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***Grassy Narrows*, Division of Powers and International Law**

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

This post discusses two issues arising from the Supreme Court's decision in *Grassy Narrows*. The post first considers the implications of the Court's conclusion that the doctrine of interjurisdictional immunity does not apply in a case where a province infringes the treaty right to hunt leaving the treaty party with no meaningful right to hunt. Second the post argues that the Court's conclusion that a provincial government may be able to justify an infringement of hunting rights of this nature is inconsistent with Canada's obligations under international law.

The division of powers issue

Prior to this decision and the Court's decision in *Tsilhqot'in Nation v British Columbia*, [2014 SCC 44](#) I think that it was broadly understood that a province could not impair an Indian treaty right. A province could not do so directly because such a law would be a law in relation to Indians or lands reserved for Indians. Perhaps the best discussion of this issue is Justice Davey's decision in the British Columbia Court of Appeal in *R v White and Bob* (1964), 50 DLR (2d) 613 (BCCA), aff'd [1965] SCR vi, which dealt with a charge of being in possession of game out of season and without a permit under the BC *Wildlife Act*. The accused defended the charge principally on the basis of one of the Douglas Treaties to which their ancestors were a party. The Douglas Treaties contained the following clause:

The condition of, or understanding of this sale, is this, that our village sites and enclosed fields, are to be kept for our own use, for the use of our children, and for those who may follow after us, and the lands shall be properly surveyed hereafter; it is understood however, that the land itself with these small exceptions, becomes the entire property of the white people forever, it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.

While it is arguable that Justice Davey's judgement principally turns on the opening language of what is now s.88 of the *Indian Act*, RSC 1985, c I-5, he also went on to state as follows:

Sections 8 ... and 15 ... of the *Game Act* specifically exempt Indians from the operation of certain provisions of the Act, and from that I think it clear that the

other provisions are intended to be of general application and to include Indians. If these general sections are sufficiently clear to show an intention to abrogate or qualify the contractual rights of hunting notoriously reserved to Indians by agreements such [this Treaty] they would, in my opinion, fail in that purpose because that would be legislation in relation to Indians that falls within Parliament's exclusive legislative authority under s. 91 (24) of the *B.N.A. Act*, and also because that would conflict with s. 87 [now s.88] of the *Indian Act* passed under that authority. Legislation that abrogates or abridges the hunting rights reserved to Indians under the **treaties** and agreements by which they sold their ancient territories to the Crown and to the Hudson's Bay Company for white settlement is, in my respectful opinion, legislation in relation to Indians because it deals with rights peculiar to them. Lord Watson's judgment in *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 58 L.J.P.C. 54, if any authority is needed, makes that clear. At p. 60 he observed that the plain policy of the *B.N.A. Act* is to vest legislative control over Indian affairs generally in one central authority. On the same page he spoke of Parliament's exclusive power to regulate the Indians' privilege of hunting and fishing. In my opinion, their peculiar rights of hunting and fishing over their ancient hunting grounds arising under agreements by which they collectively sold their ancient lands are Indian affairs over which Parliament has exclusive legislative authority, and only Parliament can derogate from those rights.

There was also room for thinking that the province could not impair an Indian treaty right even indirectly; such a law would be inapplicable because of the doctrine of interjurisdictional immunity. The premise of the argument is that treaty rights are part of the core content of one or other head of s.91(24) and that any non-trivial interference with a treaty right would make a valid law not invalid but inapplicable. Authority for this proposition prior to *Tsilhqot'in* would have included *R. v Morris*, [2006] 2 SCR 915.

But in *Tsilhqot'in* (handed down the week before *Grassy Narrows*), the Supreme Court of Canada in an *obiter* statement apparently made the doctrine of interjurisdictional immunity inapplicable to head 24 of section 91 of the *Constitution Act, 1867* at least in relation to aboriginal title (at para 140 et seq). It also expressed doubt about the authority of *Morris* on interjurisdictional immunity (at para 150). My colleague Jennifer Koshan and I have criticized that aspect of *Tsilhqot'in* in an earlier post [here](#). In *Grassy Narrows* (in another *obiter* statement at para 53) the Court, again unanimously, extended the non-applicability of the doctrine of interjurisdictional immunity to provincial laws and actions that infringe a treaty right. The Court did so with the bald statement (at para 33) that “*Tsilhqot'in Nation v British Columbia* is a full answer” to any claim as to the inapplicability of provincial laws. Thus, there is no longer a protected core to head 24 of s.91. Provincial laws and provincial alienations that are so extensive as to render an Indian treaty right (i.e. a right arising from an agreement, i.e. consent) to hunt meaningless will not be inapplicable. That however is not the end of the matter; while there is no bright line inapplicability rule the provincial government will still have to justify takings up of land that have this result.

The relevance of international law

This brings us to the second topic of this post, the relevance of international law. The argument I want to present here is that if the relevant government has used (taken up) or authorized the use of lands within the traditional territory of a First Nation to such an extent that a treaty right to

hunt is no longer meaningful then, as a matter of international law, there is no opportunity to justify the infringement because the government action amounts to an impermissible denial of a minority's right to culture within the meaning of Article 27 of the [International Covenant on Civil and Political Rights](#) (ICCPR). I have hinted at various forms of this argument in previous posts ([here](#), [here](#) and [here](#)) but I will now present a more elaborate form of the argument. Article 27 provides as follows.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

While the Article does not refer specifically to indigenous peoples it is clear that in most if not all cases indigenous peoples will qualify as minorities within the meaning of the Article. The Article protects the minority's right to culture. In its interpretive note on Article 27 ([General Comment No. 23](#)) the Human Rights Committee (HRC) (the expert supervisory body for the ICCPR) has emphasized that in the case of indigenous communities the right to culture may have a material element that is closely connected to traditional territories:

7. With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them. (references omitted)

In its decisions the HRC has also emphasized that not every state authorized activity in a community's traditional territory will violate Article 27. However, the HRC does contemplate that the cumulative effect of state authorized activities may amount to a denial of the right to culture. For example, in a case involving water transfers in Peru that affected the traditional activities of an indigenous community ([Angela Poma Poma v Peru \(2009\)](#)), the HRC discussed the threshold question as follows (at paras 7.2 – 7.7):

... the exercise of the cultural rights protected under article 27 ... manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them. The protection of these rights is directed to ensure the survival and continued development of cultural identity, thus enriching the fabric of society as a whole.

The Committee recognizes that a State may legitimately take steps to promote its economic development. Nevertheless, it recalls that economic development may not undermine the rights protected by article 27. Thus the leeway the State has in this area should be commensurate with the obligations it must assume under article 27. [M]easures whose impact amounts to a denial of the right of a community to enjoy its own culture are incompatible with article 27, whereas measures with only a limited impact on the way of life and livelihood of persons belonging to that community would not necessarily amount to a denial of the rights under article 2.

... The Committee also observes that the author has been unable to continue benefiting from her traditional economic activity owing to the drying out of the land and loss of her livestock. The Committee therefore considers that the State's action has substantively compromised the way of life and culture of the author, as a member of her community. The Committee concludes that the activities carried out by the State party violate the right of the author to enjoy her own culture together with the other members of her group, in accordance with article 27 of the Covenant.

Thus, if an indigenous community can show that the right to hunt in traditional territory (perhaps following a season round, see *Dick v R*, [1985] 2 SCR 309) is core to their right to culture; and if the state (provincial or federal government) has authorized activities within a community's traditional territory that are so extensive that the community no longer has a meaningful right to hunt and has therefore been denied its right to culture, then the state has no option but to curtail those activities that interfere with the right to culture. In other words, in this case international law supports a bright line rule and would not support the argument that a provincial government should have the opportunity to further justify its infringement of a treaty right (or indeed an aboriginal harvesting right) where state licensed activities rendered the right to hunt meaningless. In sum, the approach sanctioned by the Supreme Court of Canada in *Grassy Narrows* is inconsistent with Canada's international obligations under Article 27 of ICCPR. Another and softer way to put the argument is that when a province seeks to justify an infringement of the right to hunt, the indigenous community should plead that Canada's obligations under international law should inform that justificatory exercise: *Baker v Canada*, [1999] 2 SCR 917.

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