The Supreme Court of Canada Confirms Provincial Jurisdiction to Take Up Lands Covered by Treaty

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Introduction

On July 11, 2014 the Supreme Court of Canada (the "SCC") issued its unanimous decision in the matter of Grassy Narrows First Nation v Ontario (Natural Resources)1 (the "Decision"). The Grassy Narrows First Nation ("GNFN") sought to challenge the authority of the Province of Ontario to issue permits and approvals to conduct logging or otherwise take up lands in an area covered by Treaty 3. GNFN argued that Ontario's approval of logging operations in the areas covered by the Treaty violated GNFN's harvesting rights.

Ontario's Authority under Treaty 3

Treaty 3 was originally negotiated by the federal Crown and the Ojibway ancestors of GNFN. In 1912 Canada extended Ontario's boundaries which brought the Keewatin lands, at issue in the case, within the boundaries of the province of Ontario. For a number of years, GNFN objected to Ontario issuing forestry licenses on non-reserve lands within the Keewatin area and over which the Ojibway retained harvesting rights pursuant to the terms of the treaty. These grievances ultimately culminated in GNFN challenging Ontario's authority to take up tracts of land in the Keewatin area based on its assertion that only the federal government had the authority to authorize activities which could impact the rights guaranteed under the terms of the treaty.

The SCC rejected GNFN's position that federal approval or oversight is required before lands can be taken up for development. In reaching this conclusion, the SCC examined the nature of the Treaty as well as the division of power provisions of the Constitution Act, 18673; notably section 109 relating to the ownership of provincial lands and resources, 92(5) pertaining to the management and sale of provincial lands and related timber and 92A with reference to the exclusive power to manage natural resources otherwise vested in the provinces.

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1 2014 SCC 48.
2 Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c.11.
3 Constitution Act, 1867 (UK) 30 & 31 Vict, c.3, reprinted in RSC 1985, Appendix H, No.5.
GNFN had argued that because section 91(24) of the *Constitution Act, 1867* gives Canada jurisdiction over "Indians and Lands reserved for the Indians" the provincial government could not take up lands as this would limit or displace the federal authority. The SCC concluded that section 91(24) does not give Canada the authority to take up provincial land for exclusively provincial purposes, such as forestry, mining or settlement. The SCC also noted that while Treaty 3 was negotiated with the Crown in right of Canada, it did not mean that the Crown in right of Ontario is not bound by and empowered to act with respect to the treaty. Both levels of government are responsible for fulfilling treaty promises when acting within the definition of powers under the *Constitution Act, 1867*. In keeping with *Haida Nation v British Columbia (Minister of Forests)*, the SCC held that the duty to consult applies to both the provincial and federal government and relying on its earlier jurisprudence, ultimately concluded that a change in the level of government responsible for regulating hunting rights did not constitute a modification of the treaty. The SCC noted that the 1912 transfer of lands confirmed that Ontario would stand in Canada's place with respect to the rights of the aboriginal people in those lands. This legislation did not constitute a transfer of Crown rights and obligations by Canada to Ontario but a transfer of beneficial interest in the land.

As a consequence, "Ontario and only Ontario" had the authority to take up lands under Treaty 3, subject to the Crown's duties to the Aboriginal peoples who have interests in the land and the obligations and limits imposed by section 35 of the *Constitution Act, 1982*.

Finally, building on its earlier decision in *Tsilhqot'in Nation v British Columbia*, the SCC reiterated that the doctrine of interjurisdictional immunity does not apply to limit the powers of the provincial government. The SCC stated that if Ontario's taking up of Keewatin lands amounted to an infringement of the treaty the proper approach would be to examine the provincial actions with reference to section 35 of the *Constitution Act, 1982* and the infringement justification test set out in *R v Sparrow*.

**Conclusion**

The Decision may have significant implications for many areas of Canada as the "taking up" provisions of Treaty 3 are similar to those contained in the other numbered treaties which cover much of Canada. In addition to providing clarity to provincial governments, the Decision should also provide certainty to project developers seeking to do business in the areas of Canada covered by the numbered treaties, including Alberta. It confirms that provincial governments have the necessary authority to manage resources subject to the fulfillment of the duty to consult and the obligations and limits imposed by section 35 of the *Constitution Act, 1982*.

Notwithstanding the SCC's indication that not every taking up of land will constitute an infringement of treaty rights, provincial governments must be diligent in considering the views of aboriginal peoples when approving projects that have the potential to interfere with traditional land use activities protected by treaty. Such diligence is required as the SCC has again reiterated that meaningful consultation cannot exclude accommodation from the outset, and that a claim for breach of treaty could arise in a case where a taking up of lands leaves an aboriginal group with no meaningful right to hunt, fish and trap within its traditional territories.

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4 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73.