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The Importance of Location and Context to the Future Application of the *Grassy Narrows* Decision of the Supreme Court of Canada

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

This post discusses the future application of the decision of the Supreme Court in *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48, to the Prairie Provinces of Canada. The proposition advanced here is that Treaty rights in Manitoba, Saskatchewan and Alberta are constitutionally protected under the *Natural Resource Transfer Agreements* of 1930, all of which are schedules to the *Constitution Act, 1930*, as well as being constitutionally protected by s. 35 of the *Constitution Act, 1982* and the doctrine of the Honour of the Crown. The scope and extent of Treaty harvesting rights in the Prairie Provinces, and how the constitutional protection afforded by the *Natural Resource Transfer Agreements* within the *Constitution Act, 1930*, may affect the exercise of provincial proprietary and legislative powers, is anticipated by, but not specifically addressed in, the *Grassy Narrows* decision. This will require future judicial analysis when *Grassy Narrows* is applied in the region west of the Ontario/Manitoba border.

In constitutional law cases the courts are careful to address the issues arising in the specific factual context of a particular case. The factual context of the *Grassy Narrows* case involved the taking up of land under Treaty 3 in Ontario, but did not involve the *Natural Resource Transfer Agreements* within the *Constitution Act, 1930*. Treaty 3, like the other historical numbered treaties, included a clause authorizing the taking up of land within the Treaty area. The Treaty 3 clause provided that the Government of the Dominion of Canada could take up the land:

Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.

The *ratio decidendi* of *Grassy Narrows* is:

- that Ontario has power in respect of Crown lands by ss. 109, 92A and 92(5) of the *Constitution Act, 1867*; and also
- that the exercise of Ontario's powers under ss. 109, 92A and 92(5) of the *Constitution Act, 1867* "is burdened by the Crown obligations toward the Aboriginal people in question."

The implication of this, for Ontario, in the context of the Ojibway, was stated as follows:

[50] Here, 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. For Treaty 3 land to be taken up, the harvesting rights of the Ojibway over the land must be respected. Any taking up of land in the Keewatin area for forestry or other purposes must meet the conditions set out by this Court in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388, 2005 SCC 69.

Read carefully, the Court appears to say that burdens on the exercise of provincial power apply to, but are not necessarily limited to, the taking up of land. This would be consistent with the Court's earlier jurisprudence on the nature and application of the honour of the Crown, summarized in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623 at paragraphs 65 to 83; and, further, in the Court's jurisprudence on consultation and accommodation, which repeatedly affirms that consultation and accommodation may extend to strategic, higher level decisions that may have an impact on Treaty rights, and is not limited to decisions which constitute taking up Crown land.

The Court's decision in *Grassy Narrows* has been the subject of a variety of case comments: see e.g. [here](#), [here](#), [here](#), and [here](#). These comments all recognize some constitutional protection of Treaty rights. They necessarily focus on the constitutional protections afforded Treaty 3 rights in Ontario, and make reference to the duty to consult specifically. The focus of these comments is the constitutional protection of Treaty 3 given by s. 35 of the *Constitution Act, 1982* and the doctrine of the honour of the Crown, and the implications of this for the exercise of provincial powers under ss. 109, 92A and 92(5) of the *Constitution Act, 1867*.

The application of *Grassy Narrows* to the Prairie Provinces will necessarily involve a consideration not before the Court, i.e. the scope and extent of Treaty harvesting rights in the Prairie Provinces, and how the constitutional protection afforded by the *Natural Resource Transfer Agreements* within the *Constitution Act, 1930*, may affect the exercise of provincial proprietary and legislative powers.

Canada retained administration and control of Crown lands when the provinces of Manitoba, Saskatchewan and Alberta were created; and it assumed this responsibility in the Railway Belt and Peace River Block of British Columbia. In 1930, through the Schedules in the *Constitution Act, 1930*, these Provinces assumed administration and control over these Crown lands. The purpose of the *Constitution Act, 1930*, was to put the Prairie Provinces in the same position as Ontario (and the other original Provinces of Confederation).

Since *Grassy Narrows* confirms that the exercise of proprietary and legislative powers of Ontario as regards Crown lands and resources are subject to Treaty rights, it follows necessarily that when administration and control of Crown lands and resources was transferred through the

Constitution Act, 1930 to the provinces of Manitoba, Saskatchewan and Alberta, each therefore also took proprietary and legislative powers subject to Treaty rights.

The Grassy Narrows decision therefore necessarily means that the powers of the Prairie Provinces under ss. 109, 92A and 92(5) of the *Constitution Act, 1867* are also burdened by obligations to Aboriginal peoples. *To track the language of the Court*, provincial powers must be exercised 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. For Treaty land to be taken up, the harvesting rights of First Nations over the land must be respected. Any taking up of land in the Prairie Provinces must meet the conditions set out in *Mikisew Cree*. None of this is a surprise. Alberta's *Policy on Consultation with First Nations on Land and Natural Resource Management, 2013*, recognizes that "Alberta's management and development of provincial Crown lands and natural resources is subject to its legal and constitutional duty to consult First Nations and, where appropriate, accommodate their interests when Crown decisions may adversely affect their continued exercise of constitutionally protected Treaty rights."

But the duty to consult is derived from the honour of the Crown and the constitutional protection afforded Treaty rights by s. 35 of the *Constitution Act, 1982*. Beyond this, the *Constitution Act, 1930*, provides additional constitutional protections for Treaty rights west of the Ontario/Manitoba border. These additional constitutional protections are anticipated, but not explicitly discussed, by the constitutional framework affirmed by the *Grassy Narrows* decision.

Important contextual factors exist in the Prairie Provinces. By section 1 of the *Constitution Act, 1930*, provincial jurisdiction over lands and resources was expressly made subject to existing trusts or other interests; and the exercise of provincial powers was further limited by the *Natural Resource Transfer Agreement* provisions applicable to each Province. Moreover, the Treaty rights were altered by the *Constitution Act, 1930*, through merger and consolidation.

There is a considerable body of jurisprudence respecting the *Natural Resource Transfer Agreements*. This jurisprudence recognizes that the Treaties and the *Natural Resource Transfer Agreements* both involve solemn assurances of continuity of practices, traditions and customs integral to First Nation societies. In these respects, location is important to First Nations. Treaty harvesting rights of hunting, fishing and/or trapping are more than privileges of hunting, fishing or trapping somewhere. The Court recognizes this reality in *Mikisew Cree*, where Binnie J. for the Court writes that "for aboriginal people, as for non-aboriginal people, location is important" (2005 SCC 69 at para 47). The former SCC Justice Gerard V. La Forest made the same point in his book *Natural Resources and Public Property under the Canadian Constitution* (University of Toronto Press, 1969) at page 120: "It does, of course, matter to them where they hunt and fish....".

The *Natural Resource Transfer Agreements*

- provide that the rights to fishery were to belong and be administered by the Province "[e]xcept as herein otherwise provided." Since the transfer of public lands generally was

- subject to Treaty rights, it seems to follow logically that provincial rights in relation to the fishery are subject to Treaty rights to fish.
- provide that provincial laws respecting game were to be applicable to Indians “in order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence.” This can be viewed as a constitutionally protected right to the continuance of a supply of healthy fish and game necessary to the exercise of Treaty harvesting rights for support and subsistence.
- assure to the Indians the right to hunt for food on “all unoccupied Crown lands and on any other lands to which the Indians have a right of access.” This includes, of course, Indian reserve lands. This is a substantive right to hunt for food.

In conclusion, it is proposed here that the future application of the *Grassy Narrows* decision to the Prairie Provinces of Canada will necessarily involve a consideration of how the exercise of provincial proprietary and legislative powers are burdened by Crown obligations to First Nations which arise from the *Natural Resource Transfer Agreements* in the *Constitution Act, 1930*.

Kirk Lambrecht, Q.C. represented the intervener the Fort McKay First Nation in the Grassy Narrows case before the Supreme Court of Canada.

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