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The Keewatin Case: "Taking up" Lands under Treaty 3

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Case commented on: *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48

On July 11, 2014, the Supreme Court of Canada issued its decision in the *Grassy Narrows* case (also known as *Keewatin*). The Court held that the province of Ontario has the power to "take up" lands surrendered under Treaty 3 so as to limit the Ojibway First Nation's hunting and fishing rights within the Keewatin area of Treaty 3 in Northwestern Ontario. Based on the Court's decision in *Mikisew*, this power is subject to the duty to consult, and, if appropriate, accommodate, First Nations interests (*Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69). This duty is grounded in the honour of the Crown and binds the Province of Ontario in the exercise of the Crown's powers (*Keewatin* at paras 50-51). A potential action for treaty infringement will arise if the taking up leaves the First Nation with no meaningful right to hunt, fish or trap in the territories over which they traditionally hunted, fished, and trapped (*Keewatin* at para 52). In cases where the taking up of lands by Ontario constitutes an infringement of treaty rights, an analysis based on section 35 of the *Constitution Act, 1982* and the *Sparrow* and *Badger* decisions will determine whether the infringement is justified (*R. v Sparrow*, [1990] 1 SCR 1075; R. *v. Badger*, [1996] 1 SCR 771.) The doctrine of interjurisdictional immunity does not preclude the Province from justifiably infringing treaty rights (*Tsilhqot'in First Nation v British Columbia*, 2014 SCC 44, and for an earlier post on the Court's handling of interjurisdictional immunity in *Tsilhqot'in* see here).

The Court's analysis in *Keewatin* is based in part on sections 109, 92(5) and 92A of the *Constitution Act, 1867*. Pursuant to section 109, the Province of Ontario holds the beneficial interests in all lands in the province. Section 92(5) gives the provinces exclusive power over the "Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon" and section 92A gives the provinces exclusive power to make laws in relation to non-renewable natural resources, forestry resources, and electrical energy (*Keewatin* at para 31). Based in part on these sections, Ontario effectively replaced the federal government as the government that could take up lands pursuant to the terms of Treaty 3.

The *Keewatin* decision follows logically from the *Horseman* decision, in which the SCC held that the Alberta government could regulate hunting rights under Treaty 8, even though the treaty

was signed by the federal government (*R v Horseman*, 1990 1 SCR 901). In *Horseman*, the operation of section 12 of the *1930 Natural Resources Transfer Agreement* resulted in the Alberta government in effect replacing the federal government as the "Government of the country" with the right to regulate the treaty rights to hunt, fish and trap.

The *Keewatin* decision leaves an important question unanswered. The Court makes it clear that a taking up of lands that leaves a signatory First Nation with *no* meaningful right to hunt, fish or trap may constitute a potential infringement, and it would appear to be very difficult for the Crown to justify the taking up under those circumstances. However, the Court does not comment on whether taking up a *significant portion* of lands (but not the entire lands) over which a signatory First Nation traditionally hunted, fished or trapped would *prima facie* constitute an infringement of treaty rights. Future cases may address this issue as more and more lands become subject to forestry and mining tenures and to settlement.