this point is that IJI will no longer create a shield against provincial action that impairs core federal jurisdiction over Aboriginal peoples under section 91(24) of the *Constitution Act, 1867*, as was the case following *Delgamuukw v British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 SCR 1010. Although celebrated for its recognition of Aboriginal title, *Tsilhqot'in* was also critiqued for removing IJI arguments from the set of tools that Indigenous peoples might use to avoid the application of provincial laws (see e.g. my post with Nigel Bankes here; see also John Borrows, "The Durability of *Terra Nullius: Tsilhqot'in Nation v. British Columbia*" (2015) 48 *UBCL Rev* 701 at 734-738). At the same time, the Court's remarks on the IJI doctrine were *obiter*, and were made in the context of whether IJI applied to Aboriginal title lands (see also *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 (CanLII), where the Court held that IJI was no longer applicable to treaty rights). What about the situation where provincial laws purport to apply to reserve lands not subject to Aboriginal title claims – would IJI continue

to apply so as to immunize the federal government's "lands reserved" powers under section 91(24)?
A recent decision by the British Columbia Court of Appeal weighed in on this issue and held that *Tsilhqot'in* should be restricted to its facts, such that the IJI doctrine is still available where provincial laws purport to apply to "lands reserved."

McCaleb v Rose involved the issue of whether BC's *Manufactured Home Park Tenancy Act*, SBC 2002, c 77, applied to lands located on the Kamloops Indian Reserve No. 1. In an earlier decision, *Sechelt Indian Band v British Columbia (Manufactured Home Park Tenancy Act, Dispute Resolution Officer)*, 2013 BCCA 262 (CanLII), leave to appeal dismissed, 2014 CanLII 62242 (SCC), the Court of Appeal had found that the legislation did not apply by virtue of the IJI doctrine (see a post on that case here). The *Manufactured Home Park Tenancy Act*, by creating rights and obligations for landlords and tenants in manufactured home parks, could not apply on reserve lands because it impaired the core of the federal government's powers over "lands reserved" under section 91(24). The Court in *Sechelt Indian Band* followed an earlier case from the Supreme Court, *Derrickson v Derrickson*, 1986 CanLII 56 (SCC), [1986] 1 SCR 285, where it held that provincial matrimonial property legislation was not applicable to the possession of lands reserved for Indians under section 91(24).

The question for the BC Court of Appeal in *McCaleb v Rose* was whether *Sechelt Indian Band* was implicitly overruled by the Supreme Court of Canada in *Tsilhqot'in*. The Court of Appeal answered this question in the negative, using the following reasoning (at para 10):

> *Tsilhqot'in* was dealing with lands held under Aboriginal title and was not dealing with lands reserved for Indians within the meaning of s. 91(24). In my view, the Supreme Court of Canada cannot be taken to have overruled an established line of authorities involving s. 91(24), including *Derrickson*, when making comments in *obiter dicta* on another topic and without mentioning the authorities. The approach to be taken under s. 35 in preserving existing Aboriginal and treaty rights is different from the division of powers analysis required in respect of lands reserved for Indians within the meaning of s. 91(24). If the submissions of the appellant were correct, it would not have been necessary for the Supreme Court of Canada to have mentioned the constitutional limit of s. 91(24) in para. 103 quoted above.

The Court of Appeal's reference to paragraph 103 of *Tsilhqot'in* is interesting. There, the Supreme Court stated that "provincial power to regulate land held under Aboriginal title… may in some situations also be limited by the federal power" under section 91(24). But was that intended to signal a continuation of the IJI doctrine in some cases where section 91(24) powers were at play, or only to signal that provincial laws cannot encroach on section 91(24) powers under the validity / pith and substance doctrine? Again, until the Supreme Court clarifies its views on the application of the IJI doctrine to the full scope of section 91(24) powers, we cannot be sure about this.

The *McCaleb v Rose* decision could be seen as positive in that it may be advantageous for IJI to continue to be available as an argument for Indigenous people in some circumstances. Indeed, as Borrows argues, to the extent that IJI was renounced in *Tsilhqot'in*, the Supreme Court "eroded

the ‘Aboriginal Constitution’ … [that] prevented local colonial governments from molesting or disturbing First Nations in their use and occupation of land” (at 735-36, quoting Brian Slattery, “The Aboriginal Constitution” (2015) 67 SCLR (2d) 319; see also Borrows’ book *Canada’s Indigenous Constitution* (University of Toronto Press, 2010)). But another aspect of *McCaleb v Rose* – that section 91(24) “lands reserved” powers confer immunity from the application of provincial laws, while Aboriginal title does not – is troubling if we think about reconciliation and the ongoing diminishment of Aboriginal powers, authority and governance by various government actors (including the courts) in Canada. As noted in our earlier post, *Tsilhqot’in* is also problematic in this respect (see e.g. the Supreme Court’s references to *two* levels of government (at para 141)). And as Naiomi Metallic argued at the recent (and excellent) conference *Reconciliation / Wahkotowin*, if cooperative federalism is so important, and is one of the justifications for eschewing the use of IJI, why don’t we recognize Indigenous governments within that concept?

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