March 5, 2024

Preliminary Thoughts on the Implications of the *Children, Youth and Families Reference* for the Lands Reserved Head of Section 91(24)

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Case Commented on: *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 (CanLII).

The *Children, Youth and Families Reference* is a decision on the "Indians" head of section 91(24), a head that the Supreme Court of Canada has reframed as "Indigeneity, that is, Indigenous peoples as Indigenous peoples" (*Reference* at para 94). The Court takes a broad view of the scope of this head of federal power. It also reminds us that the double aspect doctrine means that so long as federal legislation is firmly connected to a federal head of power it can compete with and trump provincial legislation grounded on provincial heads of power addressing the same subject area (e.g. child and family welfare), so long as the federal legislation is addressed to the federal aspect of that subject matter. Furthermore, the *Reference* makes it clear that Parliament may accord the laws of Indigenous Nations the authority of federal law while the Nations await judicial confirmation that section 35 of the *Constitution Act, 1982* protects a broad inherent power of Indigenous self-government. This implies that, provided that the federal government has the necessary legal or political motivation, it has the means to back-out provincial laws and create space for Indigenous self-government on a broad range of matters that can be connected to Indigenous peoples as Indigenous peoples.

But section 91(24) contains two distinct sources of legislative authority: Indians and "lands reserved for Indians" (see, for example, *Delgamuukw v British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 SCR 1010, at paras 173 – 178). The purpose of this post is to explore the implications of the *Children, Youth and Families Reference* for the "lands reserved" head of section 91(24). The post begins by examining the scope of the "lands reserved" head of power and then goes on to examine how this power may be engaged in the future.

Lands Reserved

The principal issue in the Privy Council's decision in the *St Catherine's Milling Case*, (1889) 14 AC 46 (JCPC) (available on BAILII) was the question of whether the beneficial interest in the lands that First Nations had ceded to Canada under the terms of Treaty 3 accrued to Canada or to the Province. Or, to put that in more concrete terms, which of those two governments was able to grant third party timber rights to those lands (at least insofar as the Treaty 3 lands lay within the boundaries of the Province of Ontario) once Canada had purportedly acquired the Indigenous interest in the lands through the cession clause of the treaty? As is well known, the Privy Council advised that the benefit of Treaty 3 accrued to Ontario, and that is the *ratio* of *St Catherine's*. However, Lord Watson also offered important comments on the state of the Crown's purported

beneficial ownership and title *before* Treaty 3 was signed; that is to say in the decades and centuries between the Crown's purported acquisition of sovereignty of the relevant territory and the date of the treaty. And these comments inform the proper interpretation of the lands reserved head of section 91(24) and the related property provision in Part VIII of the *Constitution Act, 1867*, namely section 109.

Lord Watson advised that until the Nations surrendered their interest in the lands, the provincial Crown's underlying title was burdened by the interest of the Nations, since these lands had been reserved to the Nations by the terms of the Royal Proclamation of 1763. That burden was a large one since the lands only became available to Ontario as a source of revenue if and when the Crown's interest was "disencumbered of the Indian title" (at 59). Until then, the interest of the Nations was "an interest other than that of the Province" (*ibid*) within the meaning of section 109 of the *Constitution Act, 1867*. Lord Watson also confirmed that while the "lands reserved" head of section 91(24) could not be read to confer a proprietary right on Canada, this legislative head of power could not be confined to "Indian reserves". Instead, these words must be interpreted according to their natural meaning and hence must include "all lands reserved, upon any terms and conditions, for Indian occupation." (*ibid*)

For Lord Watson such lands would have included all lands reserved by the Royal Proclamation of 1763. Later (see *Calder et al v Attorney-General of British Columbia*, 1973 CanLII 4 (SCC), [1973] SCR 313), when it became understood that it was the prior occupation of lands by Indigenous societies in accordance with traditional laws rather than the Proclamation that was the source of Indigenous title, it also followed that such lands must be "lands reserved" within the meaning of section 91(24). At least, that was the case until the Crown acquired that substantial burden by means of treaty or some other lawful way (which, until 1982 would have included extinguishment/expropriation by the federal Parliament). Chief Justice Lamer confirmed this understanding in *Delgamuukw* when he said that "[s]ection 91(24) … carries with it the jurisdiction to legislate in relation to aboriginal title" (at para 174). Chief Justice Lamer also followed *St Catherine's* when it came to the interpretation of section 109, concluding that:

> Although that provision vests underlying title in provincial Crowns, it qualifies provincial ownership by making it subject to the "any Interest other than that of the Province in the same". In *St. Catherine's Milling*, the Privy Council held that aboriginal title was such an interest, *and rejected the argument that provincial ownership operated as a limit on federal jurisdiction*. The net effect of that decision, therefore, was to separate the ownership of lands held pursuant to aboriginal title from jurisdiction over those lands. Thus, although on surrender of aboriginal title the province would take absolute title, jurisdiction to accept surrenders lies with the federal government. The same can be said of extinguishment -- although on extinguishment of aboriginal title, the province would take complete title to the land, the jurisdiction to extinguish lies with the federal government. (at para 175, emphasis added)

For Chief Justice Lamer, this expansive understanding of the scope of "lands reserved" as applied to Indigenous title lands was also entitled to the protection of the doctrine of interjurisdictional immunity (IJI) (at para 181).

The Supreme Court of Canada subsequently reversed its position on the availability of interjurisdictional immunity in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 (Can LII), at paras 133 - 152 where the Court took the view that the applicability of provincial laws to Aboriginal title lands should be determined on the basis of the "s. 35 infringement and justification framework" on the grounds that:

> This carefully calibrated test attempts to reconcile general legislation with Aboriginal rights in a sensitive way as required by s. 35 of the Constitution Act, 1982 and is fairer and more practical from a policy perspective than the blanket inapplicability imposed by the doctrine of interjurisdictional immunity. (at para 150)

I, along with Jennifer Koshan, criticized this aspect of *Tsilhqot'in* at the time (see "*Tsilhqot'in*: What Happened to the Second Half of Section 91(24) of the *Constitution Act, 1867*?"), principally on the basis that the decision failed to acknowledge how IJI might work to create space for the exercise of Indigenous law-making authority. But any thought that the Court might retreat from this position became more remote a few short weeks later when the Court decided *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 (Can LII), at para 37. The principal issue in *Grassy Narrows* was whether or not the power to take up lands under Treaty 3 could be exercised by the Crown in right of Ontario. The Court concluded that the authority to take up lands fell to Ontario and not to Canada. But, on the understanding that the power to take up lands is limited by the need to ensure that treaty hunting rights are meaningful (at para 52), the Court went on to consider whether that core hunting right could be protected by IJI. Once again, in *obiter* comments, the Court concluded that any provincial taking up that infringed such a core hunting right would be assessed on the basis of section 35(1) and the concept of justifiable infringement:

> The doctrine of interjurisdictional immunity does not preclude the Province from justifiably infringing treaty rights. While it is unnecessary to consider this issue, this Court's decision in *Tsilhqot'in Nation* is a full answer. (at para 53, citations omitted)

I still consider the Court's decision to the effect that IJI is not available to protect either Indigenous title rights or Indigenous treaty rights to be entirely arbitrary. For a much more extensive discussion see Kerry Wilkins, "Exclusively Yours: Reconsidering Interjurisdictional Immunity", (2019) 52(2) UBC Law Review 697; Kerry Wilkins, "Life Among the Ruins: Section 91(24) After *Tsilhqot'in* and *Grassy Narrows*" (2017) 55(1) Alta L Rev 91. But it is also important to emphasise that the Court is not saying that Aboriginal title or treaty hunting rights no longer form part of the content of section 91(24), the Court is simply, albeit unfortunately, saying that IJI does not presumptively protect those rights. But since they are still part of the content of section 91(24), this must necessarily entail the proposition that Canada is able to make laws in relation to title and treaty-based hunting rights, including laws for the protection of those rights. Indeed, the Privy Council seems to have acknowledged as much in *St Catherine's* when it said that Canada "still possesses exclusive power to regulate the Indians' privilege of hunting and fishing" on the lands surrendered until those lands are taken up for other purposes (at 60 AC. See also Justice Greckol's dissenting judgment in *Reference re Impact Assessment Act*, 2022 ABCA 165 (CanLII) at paras 643 – 657.

Which brings us to the *Child and Family Welfare Reference* and an Act respecting First Nations, Inuit and Métis children, youth and families, SC 2019, c 24 (the *FNIM Act*).

The *Reference* stands for the proposition that Parliament can make laws for Indigenous peoples as Indigenous peoples and that those laws may affirm Indigenous rights of self-government. Furthermore, Parliament may confer the status of federal law on those Indigenous laws thereby attracting the advantages of the paramountcy doctrine (see Robert Hamilton's summary of the decision here). The *Reference* happens to relate to child, youth, and family welfare but the reasoning in the opinion is equally applicable to other laws that fall within Parliament's jurisdiction under section 91(24) including the lands reserved sub-head of that provision.

Some such laws are unlikely to be overly contentious. While there will always be jurisdictional wrangling between the federal and provincial governments, federal legislative schemes giving effect to Indigenous laws and jurisdiction in relation to "internal" matters such as health, education, governance, etc. are unlikely to face significant opposition from provinces. Indeed, as with the child and family services legislation, such laws may well find significant support from many provincial governments. All of these matters fit comfortably within the first head of power under section 91(24). Control of, and access to, lands and resources – subjects that fall more readily in the second head of section 91(24) – are likely to raise the most contentious issues.

Application to Lands Reserved

In my view, and for the reasons given above, *Delgamuukw* stands for the proposition that lands subject to an existing Indigenous title fall within the meaning of "land reserved". It must surely follow that Canada can make laws in relation to the protection of those lands from ongoing provincial land and resource dispositions. After all, the *St Catherine's* case clearly stated that the Treaty 3 lands were only available to Ontario to use for its own purposes *after* the conclusion of Treaty 3. Prior to that, the provincial Crown's section 109 title was subject to an "interest other than that of the Province in the same" (*St Catherine's* at 59).

To engage in a thought experiment, such a federal law might be titled the "*Protection of Indigenous Title Lands Within A Province*" (the *PITL Act*). The law might affirm the federal government's understanding of the legal and constitutional status of existing Indigenous title lands. It would state that it binds the Crown (federal and provincial, as per section 7 of the *FNIM Act*). It might go on to stipulate that any disposition of land or resources to existing Indigenous title lands would be of no force or effect without the free, prior informed consent of the Indigenous title holder(s). And it might also, building on section 18(1) of the *FNIM Act* and article 32 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), affirm the inherent right of self-government in relation to Indigenous title lands. For example:

> Affirmation
> 32 (1) The inherent right of self-government recognized and affirmed by section 35 of the Constitution Act, 1982 includes jurisdiction in respect of Indigenous title lands including legislative authority in relation to those lands and authority to administer and enforce laws made under that legislative authority.

The *PITL Act* might also provide for coordination agreements between an Indigenous governing body and a provincial government. My colleague Robert Hamilton, commenting on a draft of this post, has also observed that one could imagine amendments to the federal *Impact Assessment Act*, SC 2019, c 28 (see especially section 114) that would allow for (and perhaps require) Indigenous-led assessments and give the force of federal law to the outcome of those assessments.

And it must further follow from the *Reference* that the federal government is entitled to include in my imagined *PITL Act* a provision that stipulates that "A law, as amended from time to time, of an Indigenous group, community or people also has, during the period that the law is in force, the force of law as federal law." (See *FNIM Act* at s 21).

While my section 32(1) as drafted above might only apply to Indigenous title lands for which there is an outstanding judicial declaration of title, we can continue the thought experiment by considering whether the law might be extended to claimed Indigenous title lands. The *Reference* opinion does suggest that Parliament is entitled to legislate on the basis of its understanding of the Constitution (subject to the ultimate power of the court to correct that understanding), and that in turn suggests that Parliament can legislate on the basis of its understanding of the term "lands reserved" and its understanding of the geographical scope of application of that term. The Court has already endorsed the idea that the Crown has obligations even in relation to claimed title (the duty to consult and accommodate, see *Tsilhqot'in* at paras 77 - 80), and it has also endorsed the idea that governments may make laws in relation to that duty (see *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII) at para 51).

Application to the Hunting Rights Provisions of the Numbered Treaties

The case law confirms that the numbered treaties combined with other constitutional documents afforded provincial governments the power to take up lands within the treaty area. But treaty rights must also form part of the core content of section 91(24), whether as part of the "Indians" head of that section, or the lands reserved head. And while the Supreme Court has now denied such rights the protection of IJI, *Grassy Narrows* cannot be read as undermining the power of federal Parliament to make a law with respect to the protection of treaty rights (see for example the opening words of section 88 of the *Indian Act*, RSC 1985, c I-5.) Such an Act might be entitled "*An Act for the Protection of Treaty-based Harvesting Rights*". The structure and content of such an Act might follow that of my imagined *PITL Act* as sketched out above.

Imagination and Reality

My goal in writing this post was to point out that the constitutional implications of this *Reference* decision are not limited to the fields of family and child welfare but may also have implications for land and resource rights and harvesting rights. But I also acknowledge that there is gap between a power to make a law and the political will or even the duty to do so (see *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 (CanLII)). That said, I do note that many UNDRIP provisions are framed as a rights statement coupled with a state obligation to take effective measures (see Henry Shue, *Basic Rights* (Princeton, NJ: Princeton University Press, 1980)) and I have frequently emphasised that article 27 of the International Covenant on Civil and Political Rights requires states to take positive measures to ensure that Indigeous peoples have

access to the material elements of their culture. This understanding is reflected in the General Comment of the Human Rights Committee on article 27:

> 6.1 Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a "right" and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.
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> ….
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> 7. With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

The recent decision of the British Columbia Court of Appeal in *Thomas v Rio Tinto Alcan Inc*, 2024 BCCA 62 (CanLII) (at paras 437 – 461) also confirms that both the federal and provincial governments may owe positive duties to protect Indigenous harvesting rights and the ecosystem that supports them.

I don't anticipate a lot of federal enthusiasm to make either of the laws sketched out above; and I would anticipate massive provincial opposition to any such laws. But I do believe that the thought experiment is worthwhile since it helps demonstrate that the federal government has power, for example, to protect treaty-based harvesting rights or indeed to strengthen the power of Indigenous communities to protect their own rights by recognizing their self-governing laws. Of course, the double aspect doctrine tells us that the provinces also have the power to protect and respect Indigenous harvesting rights, and British Columbia's response to the *Yahey* decision (*Yahey v British Columbia*, 2021 BCSC 1287 (CanLII); and see ABlawg posts, here, here and here) shows the way. But what happens if a provincial government fails to acknowledge that the treaty right to hunt requires landscape level protections and healthy ecosystems and continues to dispose of more and more lands to forest companies, oilsands companies, and other resource companies? Indigenous communities can file their own *Yahey*-style claims, and indeed they have (see, for example *Anderson v Alberta (Attorney General)*, 2020 ABCA 238 (CanLII)). But the federal government may also have a role to play by engaging in the exercise of legislative reconciliation in support of an Indigenous government interested in enacting its own laws to protect its traditional territory and harvesting rights.

Special thanks to Robert Hamilton for his detailed and insightful comments on an earlier draft of this post.

This post may be cited as: Nigel Bankes, "Preliminary Thoughts on the Implications of the *Children, Youth and Families Reference* for the Lands Reserved Head of Section 91(24)" (5 March 2024), online: ABlawg, http://ablawg.ca/wp-content/uploads/2024/032018/07/Blog_NB_Implications_Lands_Reserved.pdf

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