The Métis in the 21st Century Conference

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Saskatoon

Day 2 – Tape 4

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Mark Stevenson: So the, the part that I'm gonna speak about that deserves the most attention is Section 91(24), which, which provides the federal government with exclusive legislative jurisdiction for Indians and lands reserved for Indians. And you would have, I mean, originally 91(24) was given a very narrow interpretation. For example, lands reserved for the Indians were considered to be just Indian reserve lands. We now know in the courts of, you know—given that aspect of Section 91(24) a very broad interpretation, so lands reserved for the Indians, the federal government's exclusive jurisdiction covers not only Indian reserves, it covers those lands that are now Aboriginal title lands. Lands reserved in any way for the use and benefit of Indians. It also covers, for example, in the treaty areas, those individual Indians who took individual hectares of land and took them in severalty. And those of you in Treaty 8 and Treaty 6 will know about that.

So, so the term lands reserved for the Indians has been given a very, very broad interpretation, and, and as we heard yesterday and probably this morning, the term Indian is still subject to debate, and I don't think there's any doubt that the term Indian includes all Aboriginal people. It includes, we know it includes the Inuit. There's a Supreme Court of Canada decision on that, and it, it, it logically includes the Métis. And they're, they're really, in my view, if you, if you take a principled approach and you follow the Supreme Court of Canada's guidelines in, in, in the case, we, the term Indian, you have to come to the conclusion that the term, the term Indian includes the Métis.

Also in 91(24), 91(24), which provides the federal government with exclusive legislative jurisdiction for Indians, there's something associated with that called the core of Indianness. And there's a, have to make a

distinction between the scope of the legislative jurisdiction of Canada over Indians and lands reserved for Indians and the core of Indianness. For example, under its authority, Canada can legislate for, set up schools. It can legislate with respect to the conduct of referendum. It can, it can do a whole bunch of things. It can set up highway traffic regulations. But all of, for Indians, but all of those don't fall within the core of Indianness. But for those matters that do fall within the core of Indianness, those matters are unaffected by provincial laws. And this is because provincial laws, even though general in their application, cannot bear upon those matters that are federal in substance. And this is, this is not anything new. It's something that, that is a part of our Constitutional history.

And there's a, you know, there's, there's a, the main case for that is called Bell Canada against Quebec. And I'll just, just read a, what I think is an important quote from that. And in that case is says that "Works such as federal railways, things such as lands reserved for Indians, and persons such as Indians who are within the special and exclusive jurisdiction of Parliament are still subject to provincial statutes that are general in their application with a municipal legislation, legislation on adopting, hunting, or the distribution of family property." And then it goes on to say that "provided, however, that the application of these provincial laws does not bear upon those subjects and what makes them specifically a federal jurisdiction." So, federal laws, or rather provincial laws, can apply to Indians, they can apply to Métis, provided that they don't bear upon those subject matters that are specifically federal. And those subject matters that are specifically federal include Aboriginal rights.

So, and, and, and that's, that's a bit of the dilemma, is, is, is the actual existence of Métis Aboriginal rights, and, of course, there's been a, there's been a debate on that for quite some time. There was a theory and we heard that this morning, and the theory was that because Métis weren't here at the point of contact, that Métis can't have Aboriginal rights, 'cause Aboriginal rights are those rights that were being exercised at the point of contact when the Europeans arrived. And that, and that's a simplistic view.

It, it's wrong thinking. It doesn't, it doesn't reflect Canadian history. It doesn't reflect the role of the Métis in the, in the buffalo hunt. It doesn't reflect the fact that Métis traditional harvesters for centuries survived by exercising their Aboriginal rights and it also denies Métis Aboriginal ancestry. So that, that, that's wrong thinking. And, and *Powley* or *Blais* or another case, if those cases are wrongly decided, will eventually open the door, and it'll open the door because of some very good work by some very, very good Métis lawyers, and you've heard them here today—people like Jean Teillet, Lionel Chartrand, and others. And, and I'm, I'm, I'm, I'm convinced that, that when the courts do at the highest level recognize Métis Aboriginal rights, they will, in fact, have to acknowledge that those rights, those Aboriginal rights, do fall within the core of Indianness.

So, I just wanted to kind of summarize what I've said, and I think it's important to reiterate that provinces are precluded from legislating for Indians, quo Indians, or Indian lands, quo Indian lands. That's a federal prerogative. However, provincial laws of general application apply to Indians, but provincial laws which touch on the core of Indianness would generally be read down because of the doctrine of interjurisdictional immunity. Section 88 of the *Indian Act* referentially incorporates provincial laws which touch upon Indianness, so they apply as federal laws. But because Section 88 is part of the *Indian Act*, it doesn't apply to Métis. So provincial wildlife, provincial natural resource laws in their application to Métis Aboriginal harvesting rights would have to be read down.

And I wanted to, this, this, there's some case law on this coming from British Columbia. In particular, there's a case called R. against Alphonse, and, and it came out of the British Columbia Court of Appeal, 1993, and it, it deals with the application of Section 27(1c) of the provincial *Wildlife Act*. And, and what the Court of Appeal in British Columbia says is this. It says Section 27(1c) affects the core of Indianness for status Indians, non-status Indian, and Métis alike, because for all of them it affects or may affect the exercise of their Aboriginal rights. Accordingly, it reaches into the exclusive federal nature of the federal legislative power under Section 91(24) of the

Constitution Act, 1867. Therefore, it does not apply to them of its own provincial vigour. Only by the operation of Section 88 can section 27(1c) of the *Wildlife Act* be given federal vigour, and so may be made to apply to status Indians under the *Indian Act*. However, it still would not apply to non-status Indians and Métis in the exercise of their Aboriginal rights because they are not considered to be Indians for the purposes of the *Indian Act*, and that's really the state of the law in British Columbia today. Métis exercising Aboriginal harvest-, harvesting rights according to this decision are immune from the application of wildlife, provincial wildlife legislation.

And I guess, just to summarize, Métis rights, harvesting rights, fall within the core of Indianness. That's an area of, that is immunized from the application of provincial laws because of the doctrine of interjurisdictional immunity. And there is some support from the courts for this. And I think that just pursuing these sorts of arguments in the courts, for those of you who are litigators, it is going to end up sooner or later with something I think we, there's all gonna be, be very successful for Métis Aboriginal rights harvested. Thank you very much.

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