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mcmillan Aboriginal Law Bulletin

Court affirms right of Province to "Take up" Treaty Lands – *Grassy Narrows First Nation v. Ontario (Natural Resources)*

Natural resource companies conducting operations on the basis of provincially granted authorizations have received a welcome confirmation from the Supreme Court of Canada. In affirming the Ontario Court of Appeal's decision, the Supreme Court in *Grassy Narrows First Nation v. Ontario (Natural Resources),* 2014 SCC 48 has confirmed that the Province is empowered to "take up" for development what became provincial lands subject to an aboriginal treaty negotiated by the federal government, without federal government approval. This decision echoes the recent ruling in *Tsilhqot'in Nation v. British Columbia*[1] where the Court confirmed the powers of provincial governments to continue to regulate and deal with aboriginal lands, including title lands, and now treaty lands subject to "taking up" provisions.

Key Findings

- Only the provincial government had the power to take up lands under Treaty 3 due to Canada's constitutional provisions.
- The "Crown" as between Canada and the provinces is indivisible.

[1] 2014 SCC 44

- The Crown's right to take up lands under a Treaty is subject to its duty to consult and, if appropriate, accommodate First Nations' interests beforehand.

- The Crown can infringe the treaty rights only to the extent that the infringement is justified under the *Sparrow* analysis.

Historical Background

In the years immediately following Confederation, the federal government was anxious to secure a treaty for the region between Ontario and the arable lands of the west, in order to ensure travel routes for settlers. The territory, approximately 55,000 square miles, was predominately occupied by members of the Ojibway Nation (the "Ojibway").

In 1873, after prolonged negotiations, the Ojibway signed Treaty 3 and ceded a vast tract of Ojibway territory, including large parts of what is now northwestern Ontario and a small part of eastern Manitoba, to the Government of Canada. In exchange for surrendering their interest in the land, the Ojibway were given certain rights including the right to hunt and fish over their traditional territories ("Harvesting Rights").

At issue in the case was a clause in Treaty 3 which limited the harvesting rights of the First Nations by allowing the "taking up" of lands for "settlement, mining, lumbering or other purposes by [the] Government of the Dominion of Canada". In 1997, the Grassy Narrows First Nation ("GNFN"), a member of the Ojibway Nation, challenged the jurisdiction of the Province to interfere with the harvesting rights when the Ontario government issued a sustainable forest license to Abitibi-Consolidated Inc. in the former Keewatin District. The GNFN argued that only the federal government could authorize uses that interfered with the rights given that the region had not been within the boundaries of Ontario when the treaty was signed.

At the trial level, Justice Sanderson found in favour of the GNFN on every main issue. However, on appeal, the Ontario Court of Appeal overturned the decision and held that Ontario could avail itself of the "taking up" powers under Treaty 3, so as to limit the Plaintiffs' Harvesting Rights without authorization from the federal government.

The Supreme Court's Decision

The main question in the proceeding was whether Ontario was empowered to take up lands and restrict harvesting rights in the Keewatin territory under the Treaty, and if not, whether Ontario, through the division of powers created under the *Constitution Act*, 1867, could justifiably infringe upon hunting and fishing rights of the Grassy Narrows First Nation.

The Supreme Court agreed with the Ontario Court of Appeal that Ontario and only Ontario had the power to take up lands under Treaty 3 due to Canada's constitutional provisions, the interpretation of Treaty 3, and legislation dealing with Treaty 3 lands. In particular, the Supreme Court relied on three sections of the *Constitution Act*, 1867 to demonstrate that Ontario had the right to take up lands under Treaty 3:

- Section 109 gives Ontario beneficial ownership of the land inside its borders, subject to trusts or other interests already existing in those lands, including pre-existing aboriginal interests;
- Section 92(5) gives Ontario the exclusive authority to manage and sell public lands that belong to the Province; and,
- Section 92A allots the powers relating to non-renewable natural resources, forestry resources and electrical energy to the province's jurisdiction.

The Court specifically noted that there was no evidence in the historical record that the clause in the treaty was only meant to give power to the federal government. The Court also relied on the principle that the "Crown" as between Canada and the provinces is indivisible. As such, it was of no consequence that Canada, and not Ontario, was the treaty partner to Treaty 3.

In keeping with the objective of reconciliation, the Court reiterated that the Crown's right to take up lands under Treaty 3 is subject to its duty to consult and, if appropriate, accommodate First Nations' interests beforehand. Confirming that the duty is grounded in the honour of the Crown, the Court restated that the Ontario government could infringe the treaty rights only to the extent that the infringement was justified under the *Sparrow* analysis. Citing the very recent *Tsilhqot'in* decision, the Court confirmed that the doctrine of interjurisdictional immunity has no application in the context of Aboriginal rights and treaty rights.

Conclusion

While this decision was based on Treaty 3, it can be safely assumed that its application will apply to other numbered treaties in British Columbia, Alberta, Saskatchewan, Manitoba and Ontario. Natural resource companies may accordingly continue to rely on licenses and authorizations issued by Ontario over provincial lands subject to treaties, even where the original treaties were negotiated by Canada. The Supreme Court effected this practical result while protecting the ever-important principle of reconciliation between the Crown and aboriginal peoples through Canada's evolved federalist structure and the Crown's indivisibility.

How Can We Help?

For further information about the legal implications of the *Grassy Narrows First Nation* decision, please contact McMillan's Aboriginal Law team.

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