BUSINESS INTERESTS WORKING THROUGH PARTS OF CANADA'S IDENTITY: ABORIGINAL LAW AND FEDERALISM

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The Ontario Court of Appeal earlier this year provided some helpful confirmation to companies in the natural resources sector seeking licenses from the Province.

In *Keewatin v Ontario (Natural Resources)*[1], the Court of Appeal confirmed the Province's right to "take up" what became provincial lands, subject to an aboriginal treaty negotiated by the federal government, without federal government approval. The Court of Appeal did so with regard to the quintessential Canadian principles of federalism, constitutional evolution, and the indivisibility of the Crown. As we celebrate Canada Day 2013, we consider a case that highlights these parts of our Canadian identity.

Facts and judicial history

The subject treaty, Treaty 3, was signed by representatives of the Dominion of Canada and the Saulteaux Tribe of the Ojibway Indians (the "Ojibway") in 1873. The treaty includes a "harvesting clause" that permits the use of the land for hunting and fishing by the Ojibway, with the exception of land "taken up for settlement, mining, lumbering or other purposes by [the] Government of the Dominion of Canada."

In 1997 the Ontario Minister of Natural Resources granted a sustainable forestry license to Abitibi-Consolidated Inc. ("Abitibi"). This license allowed Abitibi to conduct forestry operations on the Keewatin lands, which are governed by Treaty 3. The Grassy Narrows First Nation objected to the license on the basis that it violated the harvesting clause.

The trial judge found in favour of the plaintiffs on every main issue. Specifically, she determined that Ontario did not have the authority to "take up" tracts of Keewatin land for forestry under Treaty 3, nor did Ontario have the authority to infringe on the hunting and fishing rights provided in Treaty 3, without federal government approval. Ontario, Abitibi and Canada appealed her decision.

The Decision: Canadian Constitutional Principles

The main issue on appeal was whether Ontario was empowered to take up lands and restrict harvesting rights in the Keewatin territory, 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 Court of Appeal reversed the trial judge's decision and allowed the appeal. The Court of Appeal 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 of Appeal 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. The Court of Appeal accordingly confirmed that Ontario was empowered to "take up" lands within the meaning of Treaty 3.

In coming to its decision, the Court had to balance the Canadian "living tree" concept of constitutional evolution with the Crown's enduring duty towards Canada's First Nations. The responsibility for the Crown's promises, including its promises to its aboriginal treaty partners, is determined by the allocation of power under the constitution, which evolves over time. Treaty 3, including the harvesting clause, was established between the Ojibway and the Crown, not the Ojibway and a particular level of government. The extension of Ontario's border in 1912 to include the Keewatin lands meant Ontario became both beneficial owner and the Crown within the meaning of Treaty 3. The Crown's special relationship with the First Nations remained continuous even though the government, on whose advice the Crown acts, changed.

What it Means for the Natural Resources Sector

By respecting the indivisibility of the Crown in aboriginal treaty disputes the Court of Appeal made a finding that provides some comfort to business interests in a distinctively Canadian way. The interpretation of treaties and the ever-important principle of reconciliation between the Crown and aboriginal peoples are addressed through the evolving federalist structure of Canada.

Natural resource companies can continue to rely on the licenses that they procure from the Province of Ontario.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.