From Protector to Aggressor: Section 91(24) and the Division of Powers

Prepared for: Legal Education Society of Alberta

Canada 150 – Constitutional Law Symposium

Presented by:

Dr. Bruce McIvor

First Peoples Law

Vancouver, British Columbia

Kate Gunn

First Peoples Law

Vancouver, British Columbia

For presentation in:

Edmonton, Alberta – October 27, 2017

FROM PROTECTOR TO AGGRESSOR: SECTION 91(24) AND THE DIVISION OF POWERS[1]

INTRODUCTION

The relationship between Indigenous Peoples in Canada and the Crown is a defining element of the country's constitutional structure and its national identity.[2] The significance of this relationship and its related responsibilities is reflected in section 91(24) of the *Constitution Act, 1867,* which provides the federal government with exclusive legislative jurisdiction in respect of "Indians and lands reserved for the Indians."[3] For over a century and a half, Canadian courts have relied on the federal government's legislative authority pursuant to section 91(24) as a guiding principle when asked to interpret questions of competing provincial-federal jurisdiction under the division of powers and in ensuring that the Crown fulfils its constitutional responsibilities in respect of Indigenous peoples.

Prior to 2014, the position of the Supreme Court in respect of section 91(24) was clear – the federal government's exclusive jurisdiction existed as a shield to protect Indigenous peoples from the pressures of local settler populations, and the doctrine of interjurisdictional immunity would operate so as to preserve the federal government's role and responsibilities from provincial interference. However, recent decisions from the Supreme Court signal a significant shift in the Court's longstanding approach to its interpretation of the division of powers and the extent to which it will enforce the federal government's obligations to protect the rights and interests of Indigenous peoples. This paper explores the law in respect of section 91(24) prior and subsequent to the Supreme Court's decisions in *Tsilhqot'in, Grassy Narrows* and *Daniels*,[4] with a focus on the purpose of section 91(24) and the impacts of the Court's current approach to the division of powers on the present-day relationship between Indigenous Peoples and the Crown.

THE DIVISION OF POWERS

Federal Jurisdiction & Indigenous Peoples

The federal government's responsibility to protect and regulate Aboriginal and treaty rights pursuant to section 91(24) is rooted in the federal Crown's unique historical relationship with Indigenous Peoples. This relationship pre-dates Confederation and rests on the fact that when Europeans first

[1] Please do not quote without permission of the authors.

[2] This paper updates and expands on our previous article on the *Tsilhqot'in* and *Grassy Narrows* decisions. See Bruce McIvor & Kate Gunn, "Stepping into Canada's Shoes: *Tsilhqot'in*, *Grassy Narrows* and the Division of Powers" (2016) 67 UNBLJ 146.

[3] *The Constitution Act, 1867*, 30 & 31 Vict, c 3, section 91(24).

[4] *Tsilhqot'in Nation v. British Columbia*, [2014] 2 SCR 257, 2014 SCC 44 (CanLII) [*Tsilhqot'in*]; *Grassy Narrows First Nation v. Ontario (Natural Resources),* [2014] 2 SCR 447, 2014 SCC 48 (CanLII) [*Grassy Narrows*] and *Daniels v. Canada (Indian Affairs and Northern Development)*, [2016] 1 SCR 99, 2016 SCC 12 (CanLII) [*Daniels*]

arrived and asserted sovereignty over the lands and waters which comprise what is now Canada, Indigenous Peoples already occupied and controlled those territories pursuant to their own political and legal systems.[5] From the outset the Crown was obliged to develop diplomatic relations with Indigenous Peoples in order to maintain peace and safety necessary for the expansion of European settlement. With the growth of Canada's non-Indigenous population, this relationship came to include a protective component whereby the Crown increasingly stood as an intermediary between Indigenous Peoples and the demands of expanding settler populations.

The emergence of the Crown's protective role in relation to Indigenous Peoples can be seen at least as early as 1763, when the Crown recognized and put in place protections for Indigenous Peoples' interests in lands through the issuance of the Royal Proclamation.[6] Evidence of this relationship is seen in the language throughout the Proclamation, which refers at the outset to "the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection,"[7] and subsequently to the reservation of lands and territories for Indigenous peoples "under our Sovereignty, Protection and Dominion."[8] Importantly, through the Proclamation the Crown established a process for the acquisition of Indigenous lands by requiring that such lands be granted only to the Crown by way of treaty or public cession.[9] The purpose of this requirement, according to the language in the Proclamation, was to prevent further damage resulting from the "Great Frauds and abuses" which had resulted for the purchase of Indigenous Peoples' lands by third parties.[10]

The Proclamation's restrictions on the acquisition of Indigenous lands by entities other than the Crown reflected Britain's concern at the time that "settler majorities" would seek to acquire for their own purposes those lands reserved by the Crown for Indigenous Peoples.[11] This underlying concern was affirmed in *Guerin,* where the Supreme Court noted that "[t]he purpose of this surrender requirement [originating in the Royal Proclamation] is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being

[5] See McNeil, Kent. "Factual and Legal Sovereignty in North America: Indigenous Realities and Euro-American Pretensions." Sovereignty: Frontiers of Possibility. Eds. Julie Evans, Ann Genovese, Alexander Reilly, and Patrick Wolfe. Honolulu: University of Hawaii Press, 2013 at p.37.

[6] Borrows, John. "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (UBC Law Review, 1994) at p.16.

[7] *Royal Proclamation* (1763) (reprinted in R.S.C. 1985, App. II, No. 1) [Proclamation].

[8] Proclamation, *supra* note 6.

[9] Slattery, Brian. "The Hidden Constitution: Aboriginal Rights in Canada" 32 AM. J. Comp. L. (1984) at p. 371.

[10] Proclamation, *supra* note 6.

[11] Peter W. Hogg, *Constitutional Law of Canada*, Loose-leaf Edition, Vol. 1 (Toronto: Carswell, 1997) at 27-2.