

# STEPPING INTO CANADA'S SHOES: *TSILHQOT'IN*, *GRASSY NARROWS* AND THE DIVISION OF POWERS

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## I. INTRODUCTION

The *Tsilhqot'in* and *Grassy Narrows* decisions represent an about-face in the Supreme Court's approach to the constitutional division of powers.<sup>1</sup> Prior to 2014, the Court consistently confirmed the continuing relevance and importance of the doctrine of interjurisdictional immunity in regards to section 91(24) of the *Constitution Act, 1867* and the federal Crown's responsibilities with respect to Aboriginal and treaty rights.<sup>2</sup> In *Tsilhqot'in* and *Grassy Narrows* the Court disregarded existing law and dramatically reduced the federal government's role when a province proposes to undertake activity that could negatively affect Aboriginal and treaty rights. The Court held that it is now open to provinces to consult and attempt to justify infringements of those rights pursuant to the *Sparrow/Badger* analysis. The potential ramifications of the Court's departure from established case law are considerable. The decisions call into question the Court's approach to the division of powers by reducing an established aspect of constitutional protection formerly guaranteed to Indigenous Peoples. As a result, provinces now have significantly expanded jurisdiction to make decisions which impact Aboriginal and treaty rights.

This paper provides an analysis of the current state of the law on the division of powers as it relates to the protection of Aboriginal and treaty rights. Part One outlines the law in respect of section 91(24) and the operation of the doctrine of interjurisdictional immunity prior to 2014. Part Two provides an overview of *Tsilhqot'in* and *Grassy Narrows*, with a focus on the division of powers in relation to federal authority pursuant to section 91(24). Part Three analyzes the implications of the province's significantly expanded jurisdiction since *Tsilhqot'in* and *Grassy Narrows* to infringe Aboriginal and treaty rights.

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<sup>1</sup> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 256 [*Tsilhqot'in*]; *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 SCR 447 [*Grassy Narrows*]. Thanks to Jay Nelson, Robert Janes QC and the UNBLJ's editors and anonymous reviewers for their insightful comments on drafts of this article.

<sup>2</sup> Unless expressly indicated, references in this article to Aboriginal rights should be read as inclusive of Aboriginal title.

## II. DIVISION OF POWERS PRIOR TO *TSILHQOT'IN* AND *GRASSY NARROWS*

Prior to the Supreme Court's 2014 decisions in *Tsilhqot'in* and *Grassy Narrows* a well-established body of case law confirmed the Court's long-standing approach to the constitutional division of powers and in particular federal responsibility for the protection of Aboriginal and treaty rights. The law was relatively settled—Canada bore exclusive responsibility for regulating Aboriginal and treaty rights pursuant to section 91(24) and the doctrine of interjurisdictional immunity operated to protect the federal government's exclusive role from provincial interference.

### A. Exclusive Federal Jurisdiction pursuant to Section 91(24)

The federal government's exclusive role pursuant to section 91(24) to protect and regulate Aboriginal and treaty rights has deep roots in Canada's constitutional history and the federal Crown's unique relationship with Indigenous Peoples which predates confederation. Since the fall of New France, the British preferred to employ a single, uniform 'national' policy on issues related to Indigenous Peoples. The British had long believed that local non-Aboriginal legislative assemblies were adverse to Indigenous Peoples' interests and that 'settler majorities' in provincial legislatures would be tempted to run roughshod over Aboriginal rights and encroach on established reserves.<sup>3</sup> In its 1837 *Report of the Select Committee on Aborigines (British Settlements)* the English House of Commons reiterated the potential problem:

The protection of the Aborigines should be considered a duty particularly belonging and appropriate to the executive government, as administered either in this country or by the governors of the respective colonies. This is not a trust which could conveniently be confided to the local legislatures. In proportion as those bodies are qualified for the right discharge of their proper functions, they will be unfit for the performance of this office. For a local legislature, if properly constituted, should partake largely in the interests, and represent the feelings or the settled opinions of the great mass of the people for whom they act. But the settlers in almost every colony, having either disputes to adjust with the native tribes, or claims to urge against them, the representative body is virtually a party, and therefore ought not to be the judge in such controversies.... Whatever may be the legislative system in any colony, we therefore advise that, as far as possible, the Aborigines be withdrawn from its control.<sup>4</sup>

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<sup>3</sup> Peter W Hogg, *Constitutional Law of Canada* vol 1 (Toronto: Carswell, 1997) (loose-leaf revision 2014) at 28-2.

<sup>4</sup> Great Britain, *Select Committee on Aborigines (British Settlements)* (House of Commons Parliamentary Papers no 425) (London: The Aborigines Protection Society, 1837) at 117 [emphasis added]. Ten years later, the Legislative Assembly of Upper Canada came to a similar conclusion: see See Douglas Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada," in Stanley M Beck & Ivan Bernier, eds, *Canada and the New Constitution: The Unfinished Agenda*, vol 1 (Montreal: Institute for Research on Public Policy, 1983) 225.

These concerns became central to the underlying structure of Canada's Constitution. As Peter Hogg explains, one of the driving rationales for Parliament's constitutional responsibility for Indigenous Peoples was "concern for the protection of the [A]boriginal peoples against local settlers."<sup>5</sup> By virtue of section 91(24), "the federal government was placed between First Nations and future settlers"<sup>6</sup> to ensure the protection of Indigenous interests from encroaching local populations. At the time of the enactment of the *Constitution Act, 1867*, the "distinct constitutional status" of Indigenous Peoples was recognized through section 91(24), which provided the federal government with exclusive jurisdiction in respect of "Indians, and lands reserved for the Indians."<sup>7</sup> The newly-formed Constitution guaranteed "political spaces to the founding cultural groups" of the Canadian state, including Indigenous Peoples, and in so doing "sought to respect to the right to culture difference" between those respective groups."<sup>8</sup>

More recently, the Supreme Court in *Reference re Secession of Quebec* emphasized the connection between section 91(24) and the relationship between Indigenous Peoples and the federal Crown. The Court noted that a constitution should "ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority."<sup>9</sup> The federal government's responsibility to protect the rights of Indigenous Peoples, including the "special commitments made to them by successive governments" was therefore reflective of "an important underlying constitutional value" in Canadian society.<sup>10</sup>

Up until *Tsilhqot'in* and *Grassy Narrows* in 2014, the Supreme Court continued to confirm that in the modern context federal exclusivity pursuant to section 91(24) was justified because of the "special position of [A]boriginal peoples in Canadian society".<sup>11</sup> For example, the Court in *Derrickson* held that provisions of the British Columbia *Family Relations Act* on the division of family property were inapplicable to reserve lands because "[t]he right to possession of lands on an Indian reserve is manifestly of the very essence of the federal exclusive legislative power under s. 91(24)".<sup>12</sup> Similarly, in *Paul* the Supreme Court held that provincial family

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<sup>5</sup> Hogg, *supra* note 3 at 28-2, cited in *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 1008, [2008] 1 CNLR 112.

<sup>6</sup> James Youngblood Henderson, *Treaty Rights in the Constitution of Canada* (Toronto: Carswell, 2007) at 466.

<sup>7</sup> Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and the First Nations" (1991) 36 McGill LJ 308 at 362.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 74, 161 DLR (4th) 385.

<sup>10</sup> *Ibid* at para 82.

<sup>11</sup> *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 61, [2007] 2 SCR 3 [*Canadian Western Bank*].

<sup>12</sup> *Derrickson v Derrickson*, [1986] 1 SCR 285 at 296, 26 DLR (4th) 175 [*Derrickson*].

law could not govern the disposition of matrimonial homes on reserve.<sup>13</sup> In each case, the Court concluded that matters which were “absolutely indispensable and essential” to the cultural survival of Indigenous Peoples fell within the federal government’s exclusive jurisdiction pursuant to the division of powers.<sup>14</sup>

The federal Crown’s responsibilities pursuant to section 91(24) are far from a vestige from an earlier time in Canada’s colonial history. Rather, prior to 2014, courts and scholars alike recognized exclusive federal jurisdiction to regulate Aboriginal and treaty rights as a central tenet of Canada’s constitutional obligations based on the federal Crown’s unique history and continued relationship with Indigenous Peoples. In *Tsilhqot’in* and *Grassy Narrows* the Court abruptly abandoned this understanding and in so doing disregarded the historical and current importance of the federal Crown’s constitutional responsibilities pursuant to section 91(24).

Notably, post-2014, the Supreme Court has emphasized a different underlying purpose to section 91(24). In 2016, the Court in *Daniels* described section 91(24) as central to colonization and the control of Indigenous Peoples.<sup>15</sup> As the Court explained, assigning the Crown’s law-making authority to the federal government facilitated Canada’s westward expansion, including the development of policies intended to prevent Indigenous Peoples from resisting settlement of their lands.<sup>16</sup> The Court’s emphasis on section 91(24)’s role in facilitating westward expansion and federal authority over Indigenous Peoples is a departure from the Court’s previous focus on the importance of section 91(24) in respect of protecting vulnerable minorities from the pressures of settler society.

## B. Ongoing Relevance of Interjurisdictional Immunity

Up to 2014, the federal government’s exclusive responsibility with respect to Aboriginal and treaty rights pursuant to section 91(24) was protected through the constitutional doctrine of interjurisdictional immunity, along with other constitutional doctrines such as paramountcy. Part of the division of powers, the doctrine of interjurisdictional immunity holds that there exists a “basic, minimum and unassailable content” for classes of subjects or heads of power under sections 91 and 92 that is immune from the application of the other level of government’s legislation because they constitute an integral and vital part of either level of government’s legislative authority.<sup>17</sup> As such, if the incidental effects of valid legislation of one level of government result in an unacceptable interference with the core competence of an area within the exclusive jurisdiction of the other level of

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<sup>13</sup> *Paul v Paul*, [1986] 1 SCR 306, 26 DLR (4th) 196 [*Paul*].

<sup>14</sup> *Canadian Western Bank*, *supra* note 11 at para 61.

<sup>15</sup> *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 25 [*Daniels*].

<sup>16</sup> *Ibid.*

<sup>17</sup> *Canadian Western Bank*, *supra* note 11 at paras 33–34.

government, based on the doctrine of interjurisdictional immunity, the legislation is inapplicable to the extent of the interference.<sup>18</sup>

While the doctrine of interjurisdictional immunity has been the subject of criticism, in recent years the Supreme Court repeatedly recognized it as a necessary tool to preserve the intention of the framers of the Constitution that as between the federal government and the provinces, certain legislative powers are exclusive.<sup>19</sup> For example, in *Canadian Western Bank* the Court held that “the text and logic of our federal structure justifies the application of interjurisdictional immunity to certain federal “activities” and that interjurisdictional immunity was therefore “supported both textually and by the principles of federalism.”<sup>20</sup> Although the Court held that it did not favour an “intensive reliance on the doctrine,” it nevertheless recognized that interjurisdictional immunity would continue to have a “proper part to play in appropriate circumstances.”<sup>21</sup> The Court in *Lafarge* similarly held that “there are circumstances in which the powers of one level of government must be protected against intrusions, even incidental ones, by the other level.”<sup>22</sup> In *COPA*, the Court again confirmed the ongoing importance and applicability of the doctrine of interjurisdictional immunity, stating that:

Among the reasons for rejecting a challenge to the existence of the doctrine is that the text of the *Constitution Act, 1867*, itself refers to exclusivity: *Canadian Western Bank*, at para. 34. The doctrine of interjurisdictional immunity has been criticized, but has not been removed from the federalism analysis. The more appropriate response is the one articulated in *Canadian Western Bank* and *Lafarge Canada*: the doctrine remains part of Canadian law but in a form constrained by principle and precedent. In this way, it balances the need for intergovernmental flexibility with the need for predictable results in areas of core federal authority.<sup>23</sup>

The Supreme Court has continued to recognize the role of interjurisdictional immunity in recent decisions, including in 2011 in *PHS Community Services Society* and again in 2013 in *Marine Services*.<sup>24</sup> In *PHS Community Services Society*, the Court expressly acknowledged that “while the doctrine of interjurisdictional immunity has been narrowed, it has not been abolished” and that the “recognition of

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<sup>18</sup> *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39 at paras 39, 63, [2010] 2 SCR 536 [*COPA*]; *Canadian Western Bank*, *supra* note 11 at paras 48–49.

<sup>19</sup> *Canadian Western Bank*, *supra* note 11 at para 32.

<sup>20</sup> *Ibid* at paras 33, 42.

<sup>21</sup> *Ibid* at para 47.

<sup>22</sup> *British Columbia (Attorney General) v Lafarge Canada Inc*, 2007 SCC 23 at para 41, [2007] 2 SCR 86 [*Lafarge*], citing *Canadian Western Bank*, *supra* note 11 at para 32.

<sup>23</sup> *COPA*, *supra* note 18 at para 58.

<sup>24</sup> *Canada (AG) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 [*PHS Community Services Society*]; *Marine Services International Ltd v Ryan Estate*, 2013 SCC 44, [2013] 3 SCR 53.

previously established exclusive cores of power” would therefore continue to play a role in the proper functioning of the division of powers.<sup>25</sup>

The relevance and importance of interjurisdictional immunity was also acknowledged specifically in regards to the exclusive federal authority pursuant to section 91(24). For example, in *Delgamuukw*, the Court confirmed that the core of section 91(24) “encompasses [A]boriginal rights, including the rights that are recognized and affirmed by s. 35(1).”<sup>26</sup> As such, “s. 91(24) protects a core federal jurisdiction even from provincial laws of general application, through the operation of the doctrine of interjurisdictional immunity.”<sup>27</sup> The Court later confirmed that in the context of section 91(24), interjurisdictional immunity would be triggered where provincial legislation purported to “regulate indirectly matters within exclusive federal competence, that is, to alter rights and obligations.”<sup>28</sup> A provincial law that impairs the “basic, minimum and unassailable content” of the federal power over “Indians” in section 91(24) would be rendered inapplicable to the extent of the impairment.<sup>29</sup> As a result, although the Court had placed strict limits around the applicability of interjurisdictional immunity by 2014, its ongoing relevance and purpose in respect of upholding the division of powers was clear. The Court repeatedly recognized that interjurisdictional immunity has had and would continue to play an important role in the protection of specific heads of power, including federal legislative powers under section 91(24).

### C. Consultation & Justification under Section 35

The Court’s decision to narrow the federal government’s exclusive jurisdiction pursuant to section 91(24) in *Tsilhqot’in* and *Grassy Narrows* has the potential to significantly affect how the Crown fulfils its obligations to Indigenous Peoples in respect of Aboriginal and treaty rights pursuant to section 35 of the *Constitution Act, 1982*. It is settled law that the Crown is obligated to consult and accommodate Indigenous Peoples where it contemplates actions or decisions which could affect Indigenous Peoples’ section 35 rights.<sup>30</sup> Where the Crown proposes an action that would result in a *prima facie* infringement of an Aboriginal or treaty right, it must go beyond consultation and take the necessary steps to justify the infringement in

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<sup>25</sup> *PHS Community Services Society*, *supra* note 24 at para 65.

<sup>26</sup> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 178, 153 DLR (4th) 193 [*Delgamuukw*]; see also Kent McNeil, “Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction” (1998) 61 Sask L Rev 431.

<sup>27</sup> *Delgamuukw*, *supra* note 26 at para 181.

<sup>28</sup> *Paul v British Columbia (Forest Appeals Commission)*, 2003 SCC 55 at para 19, [2003] 2 SCR 585; see also *R v Morris*, 2006 SCC 59, [2006] 2 SCR 915 [*Morris*] in relation to treaty rights.

<sup>29</sup> See *NIL/TU, O Child and Family Services Society v BC Government and Service Employees' Union*, 2010 SCC 45 at paras 70–1, [2010] 2 SCR 696 in respect of section 91(24) and matters relating to the “status and rights of Indians.”

<sup>30</sup> *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511.

accordance with the principles set out by the Supreme Court in *Sparrow* and *Badger*.<sup>31</sup>

The question of whether provinces are entitled to justify infringements of section 35 rights that fall within federal exclusivity pursuant to section 91(24) was initially the subject of conflicting jurisprudence.<sup>32</sup> For example, in 1985 in *Simon* the Court confirmed that section 91(24) immunized treaty rights from provincial regulation.<sup>33</sup> There followed a series of contradictory judgments on provincial authority to infringe section 35 rights, beginning with the Supreme Court's 1996 decision in *Côté*.<sup>34</sup> In that case, Lamer CJ cast doubt on the Court's previous jurisprudence on section 91(24) as protecting treaty rights from interference by provincial legislatures in the course of analyzing whether the provincial regulation in question acceptably restricted the treaty right to fish. Lamer CJ went on to address the question of whether the justification analysis for section 35 rights applied to both provincial and federal laws and held that:

...it is quite clear that the *Sparrow* test applies where a provincial law is alleged to have infringed an [A]boriginal or treaty right in a manner which cannot be justified: *Badger* ... (application of *Sparrow* test to provincial statute which violated a treaty right). The text and purpose of s. 35(1) do not distinguish between federal and provincial laws which restrict [A]boriginal or treaty rights, and they should both be subject to the same standard of constitutional scrutiny.<sup>35</sup>

A year later in *Delgamuukw* Lamer CJ added to the growing confusion by referring to his earlier analysis in *Côté*, stating “[t]he [A]boriginal rights recognized and affirmed by s. 35(1), including [A]boriginal title, are not absolute. Those rights may be infringed, both by the federal (e.g., *Sparrow*) and provincial (e.g., *Côté*) governments.”<sup>36</sup> He then enumerated various examples of government objectives which, in proper circumstances, the Crown might be able to prove are justifiable infringements of Aboriginal title. In so doing, however, Lamer CJ failed to explain how a province's supposed power to infringe section 35 rights could be reconciled with the limits on provinces' property interests under the *Constitution Act, 1867*.<sup>37</sup> His discussion also ignored the fact that if provinces have no constitutional authority

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<sup>31</sup> *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*]; *R v Badger*, [1996] 1 SCR 771, 133 DLR (4th) 324 [*Badger*].

<sup>32</sup> See Kerry Wilkins, “Of Provinces and Section 35 Rights” (1999) 22 Dal LJ 185; Kathryn L Kickbush & Debbie Chan, “Provincial Jurisdiction to Infringe Aboriginal Rights” (2005) 63 The Advocate 881.

<sup>33</sup> *R v Simon*, [1985] 2 SCR 387 at 411, 71 NSR (2d) 15.

<sup>34</sup> *R v Côté*, [1996] 3 SCR 139, 138 DLR (4th) 385.

<sup>35</sup> *Ibid* at para 74 [citations omitted].

<sup>36</sup> *Delgamuukw*, *supra* note 26 at para 160.

<sup>37</sup> The apparent conflict between the SCC's decision in *Delgamuukw* and its section 91(24) jurisprudence was immediately recognized by legal scholars: see e.g. Nigel Bankes, “*Delgamuukw*, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights” (1998) 32 UBCL Rev 317 and McNeil, *supra* note 26 at 450.

to infringe Aboriginal rights as a result of section 91(24), no justification is possible.<sup>38</sup> Finally, in 2002 the Court in *Kitkatla* appeared to confirm the provinces' ancillary authority to legislate in respect of section 35, provided that the effect on Aboriginal rights was incidental and the rights at issue had not yet been established.<sup>39</sup> The result was further erosion of the ability of section 91(24) to operate as an "efficient shield to protect Aboriginal peoples from the application of provincial legislation."<sup>40</sup>

Notwithstanding the Court's apparent willingness to entertain the possibility of justifiable provincial interference with Aboriginal and treaty rights, in 2006 the Court in *Morris* ultimately confirmed that provinces were not at liberty to infringe treaty rights. In *Morris*, the Court held that "[t]he purpose of the *Sparrow/Badger* analysis is to determine whether an infringement by a government acting within its constitutionally mandated powers can be justified. This justification analysis does not alter the division of powers, which is dealt with in s. 88."<sup>41</sup> Accordingly, the infringement/justification analysis from *Sparrow* and *Badger* would apply wherever there was a *prima facie* infringement of a treaty right, and the federal government bore exclusive responsibility to justify the infringement pursuant to the division of powers. While *Morris* applied specifically to treaty rights, the clear implication was that all rights protected by section 35, including Aboriginal title and Aboriginal rights, were protected from provincial legislation by the division of powers.

Since *Morris* the question of which level of government was responsible for fulfilling the Crown's section 35 obligations could be determined through a straightforward application of the division of powers. Based on the division of powers, only the government with the proper constitutional authority to regulate Aboriginal and treaty rights had the corresponding authority to justify contemplated decisions or actions that had the potential to affect those rights. When faced with provincial legislation which would affect Aboriginal and treaty rights, the initial underlying question was therefore whether the provincial legislation constituted an unacceptable interference with the federal government's exclusive jurisdiction pursuant to section 91(24). If it did, the law would be rendered constitutionally inapplicable to the extent of the interference. Where the law was inapplicable, the province could not seek to justify interference with the right. To approach the issue otherwise would result in the illogical conclusion that a provincial government could justify an effect on an Aboriginal or treaty right resulting from constitutionally inapplicable legislation.

Despite earlier confusion, as of 2014 the Court had clarified that Indigenous Peoples were entitled to rely on the established operation of the division of powers to

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<sup>38</sup> McNeil, *supra* note 26 at 452.

<sup>39</sup> *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 SCR 146. See also Jean Leclair, "The *Kitkatla* Decision: Finding Jurisdictional Room to Justify Provincial Regulation of Aboriginal Matters" (2003) 21 SCLR (2d) 73 at 88.

<sup>40</sup> Leclair, *supra* note 39 at 73.

<sup>41</sup> *Morris*, *supra* note 28 at para 55 [emphasis added].



prevent provinces from acting outside of their constitutional sphere and attempting to justify infringements of Aboriginal and treaty rights absent constitutional authority. As will be discussed, however, in *Tsilhqot'in* and then *Grassy Narrows* the Court narrowed the federal government's exclusive constitutional responsibility for the regulation of Aboriginal and treaty rights. The corresponding increase in provincial authority—including provincial access to justification measures under *Sparrow/Badger*—raises serious questions about the ability of Indigenous Peoples to exercise their section 35 rights absent federal protection.

### III. TSILHQOT'IN AND GRASSY NARROWS

#### A. The *Tsilhqot'in* Decision

##### 1. Background

The *Tsilhqot'in* litigation originated 20 years prior to the Supreme Court decision as a challenge by members of the Tsilhqot'in Nation to provincial decisions authorizing forestry activities in lands traditionally used and occupied by the Tsilhqot'in people. After a five-year trial, the trial judge at the British Columbia Supreme Court concluded that the Tsilhqot'in held Aboriginal rights in the claimed area and that those rights had been unjustifiably infringed by the provincial authorizations.<sup>42</sup> The trial judge went on to find that there was sufficient evidence of occupation by the Tsilhqot'in to support a claim for Aboriginal title over certain parts of the claimed area, but declined to issue a declaration of Aboriginal title for procedural reasons. The Court of Appeal upheld the lower court's decision that the provincial approvals had unjustifiably infringed the Tsilhqot'in's Aboriginal rights. However, based on a restrictive approach to Aboriginal title that required evidence of intensive use and occupation of specific sites, the Court of Appeal found that the Tsilhqot'in had failed to establish Aboriginal title in the claimed area. The Tsilhqot'in appealed the decision on the issue of Aboriginal title to the Supreme Court.

##### 2. Submissions on the Division of Powers

A significant related issue to the question of whether the Tsilhqot'in held Aboriginal title to the claimed area was whether provincial laws of general application would apply to Aboriginal title lands and whether a valid provincial law could ever justifiably infringe an Aboriginal right. At the Supreme Court, the Tsilhqot'in argued that the province did not have constitutional authority to infringe Aboriginal rights, and that as such the provincial forestry legislation at issue could not constitutionally

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<sup>42</sup> In reaching this conclusion, the Court applied the prevailing principles of constitutional law and agreed with the Tsilhqot'in that the Province had no constitutional jurisdiction to infringe Aboriginal title or rights (although the Court ultimately concluded that section 88 of the *Indian Act* invigorated provincial laws that infringed the former).

apply to authorize timber harvesting activities on Aboriginal title lands.<sup>43</sup> The Tsilhqot'in based their argument on the principle that Aboriginal rights are at the core of the federal government's exclusive jurisdiction pursuant section 91(24) and interjurisdictional immunity would prevent the province from impairing the core of federal jurisdiction, including through legislation which would affect Aboriginal title lands.<sup>44</sup> Consequently, the Tsilhqot'in argued that pursuant to the doctrine of interjurisdictional immunity, the province could not "impair the *core* of federal jurisdiction even through the incidental effects of otherwise valid laws of general application" and provincial legislation would therefore be inapplicable to the extent that it impaired the core of exclusive federal jurisdiction.<sup>45</sup>

### 3. The Decision

Upholding the findings of the trial judge, the Supreme Court made the first declaration of Aboriginal title in Canadian history. The Court recognized that while the issue of whether and how provincial laws would apply to title lands was not necessary for the disposition of the appeal, it was nevertheless of importance to the Tsilhqot'in and other Indigenous groups. Accordingly, the Court considered the division of powers and interjurisdictional immunity in respect of Aboriginal title and rights. On the issue of how the province could legislate in respect of title lands, the Court held that provincial legislation of general application would apply to land held under Aboriginal title up to the point of infringement. According to the Court, section 35 of the *Constitution Act, 1982* imposes limits on both provincial and federal governments such that "[n]either level of government is permitted to legislate in a way that results in a meaningful diminution of an Aboriginal or treaty right, unless such an infringement is justified in the broader public interest and is consistent with the Crown's fiduciary duty owed to the Aboriginal group."<sup>46</sup> As such, contrary to preceding case law, provinces would now be entitled to use the *Sparrow* justification and infringement framework.

The Court held that there is no role for the doctrine of interjurisdictional immunity or the "idea that Aboriginal rights are at the core of the federal power over "Indians" under s. 91(24) of the *Constitution Act, 1867*."<sup>47</sup> In reaching this conclusion, the Court expressly overrode *Morris* on the issue of interjurisdictional immunity: McLachlin CJ stated that:

To the extent that *Morris* stands for the proposition that provincial governments are categorically barred from regulating the exercise of Aboriginal rights, it should no longer be followed. I find that, consistent with the statements in *Sparrow* and *Delgamuukw*, provincial regulation of

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<sup>43</sup> *Tsilhqot'in*, *supra* note 1 (Factum of the Appellant at paras 248, 256).

<sup>44</sup> *Ibid* at para 257.

<sup>45</sup> *Ibid* at para 262 [emphasis in original].

<sup>46</sup> *Tsilhqot'in*, *supra* note 1 at para 139.

<sup>47</sup> *Ibid* at para 140.

general application will apply to exercises of Aboriginal rights, including Aboriginal title land, subject to the s. 35 infringement and justification framework. 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.<sup>48</sup>

Consequently, the *Tsilhqot'in* decision reduced Indigenous Peoples' ability to rely on the federal government's exclusive legislative authority when provinces seek to enact legislation affecting Aboriginal title and rights. As will be discussed further, the decision also raises significant questions about how the Court will approach issues related to the division of powers and interjurisdictional immunity in the future.

## **B. The Grassy Narrows Decision**

### **1. Background**

The *Grassy Narrows* appeal was heard by the Supreme Court in May 2014 and decided in July, shortly after the release of *Tsilhqot'in*. The litigation centred on the issue of what limits exist on provinces that seek to "take up" land for forestry and other purposes pursuant to the numbered treaties. The litigation was initiated by Grassy Narrows First Nation, descendants of the Anishinaabe signatories to Treaty 3. Treaty 3 was one of a series of a series of numbered treaties were negotiated by Canada between 1817 and 1921. As with most of the other numbered treaties, Treaty 3 allowed for the 'taking up' of lands for non-Indigenous settlement, mining, lumbering and other purposes. In 2005, Grassy Narrows commenced the litigation by challenging the authorizations issued by Ontario in 1997 for forestry activities in Treaty 3 lands. Grassy Narrows argued that the authorizations violated the Treaty 3 harvesting rights and that Ontario was not authorized to take up treaty lands so as to limit treaty rights without federal authorization.

At trial the judge confirmed the Anishinaabe understanding that Treaty 3 was made with Canada, not Ontario. The trial judge went on to find that this, coupled with Canada's exclusive responsibility for "Indians, and lands reserved for the Indians" under section 91(24) meant that only Canada had the right to make decisions or legislate so as to significantly affect the exercise of treaty rights. The Court of Appeal disagreed and held instead, based primarily on *St Catherine's Milling*,<sup>49</sup> that Ontario's ownership of Crown lands in Treaty 3 meant that there was no remaining role for the federal government in land-use decisions affecting treaty rights. The Court concluded that Ontario was entitled to "'stand in Canada's shoes' for the purposes of recognizing the rights of First Nations" in respect of treaty

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<sup>48</sup> *Ibid* at para 150.

<sup>49</sup> *St Catherine's Milling and Lumber Co v R* (1888), 14 App Cas 46 (JCPC).

lands.<sup>50</sup> Grassy Narrows, along with its neighbour Wabauskang First Nation, appealed the decision to the Supreme Court.

## 2. Submissions on the Division of Powers

The question of whether Ontario could legislate so as to impair the federal government's jurisdiction over treaty rights pursuant to section 91(24) was among the central issues before the Supreme Court in *Grassy Narrows* and the primary issue advanced by Wabauskang. At the Supreme Court, Wabauskang argued that the Court of Appeal erred by failing to confirm the federal government's role in implementing Treaty 3 based in part on Canada's exclusive responsibility for "Indians and lands reserved for the Indians" pursuant to section 91(24). Wabauskang argued that the Court of Appeal failed to recognize "that before it could consider whether or not Ontario [was] entitled to exercise the [Treaty 3] take up clause, it first had to determine whether" Ontario was acting within its constitutional jurisdiction.<sup>51</sup>

Wabauskang rejected the Court of Appeal's "erroneous conclusion that through an amorphous process of 'constitutional evolution' Canada's exclusive jurisdiction under section 91(24) [was] curtailed and Ontario has 'stepped into the shoes of Canada' to fulfil the solemn treaty promises made to the Ojibway in 1873" pursuant to Treaty 3.<sup>52</sup> Instead, Wabauskang argued that the federal government's exclusive jurisdiction under section 91(24), including its obligations relating to the protection of treaty rights, had been recognized and remained central to Canada's constitutional framework.<sup>53</sup> Wabauskang further argued based on *Canadian Western Bank, Morris*, and other recent Supreme Court decisions that the doctrine of interjurisdictional immunity operates where provincial legislation would impair the core of federal jurisdiction. If the provincial forestry legislation at issue in *Grassy Narrows* impaired the federal government's exclusive jurisdiction under section 91(24), it would "be rendered inapplicable to the extent of the impairment."<sup>54</sup> The question of whether the legislation infringed the treaty right and whether the province could justifiably infringe that right could only arise when and if it was confirmed that the province was acting pursuant to valid constitutional authority.

## 3. The Decision

The Supreme Court dismissed the appeal and upheld the Court of Appeal's decision. Based on its interpretation of Treaty 3 and the constitutional division of powers the Court held that only Ontario has the power to unilaterally exercise the Treaty 3 take up clause. In reaching its conclusion, the Court determined, contrary to the views of

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<sup>50</sup> *Keewatin v Ontario (Natural Resources)*, 2013 ONCA 158 at para 198, 114 OR (3d) 401.

<sup>51</sup> *Grassy Narrows*, *supra* note 1 (Factum of the Appellant Wabauskang at para 33).

<sup>52</sup> *Ibid* at para 35.

<sup>53</sup> *Ibid* at para 36.

<sup>54</sup> *Ibid* at para 106.

the Indigenous parties, that the numbered treaties were with the Crown, not the federal government, and that provinces could “stand in Canada’s shoes” with respect to the fulfilment of treaty rights.<sup>55</sup> According to the Court, the level of government that exercised rights or performed obligations under the treaty was determined by the division of powers and Ontario alone by virtue of sections 109, 92A, and 92(5) of the *Constitution Act, 1867* had the ability to take up Treaty 3 lands and to regulate those lands in accordance with the Treaty and its obligations under section 35.<sup>56</sup>

The Court further confirmed that that the doctrine of interjurisdictional immunity no longer applies to limit a province’s legislative authority to interfere with the exercise of treaty rights. The Court held that *Tsilhqot’in* was a “full answer” to the question of whether provincial laws that affect treaty rights are inapplicable.<sup>57</sup> Provinces are now entitled to take up treaty lands up to the point of there being no meaningful ability left for Indigenous Peoples to exercise their treaty rights, provided that they fulfil the duty to consult and, if necessary, justify infringements under the *Sparrow/Badger* analysis.<sup>58</sup>

The *Grassy Narrows* decision, while unsurprising in light of *Tsilhqot’in*, raises a number of unanswered questions in respect of the division of powers and federal authority pursuant to section 91(24). In particular, it remains unclear how the Constitution can ‘evolve’ so as to eliminate longstanding federal authority over specific heads of power, and how the Court’s previous decisions on the ongoing role and relevance of interjurisdictional immunity are to be reconciled with *Tsilhqot’in* and *Grassy Narrows*. These issues and their potential ramifications will be discussed in Part Three.

#### IV. IMPLICATIONS

*Tsilhqot’in* and *Grassy Narrows* are likely to result in significant uncertainty, both in respect of the type of protections Indigenous Peoples can expect for their constitutionally-guaranteed rights and how the Supreme Court will approach issues of constitutional interpretation and the division of powers going forward.

##### A. Impacts for Indigenous Peoples

###### 1. Purpose of Section 91(24)

In *Tsilhqot’in* and *Grassy Narrows*, the Court significantly restricted the federal government’s exclusive jurisdiction to regulate Aboriginal and treaty rights and in so

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<sup>55</sup> *Grassy Narrows*, *supra* note 1 at paras 30, 44.

<sup>56</sup> *Ibid* at para 53.

<sup>57</sup> *Ibid* at paras 33, 53.

<sup>58</sup> *Ibid* at para 53.

doing removed an established aspect of constitutional protection formerly guaranteed to Indigenous Peoples. The Court's decisions disregard the long-established purpose of federal exclusivity pursuant to section 91(24) and Indigenous Peoples' view of their relationship with Canada. As noted, a key underlying purpose of the federal government's responsibilities pursuant to section 91(24) was to effectively place the federal government between Indigenous Peoples and local settler populations, thereby ensuring the ongoing protection of Aboriginal and treaty rights. In the modern context of ever-increasing pressure for the use and development of Indigenous lands, the need to protect Indigenous Peoples' rights and resources from the assimilative pressures of settler society remains as relevant today as it was in 1867. By narrowing interjurisdictional immunity in respect of section 91(24), the *Tsilhqot'in* and *Grassy Narrows* decisions ignore the historical and continued importance of the federal government's exclusive authority to honour and regulate Aboriginal and treaty rights.

The decisions also stand in direct contradiction to many Indigenous Peoples' understanding of their relationship with the Crown. Indigenous Peoples across Canada have long understood that their relationship originated and continues to be with the Crown in right of Canada, and that they are accordingly entitled to look to Canada to fulfil the Crown's obligations. This issue was addressed by the English Court of Appeal in *Secretary of State*.<sup>59</sup> In relation to Canada's obligation to uphold the Crown's promises to Indigenous Peoples, the Court held that the promise to respect and protect Aboriginal and treaty rights had passed from the Crown in respect of the United Kingdom to the Crown in respect of Canada, not the provinces:

There is nothing, so far as I can see, to warrant any distrust by the Indians of the Government of Canada. But, in case there should be, the discussion in this case will strengthen their hand so as to enable them to withstand any onslaught. They will be able to say that their rights and freedoms have been guaranteed to them by the Crown—originally by the Crown in respect of the United Kingdom—now by the Crown in respect of Canada—but, in any case, by the Crown. No Parliament should do anything to lessen the worth of these guarantees. They should be honoured by the Crown in respect of Canada “so long as the sun rises and the river flows.” That promise must never be broken.<sup>60</sup>

The English Court of Appeal's decision has subsequently been relied on in Canada in support of the principle that since 1867, the Crown in right of Canada is responsible for fulfilling promises to Indigenous Peoples.<sup>61</sup> The Supreme Court's 2014 decisions to unilaterally absolve Canada of its exclusive responsibilities pursuant to section 91(24) contradicted the English Court of Appeal's promise and disregarded Indigenous Peoples' view of their relationship with the Crown.

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<sup>59</sup> *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta and others*, [1982] 2 All ER 118.

<sup>60</sup> *Ibid* at 129–130 [emphasis added].

<sup>61</sup> *Campbell et al v AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC 1123 at para 82, [2000] 4 CNLR 1.

Among the most troubling aspects of *Tsilhqot'in* and *Grassy Narrows* is the Court's failure to provide a reasoned explanation for the decision to ignore the historical purpose of section 91(24) and the Indigenous viewpoint. In contrast, the Court relied heavily on history and the original intent in another recent decision nullifying the appointment of Justice Nadon on the basis that he did not meet the requirement that seats reserved on the Court for Quebec be member of the Quebec Bench or Quebec bar.<sup>62</sup> Indigenous people are left nonplussed with the apparent double-standard. The precedent created in *Tsilhqot'in* and *Grassy Narrows* puts at risk the established special relationship between Indigenous Peoples and the federal government, a relationship grounded in the Royal Proclamation of 1763. The decisions now stand to be relied on across the country as a basis on which to re-write the Constitution so as to undermine Canada's exclusive responsibilities to Indigenous Peoples.

## 2. Increased Provincial Power

For Indigenous Peoples, governments, and resource development companies alike, an immediate impact of *Tsilhqot'in* and *Grassy Narrows* will be the significant expansion of provincial authority to legislate in ways that could infringe the rights of Indigenous Peoples. By narrowing the operation of interjurisdictional immunity in respect of section 91(24), the Court also authorized provinces to enact legislation affecting Aboriginal and treaty rights in the absence of federal oversight. This shift stands in direct contradiction of established case law on the role of interjurisdictional immunity and the protection of Aboriginal and treaty rights.

Prior to 2014, the Supreme Court dealt explicitly with the question of provincial access to the infringement/justification regime in *Morris*. There the Court held conclusively that only the federal government could infringe the constitutionally-protected rights of Indigenous peoples.<sup>63</sup>

Implicit in this conclusion was the acknowledgement that provinces are ill-positioned to take the steps necessary to justify infringements of Aboriginal and treaty rights. Unlike the federal government, provinces are closely tied to resource development and face additional and intensive pressures from local populations which militate against upholding the honour of the Crown. The Court's 2014 decisions ignore the inherent conflict which arises when provinces, heavily influenced by economic imperatives, are tasked with justifying infringements resulting from decisions to exploit Indigenous lands.

The *Sparrow/Badger* test is based on the expectation that the manifestation of the Crown burdened with carrying out justification measures will uphold its promises and act honourably. Provinces are under considerable pressure to water down these constitutional obligations. One need only look to the hundreds of court cases launched by Indigenous Peoples across the country challenging decisions

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<sup>62</sup> Reference re Supreme Court Act, ss 5 and 6, 2014 SCC 21, [2014] 1 SCR 43.

<sup>63</sup> *Morris*, supra note 28 at para 55.

affecting Aboriginal and treaty rights for confirmation that the provinces have and are likely to continue to have a particularly poor track record with respect to the infringement of Indigenous Peoples' constitutionally-protected rights. Until 2014, the federal government's exclusive jurisdiction pursuant to section 91(24) acted as a necessary check on provincial power.

The Supreme Court's 2014 decisions suggest a significant expansion of provincial authority, including in respect of provincial property rights. An important pre-2014 corollary of the federal government's exclusive legislative authority pursuant to section 91(24) was the principle that provincial property rights could not trump federal jurisdiction. Instead, the doctrine would operate to curtail the exercise of a province's proprietary interests wherever they resulted in an unacceptable interference with the federal government's exclusive jurisdiction regardless of whether the province exercised its powers pursuant to section 92(13) or another head of provincial power.

As early as 1898 in the *Fisheries Case* the Privy Council confirmed the practical effect of Canada's exclusive jurisdiction under section 91. Based on the division of powers, it was legally permissible for Canada to exercise its exclusive authority in such a way so as to virtually confiscate provincial property:

The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the legislature is elected.<sup>64</sup>

Over 30 years after the *Fisheries Case*, the Supreme Court confirmed in *Reference re Waters and Water-Powers* the same point and observed that there was no legal remedy for a province whose right to the underlying beneficial interest in lands had been rendered practically useless as a consequence of Canada's exercise of exclusive legislative authority:

This, of course, is not to say that the Dominion in exercising its legislative authority under section 91, may not legislate in such a way as to affect the proprietary rights of a province. It is plain that in consequence of legislation on the subject, for example, of Fisheries, the provinces may be very greatly restricted in the exercise of their proprietary rights; but so long as the Dominion legislation truly concerns the subject of "Fisheries," as that subject is envisaged by section 91, such legislation has the force of law, however harmful, or even foolish, it may appear to be. Within the limits of the subject matters assigned to it, the authority of the Dominion is supreme, and no court of justice has jurisdiction to take cognizance of any complaint that such authority has been abused.

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<sup>64</sup> *Attorney-General for the Dominion of Canada v Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia*, [1898] AC 700 (PC) at 713 [*Fisheries Case*].



... the proprietary rights of the provinces may be prejudicially affected, even to the point of rendering them economically valueless, through the exercise by the Dominion of its exclusive and plenary powers of legislation under the enumerated heads of section 91.<sup>65</sup>

Importantly, the reasoning from the *Fisheries Case* and its predecessors was subsequently adopted by the Supreme Court in *Sparrow* in relation to section 91(24).

More recently, the Court continued to recognize that the federal government's exclusive legislative jurisdiction could impose limits on provincial authority over property. For example, the Court in *Lafarge* specifically noted that "Property and Civil Rights in the Province" was subject to the doctrine of interjurisdictional immunity.<sup>66</sup> As such, interjurisdictional immunity would operate to protect the core federal competency even where doing so would limit the exercise of provincial property rights.<sup>67</sup> Prior to 2014 it was apparent that interjurisdictional immunity would continue to uphold exclusive federal legislative responsibility for Aboriginal and treaty rights by limiting the scope of provincial jurisdiction over property. However, rather than maintaining this important constitutional protection, the Supreme Court in *Tsilhqot'in* and *Grassy Narrows* shifted the balance of power dramatically in favour of provincial property authority.

Early decisions since *Tsilhqot'in* and *Grassy Narrows* suggest that courts are relying on the decisions as basis to affirm the expansion of provincial jurisdiction over Aboriginal and treaty rights, and by extension, land and resource development. For example, in 2014 the Federal Court dismissed an application by the Athabasca Chipewyan First Nation (ACFN) challenging the federal government decisions approving the Shell Jackpine project.<sup>68</sup> The Court held that the "federal-provincial distribution of powers limited the Crown's ability to accommodate the ACFN" and that the accommodations sought by the ACFN were outside of the federal Crown's jurisdiction and should be addressed through consultation with Alberta because Alberta enjoyed exclusive jurisdiction over the use of provincial lands.<sup>69</sup> Even the 2016 *Daniels* decision, in which the Court ostensibly expanded the application of section 91(24) to Métis and non-status Indians, is of diminished significance in light of the significant limitations placed on the role of the federal government as a result of *Tsilhqot'in* and *Grassy Narrows*.

The 2014 Supreme Court decisions leave unanswered questions regarding the regulation of Indigenous lands and rights and what role, if any, remains for

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<sup>65</sup> *Reference re: Waters and Water-Powers*, [1929] SCR 200 at 212, 219, [1929] 2 DLR 481.

<sup>66</sup> *Lafarge*, *supra* note 22 at para 4.

<sup>67</sup> *Ibid*; *Fisheries Case*, *supra* note 64; *Reference re Waters and Water-Powers*, *supra* note 65.

<sup>68</sup> *Adam v Canada (Environment)*, 2014 FC 1185 [Adams]. See also *Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2014 SKQB 327, in which the Court held at para 117 that post-*Tsilhqot'in*, provinces could now infringe Aboriginal rights subject only to the *Sparrow/Badger* infringement analysis.

<sup>69</sup> *Adam*, *supra* note 68 at paras 92, 94.

section 91(24). In particular, the Court's conclusion that *Morris* is no longer valid in relation to interjurisdictional immunity and section 91(24) calls into question whether other decisions on the division of powers and the regulation of Aboriginal and treaty rights remain good law. For example, will the Court's decisions in *Derrickson* and *Paul*, dealing with the right to regulate family property on reserve, still stand?<sup>70</sup> If not, are provinces now entitled to regulate other areas that have always been the within the exclusive purview of the federal government? Does the Court's overruling of *Morris* now mean that its affirmation of the ongoing relevance of interjurisdictional immunity in *Canadian Western Bank* and *Lafarge* are also no longer to be followed? And if this is not the case, has the Court created a double standard wherein it will continue to recognize interjurisdictional immunity in relation to some heads of power but not federal protections for Indigenous Peoples? *Tsilhqot'in* and *Grassy Narrows* are silent on these issues.

Importantly, the provinces might ultimately rue the day the Court changed the law on the division of powers and section 91(24). The corollary of broadened provincial legislative jurisdiction is greater constitutional responsibility. As the Court explained in *Tsilhqot'in*, justifying an infringement of a section 35 right is no easy task. Except for instances where lands are being taken up, i.e. put to a visibly incompatible use, based on *Grassy Narrows* it is now arguable that the provinces must also obtain First Nation consent or justify infringements of treaty rights. It is also arguable that the provinces have clear responsibility for fulfilling outstanding treaty promises and cannot simply hide behind the federal government's inaction. For example, there is no principled reason for the provinces to refuse to negotiate with First Nations for loss of use compensation based on outstanding treaty land entitlements. At a minimum, the cost of enjoying the use and benefit of Crown lands under section 92 of the Constitution should include responsibility for ensuring treaty obligations are promptly fulfilled.

## **B. Cooperative Federalism & Interjurisdictional Immunity**

The Supreme Court's abrupt departure from established case law calls into question how the Court will deal with issues of constitutional interpretation, cooperative federalism and the division of powers in the future. While in recent years the Court has been reluctant to broaden the application of the doctrine of interjurisdictional immunity, it has confirmed that "the text and logic of our federal structure justifies the application of interjurisdictional immunity to certain federal "activities"," and that the doctrine continues to have a role in respect of the proper functioning of the division of powers.<sup>71</sup> There is no explanation in either decision as to why the Court in 2014 chose to ignore its own reasoning and narrow federal exclusivity pursuant to section 91(24).

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<sup>70</sup> The 2014 decisions also raise the related issue of how paramountcy will operate, particularly in the context of reserves and modern treaties where issues such as zoning arise.

<sup>71</sup> *Canadian Western Bank*, *supra* note 11 at para 42.

In addition, the decisions are counter to principles of cooperative federalism which have been expressly endorsed by the Court. In recent decisions the Court has emphasized an approach to federalism which “accommodates overlapping jurisdiction and encourages intergovernmental cooperation.”<sup>72</sup> Cooperative federalism requires a balance between federal and provincial jurisdiction which “allows the federal Parliament and the provincial legislatures to act effectively in their respective spheres.”<sup>73</sup> In *Tsilhqot'in* and *Grassy Narrows* the Court was presented with an opportunity to embrace an inclusive form of cooperative federalism which includes a role for both federal and provincial jurisdictions in respect of Aboriginal and treaty rights. In *Grassy Narrows*, for example, Wabauskang argued that viable options existed for Canada and Ontario to exercise their respective constitutional powers over treaty rights and forestry “harmoniously, in the spirit of cooperative federalism”<sup>74</sup> provided that there was sufficient political will, intergovernmental cooperation, and legislative and regulatory drafting to “embrace the principles of flexible, cooperative federalism.”<sup>75</sup> Such an approach would have preserved the role of section 91(24) while leaving the door open for the valid exercise of provincial authority. Instead, the Court chose to return to Lord Atkin’s “water-tight compartments” approach in relation to sections 92(5) and 92A of the Constitution by completely removing the federal government’s exclusive responsibilities in favour of expanded provincial jurisdiction.<sup>76</sup>

In rejecting cooperative federalism, the Court also ignored the fact that workable examples exist which respect the division of powers and preserve interjurisdictional immunity. For example, since 1898, the federal and provincial governments have worked together to respect the division of powers in the fisheries context to develop and implement a workable regulatory scheme.<sup>77</sup> The regulatory scheme has been recognized by the courts as a constitutionally-valid example of cooperative federalism.<sup>78</sup> A similar arrangement exists in respect of provincial

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<sup>72</sup> *Reference re Securities Act*, 2011 SCC 66 at para 57, [2011] 3 SCR 837 [*Reference Re Securities Act*].

<sup>73</sup> *Grassy Narrows*, *supra* note 1 (Factum of the Appellant Wabauskang at para 88); see also *Reference re Securities Act*, *supra* note 72 at paras 7, 9.

<sup>74</sup> *Ibid.*

<sup>75</sup> Kerry Wilkins, “Dancing in the Dark: Of Provinces and Section 35 Rights After 2010” (2011) 54 SCLR (2d) 529 at 556.

<sup>76</sup> *Attorney-General for Canada v Attorney-General for Ontario*, [1937] AC 326 at 354.

<sup>77</sup> Following the decision in the *Fisheries Case*, Parliament enacted fisheries legislation and included provisions that enabled the Governor in Council to make fisheries regulations in relation to each province. See section 43(1) of the *Fisheries Act*, RSC 1985, c F-14. These regulations sub-delegate to provincial Ministers the administration of the regulations. For instance, in Ontario the relevant legislation is the *Ontario Fishery Regulations, 2007*, SOR/2007-237. The *Ontario Fishery Regulations* are administered by the Ministry of Natural Resources under the *Fish and Wildlife Conservation Act, 1997*, SO 1997, c 41, and its regulations. The validity of this sub-delegation was upheld by both the Ontario Court of Appeal and the Supreme Court of Canada in *Re Peralta et al and The Queen in right of Ontario et al, Peralta et al v Warner et al* (1985), 49 OR (2d) 705, 1985 CanLII 2082 (Ont CA), *aff’d* in *Peralta v Ontario*, [1988] 2 SCR 1045, 66 OR (2d) 543.

<sup>78</sup> *Jackson v Ontario (Natural Resources)*, 2009 ONCA 846 at para 7.

enforcement of the provisions of federal legislation regarding migratory birds.<sup>79</sup> In both cases, the federal and provincial governments can legislate pursuant to valid constitutional authority provided that one does not unacceptably interfere with the other. The same opportunity existed in *Grassy Narrows* and *Tsilhqot'in* to develop cooperative schemes which would allow the provincial and federal governments to legislate within their own respective constitutional spheres while maintaining federal exclusivity in respect of section 91(24). Notably, in other recent decisions the Court has continued to acknowledge the importance of cooperative federalism outside the context of section 91(24). In its 2015 decision regarding the federal long-gun registry, for example, the Court expressly endorsed the principles of cooperative federalism as a means “to facilitate interlocking federal and provincial legislative schemes” and to “justify relaxing a rigid, watertight compartments approach to the division of legislative power.”<sup>80</sup> The Court’s affirmation of the importance of cooperative federalism in relation to the long-gun registry makes its rejection of these principles in respect of section 91(24) all the more anomalous.

The Court’s decision to overrule preceding decisions on the division of powers and interjurisdictional immunity without a reasoned explanation is surprising. The Court has been clear in previous decisions that while it is possible for the Court to overrule its own precedent, it will not do so lightly. In 2011 Rothstein J explained that “in order to overrule its own precedent, the Court must be satisfied, based upon substantial reasons, that the precedent was wrongly decided” and that “[t]here must be compelling reasons to justify overruling.”<sup>81</sup> The 2014 decisions overrule a key aspect of *Morris* and call into question numerous other decisions of the Court but are silent on why provinces are now authorized to regulate Aboriginal and treaty rights and apply what would be otherwise inapplicable legislation.

## V. CONCLUSION

Prior to 2014, the Court repeatedly confirmed the ongoing relevance and importance of interjurisdictional immunity, including with respect to section 91(24). In *Tsilhqot'in* and *Grassy Narrows*, however, the Court carved out an exception to its long-standing application of constitutional principles by narrowing federal exclusivity in relation to Aboriginal and treaty rights in favour of significantly expanded provincial property rights. By doing so, the Court ignored the historical and continuing importance of Canada’s responsibilities under section 91(24) and the promises made to Indigenous Peoples by the English Court of Appeal at the time the Constitution was repatriated. Going forward, it remains unclear how the Court will approach the division of powers and what preceding decisions remain good law in respect of interjurisdictional immunity and section 91(24). For Indigenous Peoples,

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<sup>79</sup> *Migratory Birds Convention Act, 1994*, SC 1994, c 22; *Migratory Birds Regulations*, CRC, c 1035; *Fish and Wildlife Conservation Act, 1997*, SO 1997, c 41.

<sup>80</sup> *Quebec (AG) v Canada (AG)*, 2015 SCC 14 at para 17, [2015] 1 SCR 693.

<sup>81</sup> *Ontario (AG) v Fraser*, 2011 SCC 20 at para 130, [2011] 2 SCR 3.

the decisions mean they must now deal with the prospect of provincial governments attempting to justify decisions that infringe Aboriginal and treaty rights.