Court File No. 34986

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

ROGER WILLIAM, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations Government and on behalf of all other members of the Tsilhqot'in Nation,

APPELLANTS,

- and -

HER MAJESTY THE QUEEN in right of the Province of British Columbia and the Regional Manager of the Cariboo Forest Region,

RESPONDENTS,

- and -

THE ATTORNEY GENERAL OF CANADA,

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PART I

OVERVIEW OF ARGUMENT AND STATEMENT OF FACTS

1. Introduction

1. The Attorney General of Manitoba ("Manitoba") intervenes further to an Order of the Chief Justice dated March 15, 2013 stating two Constitutional Questions for consideration in this appeal. This factum focuses exclusively on the first Constitutional Question, namely, whether British Columbia's forestry legislation is constitutionally inapplicable to lands subject to aboriginal title in view of Parliament's exclusive jurisdiction under s. 91(24) of the *Constitution Act, 1867* over 'Indians and lands reserved for Indians". Manitoba submits the answer to this question is "no". Manitoba takes no position regarding the second Constitutional Question.

2. As described in British Columbia's factum, the trial judge held that (i) lands subject to aboriginal title were not "Crown" lands within the meaning of the *Forest Act*, R.S.B.C. 1996, c. 1957 and (ii) the *Forest Act* could not apply to these lands because the management, acquisition, sale and removal of timber from these lands fell within exclusive federal jurisdiction under s. 91(24). The Court of Appeal did not consider it necessary to address these issues and upheld the trial judge's decision on different grounds. For the purposes of this factum, Manitoba adopts British Columbia's argument regarding the interpretation of the *Forest Act*. Manitoba therefore assumes for the purposes of argument that the *Forest Act* applies to the lands in question, and there are existing aboriginal rights exercisable in relation to the lands subject to the forestry licences at issue.

3. Manitoba uses the word "Indians" in this factum to refer to members of First Nations' communities given the use of the word in s. 91(24).

2. Overview of Manitoba's Position

4. This appeal provides this Court with an opportunity to resolve a fundamental conflict in the constitutional framework governing the relationship between the two levels of government and aboriginal peoples in Canada.

5. Two lines of jurisprudence have developed over time in the area of aboriginal and treaty rights that are fundamentally irreconcilable. The first line of jurisprudence, grounded on section 35 of the *Constitution Act, 1982*, emphasizes the duty incumbent upon both levels of government to consult and reasonably accommodate, if necessary, aboriginal communities that may be affected by government activity that potentially infringes aboriginal or treaty rights. The second line of jurisprudence establishes a jurisdictional limit on the application of provincial legislation whenever the latter *prima facie* infringes aboriginal or treaty rights, on the basis that these rights fall within a core of federal jurisdiction under s. 91(24) that is protected from the effects of provincial law by the doctrine of inter-jurisdictional immunity. The possibility that provincial government actions may infringe a treaty or aboriginal right thus triggers a duty to consult while the doctrine of inter-jurisdictional immunity may prevent those actions from affecting aboriginal rights holders. Provincial governments are required to consult regarding actions that they may ultimately lack the jurisdiction to undertake.

6. The effect of the doctrine in this context is to deny the provinces a meaningful role in seeking reconciliation with aboriginal communities in their territory and between aboriginal and non-aboriginal residents of the province. Despite the provinces' constitutional obligation to affirm and recognize treaty and aboriginal rights, this approach treats reconciliation as a matter solely between the federal government and aboriginal peoples. This approach undermines the goal of reconciliation, while impoverishing provincial legislative jurisdiction in a matter inconsistent with the explicit text of the Constitution.

7. Manitoba submits that the resolution of this conflict requires reconsidering whether laws that may affect the exercise of aboriginal or treaty rights necessarily fall within the core of federal jurisdiction so as to trigger the doctrine of inter-jurisdictional immunity. Treating laws affecting the exercise of aboriginal or treaty rights as part of the core of federal jurisdiction would create an unworkable paradigm in which only Parliament, and not provincial legislatures, may make laws that affect the exercise of aboriginal or treaty rights. The effect may be to deprive provinces from being able to develop public policies in areas of clear provincial jurisdiction where balancing the recognition of aboriginal and treaty rights with other important public policy objectives is required. This approach represents a serious derogation from the principle of balanced federalism that animates Canada's constitutional structure.

8. Manitoba submits that the correct approach is to recognize that provincial legislation may affect the exercise of aboriginal treaty and aboriginal rights, provided these effects result from legislation properly grounded in a provincial head of power under s. 92 of the *Constitution Act 1867*. Whether such legislation or activity infringes aboriginal or treaty rights would stand to be decided under section 35 of the *Constitution Act, 1982* and the body of law that has developed regarding that section, including the requirement for justification and the case law relating to the Crown's duty of consultation. This proposed approach has the benefit of greatly simplifying the legal landscape, removing an impediment to reconciliation between provincial governments and aboriginal peoples, without sacrificing the latter's interests or rights.

PART II

QUESTIONS IN ISSUE

9. The constitutional questions raised in this appeal further to the Order are:

1. Are the *Forest Act*, R.S.B.C. 1996, c. 157 and the *Forest Practices Codes of British Columbia Act*, R.S.B.C. 1996, c. 159, or their predecessor legislation, constitutionally inapplicable in whole or in part to Tsilhqot'in Aboriginal title lands in view of Parliament's exclusive legislative authority set out at s. 91(24) of the *Constitution Act, 1867*?

2. Are the *Forest Act*, R.S.B.C. 1996, c. 157 and the *Forest Practices Codes of British Columbia Act*, R.S.B.C. 1996, c. 159, or their predecessor legislation, constitutionally inapplicable in whole or in part to Tsilhqot'in Aboriginal title lands to the extent that they authorize unjustified infringements of Tsilhqot'in Aboriginal title, by virtue of ss. 35(1) and 52 of the *Constitution Act, 1867*?

10. As noted, Manitoba's submissions are focused exclusively on the first question.

PART III

ARGUMENT

1. The Appellants' Position is Inconsistent with the Decision in St. Catherine's Milling and Lumber Co. v. The Queen

11. In *St. Catherine's Milling and Lumber Co. v. The Queen* ("*St. Catherine's Milling*"), the Privy Council held that s. 91(24) did not confer authority on the federal government to issue timber licences on land belonging to the province. As argued further below, applying the doctrine of inter-jurisdictional immunity to impugn B.C.'s authority to issue timber licences on aboriginal title lands necessarily means that Parliament must have the power to make laws authorizing the issuance of timber licences for the use of Crown timber which is administered and controlled by the province. This conclusion flatly contradicts *St Catherine's Milling*. Barring a reversal of *St Catherine's Milling*, the trial judge's decision and the appellants' position on this issue must be incorrect.

St. Catherine's Milling and Lumber Co. v. The Queen (1889), 14 A.C. 46 (J.C.P.C.)

12. *St Catherine's Milling* considered the legal effect of Treaty 3 and, in particular, whether, Canada or Ontario acquired beneficial ownership of the lands subject to the treaty. Canada had taken the position that it retained ownership of the lands under the authority of s. 91(24) and issued a timber licence to the plaintiff on that basis. The Privy Council rejected Canada's position and confirmed that the Ontario government had beneficial ownership of the lands further to s. 109 of the *Constitution Act, 1867* and legislative jurisdiction to issue timber licences under s. 92(5) of the *Constitution Act, 1867*. Section 109 provides that the lands within the province of Ontario belonged to Ontario "subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same", which the Privy Council held to include the rights of Indians under the treaty. Ontario was therefore obligated to respect Indians' harvesting rights in virtue of s. 109. The Privy Council specifically held:

> Their Lordships are, however, unable to assent to the argument for the Dominion founded on sect. 91(24). There can be no *a priori* probability that the British Legislature, in a branch of a statute which professes to deal only with the distribution of legislative power, intended to deprive the Provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets. The

> fact that the power of legislating for Indians, and for lands which are reserved for their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands...
>
> *St. Catherine's Milling, supra* at p. 59
>
> *Keewatin v. Ontario (Natural Resources)* 2013 CarswellOnt 2910 (C.A.) at paras. 117-118 and 123

13. The Privy Council articulated two important principles in *St Catherine's Milling*. First, the Crown's negotiation of treaties with the Indians took place on behalf of both the federal and the provincial government and both levels of government assumed the Crown's obligations in exercising their respective powers. Second, the interpretation of the treaty had to occur with regard to the constitutional framework as a whole: the effect of the treaty could not be to alter the division of powers provided for in the *Constitution Act, 1867*. Canada could not acquire legislative authority over lands otherwise owned by the province as a result of its legislative jurisdiction over "Indians" in s. 91(24) because that would conflict with other constitutional provisions, notably s. 109 and ss. 92(5) of the *Constitution Act, 1867*.

> *St. Catherine's Milling supra* at 60
>
> *Keewatin v. Ontario (Natural Resources), supra* at paras. 55-66, 112-120, 125-128
>
> See also: *Dominion of Canada v. Province of Ontario*, [1910] A.C. 637 at 645

14. It should be noted that s. 109 of the *Constitution Act, 1867* was incorporated by reference into the *British Columbia Terms of Union* and the ruling in *St. Catherine's Milling* thus extends to British Columbia.

> *British Columbia Terms of Union*, (reprinted in RSC, 1985, App II, No. 10), Term 10 [Appellant's Brief of Authorities, Vol. 3, Tab 93, p. 196]

15. These principles were reaffirmed in the recent Ontario Court of Appeal decision in *Keewatin v. Ontario (Natural Resources)* ["*Keewatin*"]. The plaintiff in *Keewatin* argued that the power to take up lands in Treaty 3 was exercisable only by the federal government because it was the latter that had negotiated the treaty. Emphasizing the evolutionary character of treaty rights under the Constitution, the Court of Appeal held that:

> Responsibility for respecting the Crown's promises falls to be determined by the allocation of powers under the constitution and the location of that responsibility evolves as the constitution evolves... The interest assigned to Ontario by s. 109 as beneficial owner carries with it the burden of the harvesting clause imposed by the Treaty. In the exercise of its rights and powers as beneficial owner, Ontario is legally obliged to ensure that its actions on behalf of the Crown are consistent with the promises made by the Crown.
>
> *Keewatin, supra* at para. 140

16. *St Catherine's Milling* has stood as good law in Canada for over a century. It was unanimously reaffirmed by this Court in *Smith v. The Queen.* The decision determined that s. 91(24) of the *Constitution Act, 1867* does not give the federal government the authority to authorize the use of Crown lands and resources such as issuing timber licences. Because the distribution of legislative power is exhaustive, if British Columbia cannot make laws for the issuance of timber licences, the federal government must be able to do so. This result is inconsistent with *St Catherine's Milling*. Barring a reversal of the holding in *St Catherine's Milling*, the trial judge's decision and the appellants' position on this issue must be incorrect.

> *Smith v. The Queen*, [1983] 1 S.C.R. 554 at 561-2 and 580

2. Minimizing Jurisdictional Uncertainty while Ensuring Respect for Aboriginal and Treaty Rights is an Enduring Theme of Canada's Constitutional History

17. An overarching theme of Canada's constitutional history has been the effort of the federal and provincial governments to minimize any jurisdictional uncertainty resulting from s. 91(24) while ensuring that the provinces respect Indians' harvesting rights. As discussed, in *St Catherine's Milling* the Privy Council viewed both levels of government as legally obligated to respect Indian harvesting rights.

18. This pattern can be seen in the resolution to the dispute between Ontario and Canada regarding the implementation of treaty rights in Ontario in the aftermath of *St Catherine's Milling*. This history is summarized in *Keewatin*. The decision in *St Catherine's Milling* gave rise to uncertainties regarding the implementation of the treaty, notably the manner in which the federal government would select reserve lands. Canada and Ontario resolved these uncertainties through agreements and reciprocal legislation, the effect of which was to provide a

process whereby Ontario would agree to the selection of reserve lands and to respect the treaty rights of the Indians inhabiting the territory. In today's parlance, this was an early example of cooperative federalism with a view to ensuring Indians' harvesting rights were respected.

Keewatin, supra at paras. 175-185

19. The pattern of governments resolving jurisdictional uncertainties regarding the application of provincial law to Indians, while ensuring the respect for their rights, continued in the first part of the 20th century. When Manitoba, Saskatchewan and Alberta (the "Prairie Provinces") joined Confederation, Canada retained administration and control of Crown lands and resources and therefore the Prairie Provinces were at a disadvantage vis-à-vis the original provinces. After many years of negotiations, in 1929 the federal government and each of the Prairie Provinces agreed to the *Natural Resources Transfer Agreements* ("*NRTAs*"), which were later given the force of constitutional law by the *Constitution Act, 1930*. In order for the Prairie Provinces to be in the same position as the original provinces as provided for in section 109 of the *Constitution Act, 1867,* the *NRTAs* transferred the interest in Crown lands in the Prairie Provinces to those provinces on the conditions set out in the agreements. The governments also agreed, among other points: (i) to a process for selecting reserve lands for First Nations (to fulfill the federal government's treaty obligations), (ii) that provincial game laws would apply to Indians (to minimize any jurisdictional uncertainty), and (iii) that the provinces would respect the Indians' right of hunting, trapping and fishing game and fish for food at all seasons of the year.

Constitution Act, 1930, Schedule 1, paragraphs 1, 11-13, Schedule 2, paragraphs 1, 10-12, Schedule 3, paragraphs 1, 10-12

20. The amendment and patriation of the Constitution in 1982 further evinces this pattern of clarifying the scope of provincial jurisdiction while ensuring respect for aboriginal and treaty rights. Aboriginal political organizations were seeking entrenchment of their rights in the new Constitution being negotiated, which was ultimately achieved in the form of section 35 of the *Constitution Act, 1982*. At the same time, the scope of provincial legislative jurisdiction over natural resources was a major preoccupation of the provinces at the time due to two decisions of

this Court that significantly limited the scope of this authority: *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan* ["*CIGOL*"][1] and *Central Canada Potash Co. Ltd. v. Government of Saskatchewan* ["*Canada Potash*"][2]. The right to tax these resources, and legislate regarding the extraction and sale of resources, even when they were primarily destined for international markets, was a major issue for the provinces and ultimately led to the inclusion of s. 92A in the *Constitution Act, 1867*, the only amendment to the division of powers in the 1982 amendments.

> W.D. Moull, "Natural Resources: The Other Crisis in Canadian Federalism" (1980) Osgoode Hall Law Journal, Vol. 18, No. 1 at pps. 3-4

21. The history and basic principles of constitutional interpretation require reading s. 92A and section 35 harmoniously with the rest of Canada's constitutional framework. In light of *St Catherine's Milling*, its aftermath in Ontario and the *NRTA*s, s. 92A of the *Constitution Act, 1867* and s. 35 of the *Constitution Act, 1982* should be interpreted as another step in this country's enduring effort to clarify the scope of provincial legislative jurisdiction over land and natural resources, while ensuring that provincial governments recognize and affirm aboriginal and treaty rights.

22. This enduring theme is manifest in this Court's emphasis on reconciliation between aboriginal and non-aboriginal societies. The need for reconciliation between government, aboriginal peoples and Canadian society as a whole is the fundamental premise animating section 35 of the *Constitution Act, 1982*. This approach expressly requires the Crown to respect aboriginal and treaty rights in the exercise of their legislative jurisdiction and other powers. This applies equally to the federal and the provincial manifestations of the Crown. Provinces are required to consult whenever any proposed decisions or actions may adversely affect the exercise of aboriginal or treaty rights and many of the leading cases have arisen in the context of decisions being made by provincial governments, or government decision makers acting under provincial laws. The duty has always been identified as a duty on the part of the Crown as a whole. Implicitly, provincial governments must be taken to have the jurisdiction to make

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[1] In *CIGOL*, the majority of this Court ruled that Saskatchewan's system of petroleum royalties and taxation was *ultra vires* as an indirect tax.

[2] In *Canada Potash* this Court ruled that Saskatchewan's potash pro-rationing scheme was *ultra vires* because its purpose was to fix the export price of potash and thus interfered with the federal government's legislative authority over trade and commerce under s. 91(2) of the *Constitution Act, 1867*.

laws incidentally affecting these rights, but are required to seek reconciliation where those rights could be affected.

> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at paras. 34 and 37 ["*Haida Nation*"]
>
> See also: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650 at paras. 31-38 and 45-49.

3. Aboriginal and Treaty Rights Should not be Considered Part of the Core of Federal Jurisdiction under s. 91(24)

A. Interpreting the Division of Powers

23. This Court summarized the interpretive approach to the division of powers in *Canadian Western Bank v. Alberta* ["*Canadian Western Bank*"] and confirmed several important principles. First, the interpretation of the division of powers should involve a significant degree of predictability, while being capable of evolving to accord with the changing realities of Canadian society. Second, maintaining the balance of powers falls primarily to governments and constitutional interpretation should be slow to adopt a different view than that of the governments involved. Third, if a level of government enacts a law that addresses a matter within a class of subjects assigned to it, the fact the law may affect matters otherwise outside its jurisdiction does not render the law unconstitutional. This principle is grounded in the reality that it is often impossible for a legislature to exercise its authority over a matter without affecting matters within the other level of government's authority. In other words, flexibility is an important element of constitutional interpretation in this area.

> *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 at paras. 23-24 and 28-29

24. There are two exceptions to the principle that the incidental effects of an otherwise valid law do not affect its constitutionality: (i) paramountcy, which operates to limit the application of a valid provincial law where it conflicts with, or frustrates the purpose of, a valid federal law, and (ii) inter-jurisdictional immunity, which protects a core area of jurisdiction from incidental effects that impair or seriously intrude on the non-enacting government's legislative authority, whether the latter has enacted legislation or not. As identified in *Bell Canada v. Quebec (CSST)* ["*Bell Canada*"], each class of subject assigned to a particular level of government has a

"basic, minimum and unassailable content" in respect of which jurisdiction is exclusive. Inter-jurisdictional immunity is predicated on the language of exclusivity present in sections 91 and 92 of the *Constitution Act, 1867* and seeks to avoid the concurrent operation of legislation, notably in areas where such concurrency is impracticable, like aeronautics, or where it would substantially interfere with the operation of an undertaking that clearly falls within the legislative jurisdiction of one level of government. In *Bell Canada*, this Court held that federal jurisdiction will oust the application of provincial legislation "when such application would bear on **the specifically federal nature** of the jurisdiction to which such works, things or persons are subject". [emphasis added]

> *Canadian Western Bank, supra* at paras. 32, 34, 42, 45, 54, 57
>
> *Bell Canada v. Quebec (CSST)*, [1988] 1 S.C.R. 749 at 833 and 839

B. Section 91(24) and the Core of "Indianness"

25. The law is settled that the ability to register as an Indian under the *Indian Act*, band membership under the *Indian Act*, the right to participate in the election of chiefs and council members, rights that arise from living on reserve and the right to possess land or property on an Indian reserve all form part of exclusive federal jurisdiction over "Indians" and "lands reserved for Indians" under s. 91(24). A provincial law that purported to seriously intrude on these matters would be inapplicable by way of the doctrine of inter-jurisdictional immunity. However, as the majority in *Four B Manufacturing Ltd. v. United Garment Workers of America* noted:

> The conferring upon Parliament of exclusive legislative competence to make laws relating to certain classes of persons does not mean that the totality of these persons' rights and duties comes under primary federal competence to the exclusion of provincial laws of general application.
>
> *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031 at 1048
>
> *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285 at 296 [Respondent Attorney General of Canada's ("Canada") Book of Authorities, vol. 1, Tab 12]
>
> *Paul v. Paul,* [1986] 1 S.C.R. 306 at 311 [Appellant's Book of Authorities, vol. 2, Tab 51, p. 207]

26. With respect to hunting rights, it is clear that Courts have traditionally viewed Indian hunting rights as amenable to federal regulation. The Privy Council accepted this position in *St Catherine's Milling*. However, the older jurisprudence did not identify these rights as part of a "core" of federal jurisdiction. In *Kruger v. The Queen,* this Court did not hold that hunting rights went to the core of aboriginal identity. In *Dick v. The Queen*, this Court was prepared to assume, but expressly did not decide, that hunting rights formed part of a core of federal jurisdiction, holding that section 88 invigorated provincial hunting laws insofar as they touched on aboriginal rights. In *Simon v. The Queen*, this Court appears to have assumed that hunting rights touched on a core element of Indianness, having decided the matter on the basis of section 88 (given the holding in *Dick* that section 88 only applied to provincial laws that touched on Indianness), but made no express holding on that point.

St Catherine's Milling, supra at p. 60

Kruger v. The Queen, [1978] 1 S.C.R. 1 S.C.R. 104 at pps. 108-109

Dick v. The Queen, [1985] 2 S.C.R. 309 at p. 305 [Appellant's Book of Authorities, vol. 1, Tab 23, p. 305]

Simon v. The Queen, [1985] 2 S.C.R. 387 at p. 413-414

27. The decision in *Delgamuukw v. B.C.* ["*Delgamuukw*"] represents the pivotal development in the expansion of the doctrine of inter-juridictional immunity in the s. 91(24) context. In *Delgamuukw*, British Columbia argued that aboriginal title had been extinguished in the province through the application of provincial legislation. The majority of this Court, speaking through Lamer, C.J. held that because the test for extinguishment of an aboriginal right required a clear and plain intention to do so, a provincial law that extinguished aboriginal rights would be necessarily *ultra vires* as being a law in relation to Indians. However, Lamer, C.J. concluded, in the alternative, that s. 91(24) protects a core of "Indianness" that extended to all section 35 rights:

> **Laws which purport to extinguish those rights** therefore touch the core of Indianness which lies at the heart of s. 91(24), and are **beyond the legislative competence of the provinces to enact.** [emphasis added]

Delgamuukw v. B.C., [1997] 3 S.C.R. 1010 at paras. 177-178 and 180-181 [Appellant's Brief of Authorities, vol. 1, Tab 20, pps. 276-278]

28. In *Paul v. B.C. (Forest Appeals Commission)*, this Court confirmed that the decision in *Delgamuukw* was based on a pith and substance analysis, not the doctrine of inter-jurisdictional immunity. The discussion of core of "Indianness" under s. 91(24) was therefore not integral to the conclusion reached in *Delgamuukw*.

Paul v. B.C. (Forest Appeals Commission), [2003] 2 S.C.R. 585 at para. 28

29. With respect, the holding in *Delgamuukw* regarding the core of federal jurisdiction under s. 91(24) was unnecessary. Normally, before considering the "core", the law in question has already been determined to be a law that is within provincial jurisdiction. The fact it may affect the core is a question as to whether the law can apply, notwithstanding that it is *intra vires*. If a provincial law relates to Indians, which this Court accepted must be true for the law to extinguish aboriginal rights, then the law is *ultra vires* and there is no need to consider the "core". The holding in *Delgamuukw* that any provincial law that purported to extinguish aboriginal rights would be *ultra vires* was therefore sufficient to dispose of the issue. There was no need in *Delgamuukw* to consider the question of the core of federal jurisdiction under s. 91(24).

30. This Court reiterated the view that section 35 rights fall within the core of Indianness in various decisions rendered after *Delgamuukw*, namely, in *Lovelace v. Ontario*, *Kitkatla Band v. British Columbia* and *Paul*, but none of these cases turned on the issue and the question of the application of the doctrine was dismissed. However, this may have changed with this Court's decision in *R. v. Morris* ["*Morris*"]. In *Morris*, the majority of this Court held that hunting at night was a right protected under the Douglas Treaty and, as such, formed part of the core of Indianness. The trigger for applying the doctrine of inter-jurisdictional immunity was defined as "anything other than an insignificant interference", or a *prima facie* infringement with the right. The general prohibition on night hunting in B.C.'s wildlife legislation interfered with the right and was therefore inapplicable to the aboriginal defendants.

Lovelace v. Ontario, [2000] 1 S.C.R. 950 at para. 111

Kitkatla Band v. British Columbia, [2002] 2 S.C.R. 146 at para. 71 [Canada's Book of Authorities, vol. 1, Tab 16]

Paul, supra at para. 19

R. v. Morris, [2006] 2 S.C.R. 915 at paras. 43-54 [Appellant's Book of Authorities, vol. 3, Tab 1, pps. 12-16]

31. The ramifications of *Morris* are significant. Once a *prima facie* infringement was made out, the provincial law did not apply, whether or not the infringement could be justified (or, indeed, whether or not what appeared to be an infringement was in fact an infringement or was justified). In effect, this Court went from holding in *Delgamuukw* in *obiter* that the federal government had the exclusive authority to extinguish aboriginal rights to holding in *Morris* that it had exclusive federal authority to *prima facie* infringe these rights. For the reasons canvassed further below, Manitoba respectfully submits that *Morris* was wrongly decided in this regard.

C. Treating Aboriginal Rights as Part of Core of Federal Jurisdiction gives Rise to an Expansive and Shifting "Core"

32. The breadth and evolutionary dimensions of aboriginal rights, among other considerations, make it difficult to consider them as "basic" or "minimal" elements of federal jurisdiction under s. 91(24). The first problem is that a "core" that encompasses aboriginal and treaty rights expands and contracts depending upon the location in Canada and the aboriginal community affected. Aboriginal rights are site-specific and they belong to specific groups who may exercise them in specific places. Exclusive federal jurisdiction thus ebbs and flows depending on the nature of the rights, the groups who exercise them and the scope of their traditional territory.

33. The "core" is also capable of significant expansion over time given that these rights evolve. Modern treaties are the culmination of this evolution in many ways and, as complex legal agreements, they cover a wide range of activities and matters and may confer a number of substantive and procedural rights. Conceivably all of these rights form part of the core defined in *Delgamuukw*. This "core" can thus be seen as expanding over time, especially as new treaties are concluded with aboriginal communities. These treaties deal with many matters traditionally within provincial jurisdiction, which is why the provinces are often included in their negotiation and ratification.

34. Finally, due to the particularities of Canadian constitutional history, the core only preserves federal jurisdiction in some provinces, but not others. Assuming for the purposes of argument that aboriginal and treaty rights fall within the core, some provinces are expressly empowered to justifiably infringe treaty fishing and hunting rights, notably the Prairie Provinces as a result of the *NRTA*s, but not all. The core of federal jurisdiction therefore extends to the exercise of aboriginal or treaty rights in some provinces, but not others.

35. These considerations suggest that treating rights as part of the core of "Indianness" is inconsistent with the premise that a core of legislative jurisdiction encompasses a "basic, minimum and unassailable content". The expansive and evolving nature of treaty and aboriginal rights mean they cannot reasonably be considered "basic" or "minimum" elements of legislative jurisdiction. Moreover, treating rights as part of the core of federal jurisdiction conflates rights with legislative authority. Placing dynamic concepts like aboriginal and treaty rights within a rigid "core" of legislative jurisdiction specific to one level of government is a poor fit that creates intractable practical problems.

D. *Canadian Western Bank* Significantly Restricts the Scope of Inter-Jurisdictional Immunity

36. *Morris* was decided only a few months before this Court's decision in *Canadian Western Bank*. *Canadian Western Bank* represents a crucial restatement of the role of the doctrine of inter-jurisdictional immunity in Canadian constitutional law. This Court determined that a broad application of the doctrine was inconsistent with the general tenor of constitutional interpretation in this country by favouring rigid exclusivity at the expense of the flexibility required in a modern federation.

37. This Court identified a host of problems that arose from the operation of the doctrine. First, its effects are assymetrical, invariably operating to restrict the operation of provincial legislation, but not federal legislation, thereby uneasily coexisting with the principles of federalism. Second, it gives rise to serious practical problems of application when applied to "activities" generally, since activities are not discrete entities like persons or undertakings. Third, the scope of the "core" in a given context is uncertain, yet any attempt to define the core in the abstract is inconsistent with the incremental, prudent approach to addressing

jurisdictional issues normally favoured. Fourth, the doctrine gives rise to legal vacuums, precluding the application of provincial laws in circumstances where no federal law exists. Fifth, the doctrine manifests an "unintentional centralizing tendency" that was inconsistent with cooperative federalism and the principle of subsidiarity. This Court concluded that a significant restriction in resorting to the doctrine was appropriate, holding that the doctrine:

> ... will be largely reserved for those heads of power that deal with federal things, persons or undertakings, or where in the past its application has been considered absolutely indispensable or necessary to enable Parliament or a provincial legislature to achieve the purpose for which exclusive legislative jurisdiction was conferred.

Canadian Western Bank, supra at paras. 35-37, 42, 44-45 and 76

38. This Court also held that the threshold for invoking the doctrine is that the law must impair the core of the other level of government's jurisdiction, and not merely affect it, overruling *Bell Canada* on this point. This Court further clarified in *Quebec (Attorney General) v. Canadian Owners and Pilots Association* ["*COPA*"] that the application of the doctrine involves two steps: first, determining whether the provincial law "trenches on" the protected core of a federal competence and, if so, whether the effects are "sufficiently serious" to warrant invoking the doctrine.

Canadian Western Bank, supra at para. 48

Quebec (Attorney General) v. Canadian Owners and Pilots Association, [2010] 2 SCR 536 at paras. 26-27 and 42-45 [Appellant's Book of Authorities, vol. 2, Tab 52, pps. 227 and 231-233]

39. In characterizing the established use of the doctrine in connection with s. 91(24), this Court in *Canadian Western Bank* did not describe treaty and aboriginal rights as part of the core despite its recent holding in *Morris.* This Court observed that the doctrine had been periodically invoked "to shield Aboriginal peoples and their lands from provincial legislation of general application affecting certain aspects of their special status". This Court also identified "relationships within Indian families and reserve communities, matters that could be considered absolutely indispensable and essential to their cultural survival" as part of the core of federal legislative jurisdiction. No mention is made of the capacity to *prima facie* infringe treaty rights as part of the identified core. This Court concluded that a strict view has and should be taken of

the core of federal jurisdiction in relation to Indians "who are, in limited respects, federal "persons"..."

Canadian Western Bank, supra at paras. 40 and 60-1

40. This Court should revisit its articulation of the core of s. 91(24) in *Delgamuukw* and the application of the doctrine of inter-jurisdictional immunity in *Morris* in light of the framework established in *Canadian Western Bank.* This Court has not hesitated to revisit its previous applications of the doctrine of inter-jurisdictional immunity in light of *Canadian Western Bank*, most recently in *Marine Services International Ltd. v. Ryan Estate*, which reversed the earlier decision in *Ordon Estate v. Grail* regarding the scope of the "core" of federal jurisdiction in the marine context.

Marine Services International Ltd. v. Ryan Estate, 2013 SCC 44 at para. 64

E. All of the Problems with the Doctrine of Inter-Jurisdictional Immunity Exist if Aboriginal Rights Form Part of the Core of Federal Jurisdiction

41. The criticisms of an overly broad approach to the doctrine of inter-jurisdictional immunity identified in *Canadian Western Bank* equally apply to the approach to the doctrine of inter-jurisdictional immunity articulated in *Delgamuukw* and adopted in *Morris*.

42. Beginning with the general principles in interpreting the division of powers, the doctrine undermines the predictability, adaptability and flexibility necessary in this area of constitutional analysis. The operation of the doctrine is unpredictable and unworkable if aboriginal and treaty rights form part of the core of federal jurisdiction. In the forestry context, it would be very difficult to know for certain, even after consultation and accommodation, the degree to which issuing a timber licence might *prima facie* infringe an aboriginal right somewhere in the area subject to the licence. To the extent the licence might infringe these rights, the decision in *Morris* suggests that the province lacks the jurisdiction to issue the licence. Because the totality of legislative power is distributed in accordance with sections 91 and 92 of the *Constitution Act, 1867*, whatever falls outside of provincial jurisdiction must fall within federal jurisdiction. The necessary implication is that the federal government could issue a forestry licence where the provincial licence was inapplicable. The doctrine, as adopted in *Morris*, thus envisions two sets

of forestry licences being required, one provincial, one federal, depending on the degree to which certain aboriginal rights might be affected in certain places. Such an approach is totally unworkable.

43. In addition, the scope of aboriginal rights is uncertain as the courts have not adjudicated on their full extent. New treaties may also come into existence protecting previously unrecognized rights. A right not formally recognized today may be recognized tomorrow, whether as a result of a new treaty or a judicial decision, at which point it falls within the core, creating further uncertainties for the operation of provincial legislation on the ground.

44. Including treaty and aboriginal rights at the core of federal jurisdiction is inconsistent with the understanding of the provincial and federal governments regarding their respective jurisdiction. Neither the federal government, nor the provinces, have argued that Parliament possesses authority under s. 91(24) to make laws respecting the use or allocation of provincially-administered Crown lands or resources. The operation of the doctrine in contravention of this shared understanding is itself a serious intrusion on the legislative and democratic function. In effect the application of the doctrine as described amounts to insisting that the federal government pass legislation (among other steps) that it does not consider itself as having the authority, and quite possibly the expertise or inclination, to undertake because the matter is regulated provincially.

45. The dual application of laws that is normally countenanced in Canada's constitutional framework applies equally to subject areas that are for one purpose provincial (the administration and control of provincial Crown lands and resources) and for another purpose federal (Indians) . Many laws authorized under provincial heads of power (notably under ss. 92(5), 92(13), 92(16) or 92A) may affect the exercise of aboriginal or treaty rights because they often involve the access to and use of Crown lands and resources. Incidental effects of provincial legislation on the exercise of aboriginal or treaty rights are inevitable. Upholding a core that includes the exercise of these rights substantially limits the provinces' express legislative powers. The application of the doctrine is also unnecessary in this context in light of the direct protection that section 35 provides to aboriginal and treaty rights.

Canadian Western Bank, supra at para. 29

46. Turning to the specific problems with the doctrine identified in *Canadian Western Bank*, the doctrine is once again given an asymmetrical effect, impugning provincial legislative powers and enhancing federal jurisdiction. As applied to "activities" or "rights" (rather than "undertakings" or "people"), in this case the exercise of aboriginal rights, the doctrine in this context gives rise to intractable problems given the diverse contexts in which these rights may be exercised. The "core" is uncertain (given the variety and nature of aboriginal and treaty rights, as discussed above) and any attempt to define the "core" in the abstract (as in *Delgamuukw*) runs counter to the incremental approach favoured in constitutional interpretation. Meanwhile, uncertainty reigns until judicial decisions on the "core" are rendered, in particular when the scope of aboriginal rights is determined. The doctrine also creates legal vacuums. Provincial resource legislation potentially applies in a patchwork fashion and, in those activities/areas where it does not apply, there is no federal legislative or regulatory framework to supplement the province's scheme.

Canadian Western Bank, supra at para. 42

47. The doctrine in this context exhibits the "unintentional centralizing tendency" condemned in *Canadian Western Bank*. Indeed, in this context the tendency is especially noxious to the tenets of Canadian federalism. The necessary implication of applying the doctrine, as noted, is that the Parliament is entitled to pass legislation in areas in which provincial legislation might infringe aboriginal or treaty rights. As the government with sole authority to *prima facie* infringe aboriginal or treaty rights, the federal government would logically be responsible for undertaking the process of reconciliation, including all necessary consultation and accommodation. This would occur in the context of an initiative that would otherwise not be within its jurisdiction and in respect of which it had no role in formulating and likely no interest in pursuing. In effect, the province is denied any role in reconciling the interests of its non-aboriginal and aboriginal citizens with respect to matters within provincial jurisdiction. Reconciliation, following the logic of *Morris*, is a matter between the federal government and aboriginal peoples. Such an approach must surely be incorrect as contrary to this Court's decision in *Haida Nation*. In the words of the Ontario Court of Appeal in *Keewatin*:

> Leaving meaningful constitutional space for the exercise of provincial jurisdiction under ss. 109, 92(5) and 92A, without federal control under s. 91(24), fosters direct dialogue between the province and treaty 3 First Nations. Such dialogue is key to achieving the goal of reconciliation.
>
> *Keewatin, supra* at para. 154

48. Manitoba submits that the overarching goal of reconciliation, and the historic understanding and present-day constitutional reality that the Crown's obligations to aboriginal peoples bind both levels of government, should lead this Court to consider the impact on provincial regulatory processes of applying the doctrine of inter-jurisdictional immunity to the subject matter of s. 91(24). The core of federal jurisdiction under s. 91(24) should not include the exercise of aboriginal or treaty rights. Applying inter-jurisdictional immunity to laws that may affect aboriginal or treaty rights would put Parliament and the Government of Canada in the position of needing to enact laws in respect of the administration of provincially-administered Crown lands and resources, despite the fact the provinces have exclusive legislative jurisdiction in that subject area. The provinces are thus treated as strangers to the process of reconciliation so eloquently emphasized by this Court as the overarching constitutional goal.

F. Conclusion

49. The doctrine of inter-jurisdictional immunity adopted in *Morris*, and argued for by the appellants in this appeal, is inconsistent with (i) the decision in *St Catherine's Milling*, (ii) the provincial duty to consult, and (iii) the legislative jurisdiction expressly conferred on the provinces by the *Constitution Act, 1867*. The operation of the doctrine deprives the provinces of a meaningful role in the process of reconciliation while also being asymmetrical, unpredictable, inflexible, impractical and uncertain. This Court should reverse its previous holdings that aboriginal or treaty rights fall within the core of federal jurisdiction under s. 91(24) and conclude that British Columbia's forestry legislation applies in principle to aboriginal title lands, subject to an infringement and justification analysis under s. 35 of the *Constitution Act, 1982*.

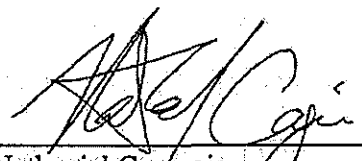
PART IV
SUBMISSIONS CONCERNING COSTS

50. Manitoba does not seek costs and asks that no costs be awarded against it.

PART V
ORDERS SOUGHT

51. Manitoba submits that the first constitutional question should be answered in the negative

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



Nathaniel Carnegie,
Counsel for the Intervener
The Attorney General of Manitoba

Dated at Winnipeg, Manitoba, this 29th day of August 2013.

PART VI

TABLE OF AUTHORITIES

CASE LAW — **CITED AT PARAGRAPH NO(S).**

STATUTES

OTHER AUTHORITIES