The Withering of Section 91(24): Is There A "Core Of Indianness" Anymore?

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A. Introduction

Section 91 (24) of the *Constitution Act of 1867* confers on Parliament jurisdiction over "Indians and Lands reserved for the Indians." This section has been held to authorize Parliament to pass laws directly in relation to Aboriginal people. Therefore, provincial governments are not entitled to pass legislation directly in relation to Indians or lands reserved for Indians. However, provinces are entitled to pass legislation with a valid provincial purpose, governing Aboriginal peoples so long as the legislation does not interfere with the purpose of the Federal jurisdiction.

The Federal Government's powers over provincial legislation are founded in the doctrine of interjurisdictional immunity ("IJI"). The IJI allows certain provincial laws to be deemed inapplicable to "Indians, and Lands reserved for Indians" when those laws significantly interfere with Aboriginal rights and the core federal powers found in section 91(24). The IJI is about jurisdiction: what matters is whether a valid provincial law "affects" the core of a federal head of legislative power. The test for immunity should therefore be focused not on a specific activity or operation and on whether that activity or operation is immune from the provincial law; rather, its focus should be on whether the federal power in question is immune from the application of the provincial law.[1] In order to establish the relationship between the impugned provisions and the relevant sources of legislative power, a pith and substance analysis must be conducted. This analysis involves categorizing the impugned provisions, and examining both the purpose and effect of the legislation.[2]

In the *NIL/TU'O* case, Chief Justice McLachlan provides a useful summary of what is encompassed in this core of Indianness:

[1] *British Columbia (Attorney General) v. Lafarge Canada Inc.* 2007 SCC 23.
[2] *Kitkatla Band v. British Columbia (Minister of Small Business and Tourism and Culture)*, 2002 SCC 31.

> It follows that a provincial law of general application will extend to Indian undertakings, businesses or enterprises, whether on or off a reserve, *ex proprio vigore* and by virtue of s. 88 of the *Indian Act*, R.S.C. 1985, c. I-5 , *except* when the law impairs those functions of the enterprise which are intimately bound up with the status and rights of Indians. The cases illustrate matters that may go to the status and rights of Indians. These include, *inter alia*:
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> - Indian status: *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751…;
> - The "relationships within Indian families and reserve communities": *Canadian Western Bank*, at para. 61;
> - "[R]ights so closely connected with Indian status that they should be regarded as necessary incidents of status such for instance as registrability, membership in a band, the right to participate in the election of Chiefs and Band Councils, reserve privileges, etc.": *Four B*, at p. 1048;
> - The disposition of the matrimonial home on a reserve: *Paul v. Paul*, [1986] 1 S.C.R. 306;
> - The right to possession of lands on a reserve and, therefore, the division of family property on reserve lands: *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, at p. 296;
> - Sustenance hunting pursuant to Aboriginal and treaty rights, such as the killing of deer for food…
> - The right to advance a claim for the existence or extent of Aboriginal rights or title in respect of a contested resource or lands: *Delgamuukw* …; and
> - The operation of constitutional and federal rules respecting Aboriginal rights: *Paul v. British Columbia*, among others.[3]

Subsequent cases have narrowed this list or completely ignored it.

The fact that Parliament has authorized the application of certain provincial laws that intrude on federal authority over Indians, however, does not insulate such laws from the dictates of subsection 35(1) of the *Constitution Act,* which recognizes and affirms existing Aboriginal and Treaty rights. However, allowing provincial laws to intrude on Federal authority decreases the responsibilities of the Federal government.

There has been an increasing trend in the courts and through legislative regimes that the core of section 91(24) has been slowly eroded, further shrinking the federal government's

[3] *NIL/TU,O Child and Family Services Society v. B.C.G.E.U.*, 2010 SCC 45 at para. 71

constitutional responsibilities. The purpose of this paper is to provide a critical analysis of some cases and legislation or policy means that are withering the section 91(24) responsibilities of the Federal government.

B. Overarching Principles

The starting point in this discussion is the Royal Proclamation, 1763 (the "Proclamation") which provides a broad view over the responsibilities of the Crown over Indians and Lands reserved for Indians. The Proclamation sets out guidelines for European settlement of Aboriginal territories in North America and recognized the importance of existing treaties and other agreements. The Proclamation states:

> WHEREAS great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests and to the great Dissatisfaction of the said Indians: In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where We have thought proper to allow Settlement…

The Proclamation is the source of the surrender/designation provisions that found their way into the Indian Act. The Proclamation recognized that the Crown and only the Crown could acquire an interest in Aboriginal Title lands. Thus, it was Her Majesty who took on responsibilities of protecting Indians and their interests in lands. Treaties were the means by which the Crown could acquire Aboriginal title. While First Nations may view the Proclamation as paternalistic document, it is the genesis of the Crown's fiduciary duty.

The need to protect Indians from the wants and desires of the local population is re-established in the division of powers. The *Constitution Act, 1867* provides the responsibilities under the proclamation to the Federal government. Pursuant to its section 91(24) powers, the Federal government enacted the *Indian Act,* (the "Act") to carry out its constitutional

responsibilities. Aboriginal Affairs and Northern Development Canada ("AANDC") administers the *Act.*

In 1969, the Prime Minister and the Minister of Indian Affairs unveiled a policy paper that was intended to dismantle the *Act* and effectively end the federal government's section 91(24) responsibilities (the "White Paper"). In the statement of the Government of Canada on Indian Policy, the Honourable Jean Chrétien stated:

> Not always, but too often, to be an Indian is to be without - without a job, a good house, or running water; without knowledge, training or technical skill and, above all, without those feelings of dignity and self-confidence that a man must have if he is to walk with his head held high.
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> All these conditions of the Indians are the product of history and have nothing to do with their abilities and capacities. Indian relations with other Canadians began with special treatment by government and society, and special treatment has been the rule since Europeans first settled in Canada. Special treatment has made of the Indians a community disadvantaged and apart.
>
> Obviously, the course of history must be changed.
>
> To be an Indian must be to be free - free to develop Indian cultures in an environment of legal, social and economic equality with other Canadians.[4]

The goals of the White Paper were to:

- Eliminate Indian status
- Dissolve the Department of Indian Affairs within five years
- Abolish the *Indian Act*
- Convert reserve land to private property that can be sold by the band or its members
- Transfer responsibility for Indian affairs from the federal government to the province and integrate these services into those provided to other Canadian citizens
- Provide funding for economic development

[4] Presentation to the First Session of the Twenty-eighth Parliament, by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development, 1969

- Appoint a commissioner to address outstanding land claims and gradually terminate existing treaties

As one of the most controversial policies on Indians in the history of Canada, Aboriginal leaders adamantly opposed the passage of this policy. Most observers thought it would be left in the dustbin of history. However, recent governments, both liberal and conservative, have through legislation policy and litigation begun to implement some of the White Paper's goals.

C. Legislative Trends

In British Columbia, there has been a legislative trend for the Province and Federal Governments to enter into a variety of agreements with First Nations that implement self-government rights. These agreements are often viewed as a progressive step towards self-determination. However, these agreements should be viewed cautiously, as in combination with other legislative regimes and case law, the fiscal and fiduciary responsibilities that the Federal Government owes to First Nation's are decreased. Examples include:

- BC Treaty Commission process;
- British Columbia Tripartite Framework Agreement on First Nation Health Governance and establishment of the First Nations Health Authority;
- Delegated Child and Family Service Agencies; and
- *First Nations Land Management Act.*

BC Treaty Commission

The Treaty Commission is the independent body responsible for facilitating treaty negotiations among the governments of Canada, British Columbia and First Nations in BC. The BC Treaty Commission establishes a six-step treaty negotiation process to advance treaties of First Nations. While it is difficult to generalize the Treaties negotiated to date, there are certain common elements that First Nations gain a measure of self-government over their

reserves and other lands, known as “treaty settlement lands”, unlike historic treaty lands, they are not section 91(24) lands. In addition, the *Act*, including the sections that benefit First Nations, such as section 87 (taxation) and section 89 (immunities from seizure) no longer apply. Fisheries, a federal responsibility and a matter particularly important to coastal First Nations, do not form part of the treaty, but is a separate document, not protected by section 35.

British Columbia Tripartite Framework Agreement on First Nation Health Governance

As part of the British Columbia Tripartite Framework Agreement on First Nation Health Governance, on October 1st 2013, Health Canada transferred its role in the design, management, and delivery of First Nations health programming in British Columbia to the new First Nations Health Authority (FNHA). The FNHA is mandated by a number of health agreements including the Transformative Change Accord: First Nations Health Plan [2006],Tripartite First Nations Health Plan [2007], and Tripartite Framework Agreement on First Nations Health Governance, they receive federal and provincial health funding to support the planning, design, management and delivery of First Nations Health programs. Health Canada provides block funds to the FNHA, which is then responsible for allocating funds and negotiating funding arrangements directly with First Nations.

Delegated Child and Family Service Agencies

The Ministry of Children and Family Development (“MCFD”) has a variety of initiatives underway to address the number of Aboriginal children in care. These include the development of agreements between the province and First Nations communities to return historic responsibilities for child protection and family support to Aboriginal communities. These agreements are known as delegation agreements.

Through delegation agreements, the Provincial Director of Child Protection (the “Director”) gives authority to Aboriginal agencies, and their employees, to undertake administration of

all or parts of the *Child, Family and Community Service Act* ("CFCSA"). The amount of responsibility undertaken by each agency is the result of negotiations between MCFD and the Aboriginal community served by the agency, and the level of delegation provided by the Director. The Government of Canada provides funds for any children in care who are ordinarily resident on reserve, but these amounts are based on the delegation of the agency and the care needs of the child. Often the care-needs of children are underestimated by federal government funding policies and the agencies are funded at a rate that does not correspond with the needs of the communities. The First Nations Caring Society of Canada and the Assembly of First Nations brought forward a complaint to the Canadian Human Rights Commission ("CHRC") alleging that the inadequate funding to First Nations agencies had resulted in over-representation of Aboriginal children in care and amounted to systemic discrimination. The CHRC has yet to provide its decision on the complaint.

Currently, there are 22 delegated agencies in British Columbia. One is in a start-up phase; three can provide voluntary services and recruit and approve foster homes; 11 have the additional delegation necessary to provide guardianship services for children in continuing care; and nine have the delegation required to provide, in addition to the above, full child protection, including the authority to investigate reports and remove children. Those with the full delegation effectively have all the powers of the Director under the CFCSA.

First Nations Land Management Act

The *First Nations Land Management Act* ("FNLMA") is a federal law enacted in 1999. It provides signatory First Nations with the authority to make laws in relation to reserve lands, resources and the environment. Interested First Nations must sign a Framework Agreement as the first step to assume control over its reserve lands. Under the FNLMA, the *Indian Act* provisions relating to land management no longer apply once a First Nation has enacted and ratified its land code.

First Nations under FNLMA have the authority to create their own system for making reserve land allotments to individual First Nation members. They also have authority to deal with matrimonial real property interests or rights. While AANDC provides funding to First Nations for delivery of land management services, it is formula-based and many First Nations find themselves operating at a deficit. First Nations with complex land issues do not obtain funding from AANDC. Importantly, the FNLMA also has the effect of relieving the federal government from its fiduciary duty responsibilities to manage reserve lands. While some First Nations have flourished under FNLMA, others continue to struggle with long outstanding land issues that they have inherited from AANDC.

D. Selected Case Law

Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010

Delgamuukw is an important decision not only for its analysis of Aboriginal title but also for its comments on division of powers. The case confirmed federal jurisdiction over Aboriginal title lands, relying on the previous court Supreme Court of Canada decision in *Guerin.*[5]

The action was commenced by the appellants, who are all Gitksan or Wet'suwet'en hereditary chiefs, who, both individually and on behalf of their "Houses" claimed separate portions of 58,000 square kilometres in British Columbia. For the purpose of the claim, this area was divided into 133 individual territories, claimed by the 71 Houses. This represents all of the Wet'suwet'en people, and all but 12 of the Gitksan Houses. Their claim was originally for "ownership" of the territory and "jurisdiction" over it. (At this Court, this was transformed into, primarily, a claim for aboriginal title over the land in question.) The Province of British Columbia counterclaimed for a declaration that the appellants have no right or interest in

[5] *Guerin v. The Queen*, [1984] 2 S.C.R. 335

and to the territory or alternatively, that the appellants' cause of action ought to be for compensation from the Government of Canada.[6]

Chief Justice Lamer concluded with two remarks. First, separating federal jurisdiction over Indians from jurisdiction over their lands is not consistent with the Federal government's primary constitutional responsibilities for securing the welfare of Canada's aboriginal peoples. Therefore, the Federal government would be unable to safeguard one of the most central of native interests — their interest in their lands.

Second, with respect to the question of jurisdiction over aboriginal title, Lamer states the same reasoning applies to jurisdiction over any aboriginal right which relates to land. The relationship with land, is equally fundamental to aboriginal peoples and, for the same reason that jurisdiction over aboriginal title must vest with the federal government, so too must the power to legislate in relation to other aboriginal rights in relation to land.[7]

***NIL/TU'O Child and Family Services Society v. B.C.G.E.U.*, 2010 SCC 45**

NIL/TU'O is a delegated child family service agency, which operates pursuant to the CFCSA. The employees of *NIL/TU'O* sought to unionize. The question for the court was whether they were governed by the federal labour legislation or the provincial labour regime. The federal government supported the province's position that the provincial law applied.

The court held that the provincial regime applied. While on the face of it, the case is simply about labour relations, a point that the majority decision took pains to emphasize. However, it is an example of the withering of the "core of Indianness" and the rejection of IJI.

The majority held that in determining the validity of the legislation related to labour relations the court must follow two steps. The first step, the "functional test", inquires into "the nature, habitual activities and daily operation of the entity in question to determine to determine

[6] *Delgamuukw,* at para. 7
[7] *Delgamuukw* at para. 176.

whether it constitutes a federal undertaking".[8] The second "interjurisdictional immunity" test, determines if the provincial law would impair the "core" of the federal power. This step is only necessary if the result of the functional step were inconclusive.

The court found the activities and operation of the agency were mandated by provincial legislation and integrated into the provincial welfare system. It was clear that under the "functional test" labour relations were under provincial jurisdiction so that it was not necessary to go to the second step to inquire where the "core of the federal power was affected.

The ultimate effect of this case is that it implicitly allows the federal government to shirk its responsibility under section 91(24) to "Indians". If child welfare is a provincial responsibility and not within the "core of Indianness" on what legal basis was the federal government operating under to justify residential schools and the "Sixties scoop."

***Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44**

Tsilhqot'in is an extremely important decision as it is the first declaration of Aboriginal title for a First Nation in Canada. Fundamentally, the Supreme Court of Canada's decision overturns the Court of Appeal's narrow view of Aboriginal title being limited to instances of intensive, site-specific occupation and restores the trial judge's view that Aboriginal title exists on a territorial basis.[9]

However, the court has further diminished the scope of the core of Indianness. The court used the opportunity to clarify the application of interjurisdictional immunity claiming that it is following *Delgamuukw* when in fact the decision directly contradicts it.

The court clearly states the doctrine of interjurisdictional immunity should not be applied in cases where lands are held under Aboriginal title. In seeking to simplify the law, the court

[8] *NIL/TU'O* at para. 3.
[9] *Tsilhqot'in* at paras. 27-29 and 56.

ignored a significant body of law which it summarized in NIL/TU'O regarding the core of Indianness.

The court held that the proper approach is to apply the s. 35 *Sparrow*. Provincial laws of general application, including the *Forest Act*, should apply to Aboriginal title lands unless they are unreasonable, impose a hardship or deny the titleholders their preferred means of exercising their rights, and such restrictions cannot be justified pursuant to the justification framework outlined above. The result is a balance that preserves the Aboriginal right while permitting effective regulation of forests by the province, as required by s. 35 of the *Constitution Act, 1982* .[10]

The effects clearly dismisses the logic of *Delgammuukw* that Aboriginal title and Aboriginal rights form part of the core and indicate that IJI is no longer a constitutional resource to rely upon for cases involving Aboriginal title; any discrepancies should be resolved pursuant to an aboriginal rights framework. Although the long-term implications of this decision are yet to be seen what we can gain from this is yet another decision where the federal government responsibilities towards Indians and Lands reserved for Indians has withered.

***Grassy Narrows Frist Nation v. Ontario (Natural Resources)*, 2014 SCC 48**

Grassy Narrows may be the final nail in the IJI coffin. The issue in *Grassy Narrows* was around the "taking up" clause in Treaty No. 3. The numbered treaties throughout Canada contain similar language to that found in Treaty No. 3, which allows the Crown to take up land, while guaranteeing to its First Nations' signatories the continued right to pursue their "usual vocations of hunting, fishing and trapping. The issue in the case was not how to reconcile the competing rights, but which level of government had the authority to take up lands, given the language of the Treaty.

[10] *Tsihlqot'in* at para 151.

The Supreme Court of Canada unanimously confirmed that Ontario has the authority to "take up" Treaty 3 lands for matters falling under its constitutional jurisdiction provided that it adequately consults and accommodates treaty rights holders. Ontario's constitutional jurisdiction, the text of Treaty 3, and legislation dealing with Treaty 3 lands all support this conclusion. The decision will likely inform the nature of provincial consultation and accommodation where provincial activity deals with treaty rights on provincial Crown lands.

In 1997, Ontario issued a forestry licence to a pulp and paper manufacturer to clear-cut lands in the Keewatin area of the Treaty 3 territory. In 2005, Grassy Narrows challenged the licence for violating their harvesting rights under Treaty 3.[11] The trial judge held that the taking up clause in Treaty 3 required a two step process whereby Ontario could not limit the harvesting rights of treaty holders without first obtaining federal approval. Second, the doctrine of interjurisdictional immunity restrained Ontario from justifiably infringing treaty rights.[12] The Court of Appeal reversed the decision of the trial judge by holding that Ontario does not require federal approval to take up lands in the Keewatin area, as it has exclusive jurisdiction to manage and sell lands within the Keewatin area.

The Supreme Court of Canada held that while Ontario may take the benefits of the Treaty, it is also burdened by Crown obligations towards Aboriginal people. When dealing with Aboriginal interests the province is subject to the fiduciary duties of the Crown and must uphold the honour of the Crown.[13] For land to be taken up under Treaty 3 in accordance with these principles and to avoid breaching Treaty 3 harvesting rights, the province must meet the conditions set out in the Supreme Court decision of *Mikisew Cree*.[14] Ontario is obligated to consult and, if appropriate, accommodate First Nation's interests before it acts. The taking up

[11] *Grassy Narrows* at para 18.
[12] *Grassy Narrows* at para. 21.

[13] *Grassy Narrows* at para. 50.
[14] *Grassy Narrows* at para. 37.

cannot deprive the treaty right holders of the meaningful right to hunt, fish or trap in relation to the territories where those activities were traditionally carried out.[15]

In conformity with the *Tsilhqot'in* decision, the Court held that Ontario is not precluded from justifiably infringing treaty rights because of interjurisdictional immunity. If the taking up of Keewatin lands constitutes a breach of Treaty 3, it may be justified if it meets the criteria discussed in the *Sparrow/Badger* analysis under s. 35 of the *Constitution Act*, *1982.* [16]

In each of the cases above, the federal government supported the positions of the provinces that federal jurisdiction under section 91(24) was extremely limited and that provincial laws ought to apply. The result is that the section 91(24) reference to "lands reserved for Indians" now effectively is limited to reserve lands, while the government continues to take steps to further diminish its responsibilities to "Indians" as well.

E. Cases to Watch For

Site C Clean Energy Project

The Site C Clean Energy Project (Site C) is a proposed third dam and hydroelectric generating station on the Peace River in northeast B.C. Approved by the Province of BC in October, 2014, construction of the project is expected to begin in the summer of 2015.

On December 22, 2014 Prophet River First Nation, West Moberly First Nations and McLeod Lake Indian Band filed a petition in the Supreme Court of British Columbia challenging the Minister of Forests, Lands and Natural Resources Operations and Minister of environment ("the Ministers") issue of the Environmental Assessment Certificate Approving the Site C Clean Energy project. This proceeding is being currently being heard with arguments to close on May 6, 2015.

[15] *Grassy Narrows* at para. 52.
[16] *Grassy Narrows* at para. 53.

The same First Nations and Doig River First Nation also filed a Notice of Application in the Federal Court on November 5, 2014 challenging the decision statement of the Federal Minster of the Environment issued under Section 54 of the *Canadian Environmental Assessment Act*. This proceeding will be heard in July, 2015.

In both proceedings the First Nations argue that the approval of the Project infringes their treaty rights, that the consultation and accommodation was inadequate and that the Ministers abused their discretion in issuing the approvals. The case is not a section 91(24) case, but addresses the content of the Crown's duty to consult and accommodate in the case of the numbered treaties as well as whether the Crown must consider the potential infringement of the treaty rights when issuing an approval for a project.

The key legal issue is the interpretation of paragraph 48 of the *Mikisew* case, cited in obiter, in *Grassy Narrows*. That paragraph provides:

> The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over *its* traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.[17]

The Crown has taken the position that the meaning of this paragraph has been that there can be no infringement of treaty right until such time as there is no meaningful right to hunt (or fish or trap depending on the circumstances) throughout the whole of the First Nation's traditional territory. Effectively, the provincial Crown may extinguish the right by taking up land, something that it cannot do by legislative means. The First Nations' take the position that this cannot be the meaning either of the Treaty that they negotiated nor what the Court intended. If the Crown's position is accepted it will have huge implications for First Nations under the numbered treaties. Effectively, the substantive rights will be stripped of any

[17] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69

meaning and all the First Nation will be able to rely upon is their procedural right of consultation.

Daniels v. Canada – To be heard October 2015

In October, 2015 the Supreme Court of Canada will hear arguments that will lay to rest the issue of whether non-status Indians and Métis people are "Indians" for the purpose of s. 91(24) of *Constitution Act, 1867*.

The Federal Court had concluded that Métis and non-status Indians were included in that category, giving them access to a number of benefits that were previously only available to status Indians.[18] On appeal, the Federal Court of Appeal narrowed that interpretation to include only the Métis.

The Federal Court of Appeal found that the Métis people of Canada are indeed Indians for the purposes of section 91(24).[19] The court held that section 91(24) is not a race-based head of power. Unlike the trial judge, the Federal Court of Appeal interpreted section 91(24) to require that "Métis" mean more than mere racial connections to Indian ancestry. Rather, it is the specific ethnic and cultural ancestry that defines the Métis people separately from Indian peoples, per the jurisprudence from the Supreme Court of Canada starting in *R. v. Powley*.[20] The *Powley* criteria are inconsistent with a race-based definition of Métis.[21] Instead, Métis Aboriginal heritage or indigenousness is based upon self-identification and group recognition as Métis, not First Nations.[22] The court found that the Métis have their own language, culture, kinship connections and territory, all of which make the Métis one of the Aboriginal peoples of Canada.[23] In this respect, the Federal Court of Appeal reconciled the interpretation of

[18] See the lower court decision at 2013 FC 6
[19] *Daniels*, paras 130-147
[20] See *R. v. Powley*, 2003 SCC 43
[21] *Daniels*, para. 99
[22] *Daniels*, para. 108
[23] *Daniels*, paras. 96-97

section 91(24) of the *Constitution Act, 1867* with section 35(1) of the *Constitution Act, 1982* which explicitly refers to three Aboriginal peoples of Canada – Indians, Inuit and the Métis.

However, the Federal Court of Appeal did not declare that non-status Indians were also Indians under section 91(24), overturning the decision of the trial judge on this point. The Federal Court of Appeal held that the declaration sought with respect to the non-status Indians would be too generic to have "utility". The court did not rule out that some non-status Indians could be Indians under section 91(24) but held that such a declaration would require an analysis of the reason why each particular group of non-status Indians was excluded from the *Indian Act* on a case by case basis in order to determine if that exclusion was invalid due to section 91(24).[24]

The hearing is set for October 8, 2015. If the court supports the proposition that the Métis and Non-Status Indians fall within the jurisdiction of section 91(24), the ever restricting responsibilities of the Federal government will expand exponentially. This will have interesting consequences for the Federal government as we have demonstrated there has been a selective off loading of this responsibility over the past century.

[24] *Daniels*, paras. 78-79