

**ABORIGINAL PEOPLES, BRITISH COLUMBIA & CANADA:
THE CONSTITUTIONAL DIVISION OF
LAND INTERESTS & LEGISLATIVE POWERS**

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I. Introduction

This paper is designed to provide the basic Constitutional background for today's conference entitled *Making or Breaking the Treaty Process: The Constitutional Status of Treaty Settlement Land*. Part II outlines the Constitutional division of property interests in land as between the Aboriginal peoples of British Columbia, the Province of British Columbia and Canada. Similarly, Part III discusses the Constitutional division of legislative powers regarding land as between these parties. Part IV briefly touches on the policy considerations behind these divisions. Part V notes some related legal issues in the developing case law.

II. The Constitutional Division of Property Interests in Land

Aboriginal Peoples

The prior occupation of British Columbia by Aboriginal peoples is what gives rise to Aboriginal title in law.¹ In particular, an Aboriginal people holds Aboriginal title to the land it exclusively occupied at 1846, the time of British Crown sovereignty over what became British Columbia.² The Supreme Court of Canada has held that the British Crown's recognition and affirmation of Aboriginal rights in section 35(1) of *Constitution Act, 1982* included a recognition and affirmation of this Aboriginal title interest in land.³ Section 35(1) reads:

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

The Province

As with all land tenures, underlying an Aboriginal peoples' Aboriginal title to land is a title the British Crown gained at law with its assertion of sovereignty over the lands of British Columbia in 1846.⁴ Section 109 of *Constitution Act, 1867* allocated this underlying title to the Province when British Columbia was admitted into Canada in 1871.⁵ The Supreme Court of Canada has confirmed that under s. 109 Aboriginal title is an interest in land other than the underlying title interest belonging to the Province.⁶ Section 109 reads:

109. All Lands... belonging to the several Provinces of Canada . . . at the Union . . . shall belong to the several Provinces . . . subject to . . . any Interest other than that of the Province in the same.

¹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 114.

² *Delgamuukw*, *supra*, at para. 143, 145; *Haida Nation*, [2004] 3 S.C.R. 511, at para. 65.

³ *Delgamuukw*, *supra*, at para. 133.

⁴ *Delgamuukw*, *supra*, at para. 145.

⁵ *Delgamuukw*, *supra*, at para. 175.

⁶ *Ibid.*

Canada

The federal Crown's Constitutional interest in lands is very limited. Section 117 of *Constitution Act, 1867* grants Canada a right to assume any lands for the limited purpose of national defense. Section 108 of *Constitution Act, 1867* provides that Canada has a proprietary interest in only certain enumerated lands (e.g. lands for carrying on customs and postal services or required for national defense). These enumerated lands do not include Aboriginal title lands.⁷

Thus, the Constitutional division of property interests in land can be expressed as follows. But for the limited federal Crown lands falling under sections 108 or 117 of *Constitution Act, 1867*, the Crown's entire beneficial interest in lands within British Columbia belongs to the Province, and is subject to the Aboriginal title interests of the Aboriginal peoples' of British Columbia, per s. 109 of *Constitution Act, 1867*.⁸

III. The Constitutional Division of Legislative Powers Regarding Lands

Aboriginal Peoples

Aboriginal title to land originates in part from an Aboriginal people's systems of law, including any laws regarding land use, existing prior to the assertion of British sovereignty.⁹ The law of Aboriginal title provides present-day protection to these pre-existing systems of Aboriginal law making as part of its protection of the historic patterns by which an Aboriginal people occupied land.¹⁰ It is through its legal systems that an Aboriginal people collectively exercises its right to choose what uses its Aboriginal title lands can be put.¹¹ Hence, the recognition and affirmation of Aboriginal title under s. 35 of *Constitution Act, 1982* essentially protects an Aboriginal people's legislative power regarding its Aboriginal title lands.

The Province

The Crown's legislative power regarding lands within the province is divided between the Parliament of Canada and Legislature of British Columbia by sections 91 and 92 of *Constitution Act, 1867*. Section 92 provides the Province with substantial legislative power:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

13. Property and Civil Rights in the Province.

⁷ *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46 (J.C.P.C), at pp. 56-59.

⁸ *Ibid.*

⁹ *Delgamuukw, supra*, at paras. 114, 126 and 147-148.

¹⁰ *Ibid.*, at para. 126.

¹¹ *Ibid.*, at para. 115, 118-119 and 166.

Section 92A of *Constitution Act, 1867* also expressly provides the Province with exclusive power to make laws regarding the non-renewable natural resources and forestry resources in the province.

Canada

However, since British Columbia's admission into Confederation in 1871, the Crown power to legislate in relation to "Indians, and Lands reserved for the Indians" has been exclusively vested with the federal government by virtue of s. 91(24) of the *Constitution Act, 1867*.¹² Section 91(24) reads:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

24. Indians, and Lands reserved for the Indians.

This federal jurisdiction regarding "...Lands reserved for the Indians" is not limited to reserve lands administered under the *Indian Act*.¹³ Section 91(24) of *Constitution Act, 1867* carries with it the Crown's jurisdiction to legislate in relation to Aboriginal title lands.¹⁴ Aboriginal rights, including Aboriginal title, are at the core or heart of s. 91(24) such that they are protected from intrusion by provincial laws.¹⁵

IV. Policy Considerations Behind Constitutional Divisions

This granting of s. 91(24) powers to Canada under *Constitution Act, 1867* reflects a continuation of the British Crown's Indian land policy dating back to the *Royal Proclamation of 1763*.¹⁶ By this policy the British Crown sought to ensure a future of security for expanding British settlement in North America by minimizing potential conflict between settlers and Indians.¹⁷ It did so in part by protecting Indian nations from being disturbed in the possession of their lands by the legislative measures of local governments.¹⁸ This proven British policy, born of both

¹² *Ibid*, at para. 173.

¹³ *Delgamuukw, supra*, at para. 174.

¹⁴ *Ibid*.

¹⁵ *Ibid*, at paras. 178, 181. See also *Canadian Western Bank v. Alberta*, 2007 SCC 22, at paras.40-41, and 60-61.

Likewise, see generally *R. v. Morris & Olsen*, 2006 SCC 59, and particularly at paras. 41-43, regarding treaty rights.

¹⁶ *Province of Ontario v. Dominion of Canada* (1909), 42 S.C.R. 1, at pp. 103-104, aff'd [1910] A.C. 637, at pp. 646-647.

¹⁷ *R. v. Marshall & Bernard*, 2005 SCC 43, at para. 95. Similarly, see *Canadian Western Bank v. Alberta*, 2007 SCC 22, at paras. 60-61.

¹⁸ *R. v. Marshall & Bernard, ibid; The Royal Proclamation of 1763*. Similarly, see *Canadian Western Bank v. Alberta, ibid*, and at paras. 40-41.

prudence and justice, was continued in 1867 through s. 91(24) as the authors of Confederation anticipated the expansion of Canada westward from Ontario into the unsundered territories of potentially hostile Indian nations, including those in the Colony of British Columbia.¹⁹

V. Related Legal Issues in the Developing Case Law

Despite the above-mentioned law and policy regarding Aboriginal title and s. 91(24) of *Constitution Act, 1867*, there are related legal issues that may remain to be resolved by the developing case law. Some of these legal issues arguably stem from the Supreme Court of Canada commentary in *Delgamuukw* regarding provincial infringement of Aboriginal title:

160 The Aboriginal rights recognized and affirmed by s. 35(1), including Aboriginal title, are not absolute. Those rights may be infringed, both by the federal (e.g., *Sparrow*) and provincial (e.g., *Côté*) governments. ...

If s. 91(24) of *Constitution Act, 1867* provides the exclusive federal jurisdiction to legislate in relation to Aboriginal title, how can provincial governments infringe Aboriginal title? Does provincial legislation infringe Aboriginal title by applying directly to it? If not, does provincial legislation infringe Aboriginal title by applying indirectly through s. 88 of the *Indian Act* or some future federal legislation? Section 88 of the *Indian Act* reads:

88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, ...

In the current Tsilhqot'in Aboriginal title trial of *William v. British Columbia*, Victoria Registry No. 90 0913 (B.C.S.C.), the Province has plead that the provincial *Forest Act* applies directly to any such title lands claimed. Alternatively, the Province says that the *Forest Act* was incorporated into federal law and made applicable by s. 88 of the *Indian Act*. Final argument on these issues occurred in early 2007. Judgment is expected in late 2007.

¹⁹ *Province of Ontario v. Dominion of Canada* (1909), 42 S.C.R. 1, per Idington J. at pp. 103-105, 106-107 and 117, and per Duff J. and MacLennan J. at pp. 124-125, aff'd [1910] A.C. 637, at pp. 646-647. Provision was made for the expansion of Canada to British Columbia in s. 146 of *Constitution Act, 1867*.