Supreme Court Of Canada Confirms Provincial Power To Take Up Lands Under Treaty – Grassy Narrows First Nation v Ontario

written by vickyp | July 22, 2014

Today, the Supreme Court of Canada released another important Aboriginal law decision, *Keewatin v. Ontario (Natural Resources)*, 2014 SCC 48. The decision confirms the power of Ontario, along with other provincial governments, to manage natural resources over lands subject to numbered treaties. Treaty 3 is one of the historical, numbered treaties entered into between Canada and First Nations in the late 1800s and early 1900s whereby signatory First Nations surrendered their Aboriginal rights and title to lands they traditionally used in return for treaty rights, including the right to hunt and fish.

Treaty 3 sets out the Grassy Narrows First Nation's right "to pursue their avocations of hunting and fishing throughout the tract surrendered" except on tracts "required or taken up for settlement, mining, lumbering or other purposes by [the] Government of the Dominion of Canada" (the "taking up" clause).

The central issue in the case was whether the reference to the "Dominion of Canada" in the taking up clause meant that Ontario did not have the power to take up lands to issue forestry licences over treaty lands. The Grassy Narrows First Nation argued that the reference to the Dominion of Canada in the taking up clause meant that only the federal government could exercise that power. Today's decision clearly confirms Ontario's power to take up lands under Treaty 3. The decision also reiterates that taking up of lands by Ontario and other provinces remains subject to the duty to consult and accommodate First Nations.

The decision provides welcome confirmation of provincial powers to manage their natural resources, and confirmation that the federal government has no supervisory role in that process.

Judicial History

As summarized in a previous post, the Ontario Superior Court of Justice held that, based on a literal reading of the taking up clause, only the federal government had the power to authorize activities which significantly interfere with Treaty 3 harvesting rights. The trial judge found that Treaty 3 required a two-step process whereby the Province of Ontario was required to seek approval from the federal government before taking up land.

The Ontario Court of Appeal disagreed and reversed the trial decision. The unanimous court emphasized that the treaty partner is the Crown, and not any particular level of government. Crown responsibility devolved to Ontario when the ceded Treaty 3 lands were transferred to the Province, and Ontario had the right to manage and regulate activities on harvesting lands. For a summary of the Ontario Court of Appeal decision, please see our previous post.

Supreme Court of Canada Decision

Canada or Ontario?

Today's decision provides a clear and firm answer to the question of whether the taking up clause allows Ontario to take up lands under Treaty 3. The Supreme Court stated clearly and unequivocally that "Ontario and only Ontario" has the power to take up lands under Treaty 3.

While Treaty 3 was negotiated by the federal government, the treaty was between the First Nations and "the Crown". The implementation of the Crown's rights and duties under the treaty is to be carried out in accordance with the division of powers between federal and provincial governments under the Constitution. As Ontario has exclusive authority under the*Constitution Act, 1867* to take up provincial lands for forestry, mining, settlement and other provincial matters, only Ontario has the right to take up lands under Treaty 3.

The decision also put to rest the argument that Canada has a supervisory role in taking up of lands by provincial governments. The Supreme Court firmly rejected that argument, holding that if the drafters of the treaty wanted Canada to have a continuing supervisory role in taking up lands under the treaty, the treaty would have said this.

Duty to Consult

The decision confirms that the Crown's right to take up lands under numbered treaties is subject to the duty to consult and accommodate as set out in *Mikisew.* In summary, the Crown must inform itself of the impact its action will have on the First Nation's exercise of rights under the treaty and communicate with the First Nation. The Crown must deal with the First Nation in good faith and with the intention of substantially addressing their concerns.

Not every taking up of lands will constitute an infringement of a First Nation's treaty rights. It is only where a First Nation is left with no meaningful right to harvest in territories over which they traditionally harvested that a potential action for treaty infringement will arise. This confirms the law as previously set out by the Supreme Court in *Mikisew Cree First Nation v. Canada,* 2005 SCC 69.

Implications of *Keewatin*

As shown in the map below, the language of the taking up clause under Treaty 3 is

replicated in or similar to several of the other numbered treaties in Manitoba (Treaty 5), Saskatchewan (Treaty 6), and Alberta (Treaty 6 and 7). Treaty 3 is circled in blue, and numbered treaties with similar “taking up” clauses are circled in red:

 This work, “Numbered Treaties with Taking Up Clause Similar to Treaty 3” is a derivative of “Creative Commons Numbered Treaties Map” by Themightyquill, licensed under CC BY-SA 3.0.

In other numbered treaties, the taking up clause is not limited to “the Dominion of Canada”, but rather refers to “the government of the country”. Given the different wording in the taking up clauses, the trial decision raised the prospect of very different processes for taking up of lands for natural resource development within the same province. The Supreme Court’s clear statement that it is the provincial government, and only the provincial government, that has the power to take up provincial lands under numbered treaties ensures that this outcome will be avoided. The decision provides welcome confirmation of the competence of provincial governments to issue tenures and approvals for development of provincial natural resources for logging, mining, oil and gas, and other similar matters.

The decision also firmly rejects any notion of a federal supervisory role over the exercise of provincial powers under the numbered treaties. *Grassy Narrows* affirms that it is the level of government with the power to regulate that must consult and accommodate, and that the involvement of both levels of government is not required if the matter is purely within one level of government’s jurisdiction.

The decision reminds provincial governments that their power to take up lands under numbered treaties is subject to obligations rooted in the honour of the Crown. Where treaty rights may be affected by provincial decisions to take up land, the Provinces will have to ensure that the Crown’s duty to consult and accommodate has been discharged.

The *Grassy Narrows* decision follows shortly after the Supreme Court’s decision in the *Tsilhqot’in Aboriginal title case*. While the two cases deal with separate and distinct issues – provincial powers to take up lands under treaties (*Grassy Narrows*), vs. Aboriginal title in areas where no treaties have been signed (*Tsilhqot’in*) – in both cases the Supreme Court has confirmed the power of provincial governments to enact legislation within their constitutional sphere of natural resource management, subject to their constitutional duties to First Nations. Therefore, while the two cases arose in very different contexts, both cases confirm ongoing provincial powers over lands even where subject to Aboriginal claims and interests.

Last Updated: July 14 2014

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