Ontario government entitled to exercise crown rights under Treaty 3

DENTONS

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Introduction

On July 11, 2014 the Supreme Court of Canada (the "SCC") released its decision in *Grassy Narrows First Nation v Ontario (Natural Resources).*[1] The unanimous decision affirms the Ontario Court of Appeal judgement which held that the Province of Ontario does not require Government of Canada approval to develop certain lands surrendered by the Ojibway First Nation to the Crown under Treaty 3.[2]

Background

In 1873, the Dominion of Canada concluded Treaty 3 with the Ojibway Chiefs for the surrender of approximately 55,000 square miles of land in what is now northwestern Ontario and eastern Manitoba. The Dominion of Canada needed to secure safe passage through these lands to promote settlement in western Canada and build the Canadian Pacific Railway. In exchange for surrendering the lands, the Crown granted the Ojibway reserve lands in the area. Treaty 3 also gave the Ojibway rights to harvest non-reserve lands in their traditional territory until those harvest lands were "taken up" for settlement, mining, lumbering or other purposes by the Government of the Dominion of Canada. [3]

In 1997, Ontario granted a timber licence to Abitibi-Consolidated Inc. (now known as Resolute FP Canada Inc.) to conduct clear-cut forestry operations on Crown lands situated in a portion of the Treaty 3 lands known as the Keewatin area. At the time Treaty 3 was concluded, the Keewatin area was under the exclusive control of Canada. However, it was subsequently annexed to Ontario through the enactment in 1912 of the *Ontario Boundaries Extension Act*.

In 2005, the Grassy Narrows First Nations (the "**Grassy Narrows**"), descendants of the Ojibway First Nation, brought an action to set aside the forestry licence on the basis that it violated their Treaty 3 harvesting rights.

Judicial history

In 2006, a case management judge divided the trial into two phases. The first phase consisted of two threshold questions:[4]

1. Whether Ontario has authority to "take up" tracts of land within the Keewatin area so as to limit Treaty 3 harvesting rights?
2. If the answer to the first question is no, does Ontario have authority under the *Constitution Act, 1867* to justifiably infringe the appellants' treaty rights?

The second phase of the trial will eventually involve a determination of the Grassy Narrows' claim that the specific forestry licenses at issue are invalid. This second phase of litigation has yet to commence.

The trial judge held that Treaty 3 established a two-step process for taking up treaty lands.[5] Ontario could not take up any portion of the Keewatin area without the federal government's approval. Moreover, the trial judge further held that provinces cannot infringe treaty rights even if such an infringement could be justified, because of the constitutional doctrine of interjurisdictional immunity.[6]

The Ontario Court of Appeal unanimously reversed the lower court decision and confirmed Ontario's ability to take up lands without any involvement from the Government of Canada.[7]

The decision

The SCC unanimously upheld the Ontario Court of Appeal decision. The SCC essentially based its reasoning on provisions of the *Constitution Act, 1867*, on the text of Treaty 3, and on legislation dealing with Treaty 3 lands.

Constitutional Authority of the Province

The SCC held that Treaty 3 was fundamentally an agreement with the "Crown", a concept that includes all government power (i.e. federal and provincial).[8] It rejected the theory that since Treaty 3 was made with the federal Crown (as opposed to the Crown in right of Ontario); only the federal Crown had obligations and powers over matters covered by Treaty 3.[9]

According to the SCC, it is the division of powers established in the *Constitution Act, 1867* that determines which of the federal or provincial governments is entitled to exercise the Crown's rights under Treaty 3.

Given that the Keewatin area was annexed to Ontario in 1912, section 109 of the *Constitution Act, 1867* establishes that Ontario holds the beneficial interest in these lands and the resources on or under these lands. Furthermore, section 92(5) of that *Constitution Act, 1867* gives provinces an exclusive jurisdiction over "Management and Sale of Public Lands belonging to the Province and the sale of Timber and Wood thereon". Finally, section 92A gives the Province jurisdiction to make laws in relation to non-renewable natural resources, forestry resources, and electrical energy. These provisions of the *Constitution Act, 1867* collectively give Ontario an exclusive constitutional authority to take up provincial lands for provincially regulated purposes.

The Grassy Narrows argued that the federal government's authority over "Indians and Lands Reserved for Indians" set out in section 91(24) of the *Constitution Act, 1867* gives Canada a residual role in respect of the taking up of Treaty 3 lands. The SCC rejected this argument. It noted that while section 91(24) allows the federal government to enact legislation dealing with Indians and lands reserved for Indians that may have incidental effects on provincial lands, it does not give Canada authority to take up lands for exclusively provincial purposes such as forestry, mining or settlement.[10]

Interpretation of Treaty 3 and subsequent legislation

According to the SCC, both the text of Treaty 3 as well as subsequent legislation dealing with Treaty 3 lands support the conclusion that only Ontario could properly take up Treaty 3 lands. Indeed, the text of Treaty 3 does not contemplate a two-step process involving federal and provincial approval. Likewise, reciprocal statutes enacted after the conclusion of Treaty 3 in order to resolve a boundary dispute between Canada and Ontario or to extend the borders of Ontario, did not mention any continuing supervisory role for Canada in the taking up of lands by the

Province, or any two-step process involving both levels of governments.

Limits on the Power to Take Up Lands

Finally, the SCC held that Ontario's power to take-up lands under Treaty 3 is not unconditional. Based on prior decisions such as *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*[11], the SCC reaffirmed that the Province, "must exercise its powers in conformity with the honour of the Crown, and is subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests". [12] This requires the Province of Ontario to consult and, if appropriate, accommodate First Nation interests.[13]

The Court also reiterated its recent dicta in *Tsilhqot'in Nation v British Columbia* [14] that the doctrine of interjurisdictional immunity does not prevent provincial laws from justifiably infringing treaty rights.[15] Consequently, where a province's taking up of lands amounts to an infringement of treaty rights, this infringement can be justified if the provincial government satisfies the requirements of the *Sparrow/Badger* analysis under section 35 of the *Constitution Act, 1982*. [16]

References:

[1] 2014 SCC 48.
[2] Keewatin v. Ontario (Minister of Natural Resources), 2013 ONCA 158, 114 OR (3d) 401 ["Keewatin"].
[3] Supra note 1 at para 2.
[4] Ibid at para 19.
[5] Keewatin v Minister of Natural Resources, 2011 ONSC 4801.
[6] Ibid at para 22.
[7] Keewatin, supra note 2.
[8] Supra note 1 at para 39.
[9] Supra, note 1 at para 30.
[10] Supra note 1 at para 37.
[11] [2005] 3 SCR 388.
[12] Supra note 1 at para 50.
[13] Ibid at para 52.
[14] 2014 SCC 44.
[15] Ibid at para; Tsilhqot'in Nation v British Columbia, 2014 SCC 44.
[16] Supra note 1 at paras 52 and 53.

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