

Supreme Court Clarifies Provincial Aboriginal Consultation Responsibilities When Issuing Resource Permits in *Keewatin* and Applies *Tsilqot'in* Infringement Test

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The Supreme Court of Canada's recent decision in Grassy Narrows First Nation v Ontario (Natural Resources) (also known as "Keewatin") underscores once again the Crown's duty to consult. It asserts the need for provinces and territories to consult early with Aboriginal communities and not wait for a resource project proponent to reach a deal with the community. The Supreme Court's decision, released on July 11, 2014, also dealt with infringement of treaty rights – and specifically the Grassy Narrows First Nation and Wabauskang First Nation's harvesting rights under Treaty 3. The Supreme Court applied the test used by the Court in its June 26 decision in Roger William (on behalf of the Tsilhqot'in Nation) v BC.

Background

Treaty 3 and the Keewatin Lands

When Canada was expanding westward and settlers traveled along a route through Northwestern Ontario and Eastern Manitoba, it sought to ensure safe travels through Ojibway lands. In 1873, Treaty 3 was negotiated between the Chiefs of the Ojibway and the Dominion of Canada.

The Ojibway yielded ownership (according to Canada) or negotiated land sharing (according to the Ojibway) of the Treaty 3 territory to Canada in return for reserve lands, annuities and goods. The Ojibway retained harvesting rights on non-reserve land within the Treaty area until the land was "taken up" for settlement, mining, lumbering, or other purposes by the Government of the Dominion of Canada or any of its duly authorized subjects.

Treaty 3 territory covers a large portion of Northwestern Ontario and Eastern Manitoba, known as the Keewatin lands. At the time the Treaty was signed, the Keewatin lands were under the jurisdiction of the Government of Canada. Since 1912, these lands, except for a small area in Manitoba, have been part of Ontario.

The Grassy Narrows First Nation (Grassy Narrows) is located within the Keewatin lands. Wabauskang First Nation (Wabauskang) also has traditional territory within the Keewatin lands.

Litigation Respecting the Abitibi/Resolute Forestry Operations Licence

In 1997, the Ontario Minister of Natural Resources (MNR) issued a licence to Abitibi-Consolidated Inc., now Resolute FP Canada Inc. (Resolute), to carry out forestry operations on Crown lands within the Keewatin lands. In 2005, Grassy Narrows commenced litigation against

the provincial and federal governments and Resolute alleging that the licence violated their Treaty 3 harvesting rights (*Keewatin*).

Grassy Narrows argued that, absent federal authorisation, Ontario could not “take up” lands (i.e., issue permits) within the Keewatin lands under Treaty 3 so as to limit the harvesting rights protected under the Treaty. Grassy Narrows also argued that Ontario did not have the authority to infringe the Grassy Narrows’ treaty rights under the *Constitution Act, 1867* (Constitution).

Lower Court Decisions and the Two-Step Process

The trial judge agreed with Grassy Narrows that Ontario could not take up lands within the Keewatin lands without first obtaining federal government approval. Further, the trial judge found that the doctrine of interjurisdictional immunity allowed only the federal government, not the provinces, to infringe treaty rights. This became known as the two-step process.

The Ontario Court of Appeal rejected the two-step process set up by the trial judge (see “[Landmark Keewatin Ruling Overturned](#)”). Federal approval was not required prior to issuing provincial permits. The Court did not consider whether interjurisdictional immunity prevented provincial infringement on treaty rights.

Grassy Narrows and Wabauskang appealed to the Supreme Court of Canada (SCC).

The Supreme Court of Canada Decision

Two-Step Process Rejected

The SCC unanimously upheld the Court of Appeal decision, rejecting the two-step process and concluding that, “Ontario and Ontario alone has the power to take up lands under Treaty 3”. However, the SCC determined that the power to take up lands is not unconditional and that the Province is bound by the duties attendant on the Crown.

Ontario’s authority to take up the lands is derived from both agreements and constitutional provisions. The division of powers set out in the Constitution determines the respective powers and obligations of the federal and provincial levels of government. When Ontario’s borders were expanded to include the Keewatin lands, Ontario also became responsible for the promises made between the Crown and the Ojibway under Treaty 3 when acting within its constitutional powers.

Relying on *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, and subsequent decisions, the SCC reiterated that both provincial and federal governments are responsible for fulfilling the promises and satisfying the honour of the Crown.

The appellants argued that the federal government has jurisdiction over “Indians, and Lands reserved for the Indians” under section 91(24) of the Constitution and therefore has the authority to approve the taking up of provincial land. Rejecting this view, the SCC referred to *Mikisew Cree First Nation v Canada (Minister of Canada Heritage)*, 2005 SCC 69. The SCC stated that, although section 91(24) allows the federal government to enact legislation dealing with Indians and reserves that may have some incidental effects on provincial land, it does not allow the federal government to approve taking up land for provincial purposes.

The SCC also noted that Ontario has been exercising its power to take up lands through permits and authorisations on Crown lands for over 100 years without any objection. The SCC stated that this suggests that federal approval is not a necessary element of taking up lands under Treaty 3.

Limits on the Power To Take up Land

The SCC stated that, when taking up lands under Treaty 3, Ontario must “exercise its powers in conformity with the honour of the Crown and the exercise of those powers is subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests” .

Therefore, prior to issuing permits and authorizations, Ontario must respect Ojibway Treaty harvesting rights under Treaty 3.

Ontario must also fulfill its duty to consult and accommodate. Potential impacts on Treaty rights are considered an infringement. Any permit or legislation infringing Treaty rights must be justified, as set out by the SCC on June 26, 2014 in *Roger William (on behalf of the Tsilhqot'in Nation) v British Columbia*, 2014 SCC 44 (*Roger William/Tsilhqot'in*) (see “[Supreme Court of Canada Grants Tsilhqot'in Aboriginal Title in William](#)”).

In *Roger William/Tsilhqot'in*, the SCC determined that infringement may be justified if the Crown can establish a “compelling and substantial” objective consistent with its fiduciary duty owed to the Aboriginal group and has consulted the Aboriginal group. Of significance was the SCC’s assertion that the “compelling and substantial objective” must be considered from both Aboriginal and public perspectives. In addition, such an objective must further the goal of reconciliation with Aboriginal groups.

As in *Roger William/Tsilhqot'in*, the SCC determined in *Keewatin* that the interjurisdictional immunity argument did not apply. Moreover, it found that the doctrine of interjurisdictional immunity in no way precludes Ontario from applying the infringement test prior to issuing permits and authorisations.

Significance of Keewatin

Impacts on Provinces and Territories

Together with the *Roger William/Tsilhqot'in* case, the SCC’s decision in *Keewatin* sets significant sign posts for provinces and territories moving forward.

Provinces and territories may need to step up consultation activity rather than relying on proponents to make deals with Aboriginal people. Prior to issuing permits and authorizations which have the potential to infringe rights, they must meaningfully consult with Aboriginal people on potential impacts on their rights. Provinces and territories must also meet their fiduciary duty and uphold the honour of the Crown in their relationships with Aboriginal people. This is not necessarily the “burden” that some commentators have described. It results from the unique relationship between Aboriginal people and the Crown. It arises from treaties signed by early Canadians when they asserted sovereignty over lands where Aboriginal people had already been living and exercising sovereignty. The treaties are no less important than the Constitution in defining Canada.

The SCC in *Keewatin* also stated

Not every taking up will constitute an infringement of the harvesting rights set out in Treaty 3. This said, if the taking up leaves the Ojibway with no meaningful right to hunt, fish or trap in relation to the territories over which they traditionally hunted, fished, and trapped, a potential action for treaty infringement will arise (Mikisew, at para. 48).

What remains unclear is how to interpret an infringement in terms of a “meaningful right to hunt, fish or trap”. No doubt this will be the subject of future litigation.

Impacts on Proponents

Where does this leave proponents? It is more important than ever that proponents engage early with Aboriginal people in partnerships and when seeking consent for activities that could impact Aboriginal or Treaty rights. These activities provide the greatest certainty to move important resource projects forward. While provinces and territories may delegate some procedural aspects of consultation, they should be taking a leading role in defining their expectations for meaningful consultation.

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