



SUPREME COURT OF CANADA

CITATION: Grassy Narrows First Nation v. Ontario (Natural Resources), 2014 SCC 48

DATE: 20140711

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BETWEEN:

Andrew Keewatin Jr. and Joseph William Fobister, on their own behalf and on behalf of all other members of Grassy Narrows First Nation

Appellants

and

Minister of Natural Resources, Resolute FP Canada Inc. (formerly Abitibi-Consolidated Inc.), Attorney General of Canada and Goldcorp Inc.

Respondents

AND BETWEEN:

Leslie Cameron, on his own behalf and on behalf of all other members of Wabauskang First Nation

Appellant

and

Minister of Natural Resources, Resolute FP Canada Inc. (formerly Abitibi-Consolidated Inc.), Attorney General of Canada and Goldcorp Inc.

Respondents

- and -

Attorney General of Manitoba, Attorney General of British Columbia, Attorney General for Saskatchewan, Attorney General of Alberta, Grand Council of Treaty # 3, Blood Tribe, Beaver Lake Cree Nation, Ermineskin Cree Nation, Siksika Nation, Whitefish Lake First Nation # 128, Fort McKay First Nation, Te'mexw Treaty Association, Ochiichagwe'Babigo'Ining First Nation, Ojibways of Onigaming First Nation, Big Grassy First Nation and Naotkamegwaning First Nation, Métis Nation of Ontario, Cowichan Tribes, represented by Chief William Charles Seymour, on his own behalf and on behalf of the members of Cowichan Tribes, Lac Seul First Nation, Sandy Lake First Nation and Assembly of First Nations/National Indian Brotherhood

Interveners

CORAM: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 55)

McLachlin C.J. (LeBel, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ. concurring)

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GRASSY NARROWS FIRST NATION v. ONTARIO

**Andrew Keewatin Jr. and Joseph William Fobister,
on their own behalf and on behalf of all other
members of Grassy Narrows First Nation**

Appellants

v.

**Minister of Natural Resources, Resolute FP
Canada Inc. (formerly Abitibi-Consolidated Inc.),
Attorney General of Canada and Goldcorp Inc.**

Respondents

- and -

**Leslie Cameron, on his own behalf and on behalf
of all other members of Wabauskang First Nation**

Appellant

v.

**Minister of Natural Resources, Resolute FP
Canada Inc. (formerly Abitibi-Consolidated Inc.),
Attorney General of Canada and Goldcorp Inc.**

Respondents

and

**Attorney General of Manitoba, Attorney General of British
Columbia, Attorney General for Saskatchewan, Attorney
General of Alberta, Grand Council of Treaty # 3, Blood Tribe,
Beaver Lake Cree Nation, Ermineskin Cree Nation, Siksika
Nation, Whitefish Lake First Nation # 128, Fort McKay First
Nation, Te'mexw Treaty Association, Ochiichagwe'Babigo'Ining**

First Nation, Ojibways of Onigaming First Nation, Big Grassy First Nation, Nautkamegwanning First Nation, Métis Nation of Ontario, Cowichan Tribes, represented by Chief William Charles Seymour, on his own behalf and on behalf of the members of Cowichan Tribes, Lac Seul First Nation, Sandy Lake First Nation and Assembly of First Nations/National Indian Brotherhood

Intervenors

Indexed as: Grassy Narrows First Nation v. Ontario (Natural Resources)

2014 SCC 48

File No.: 35379.

2014: May 15; 2014: July 11.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Aboriginal law — Treaty rights — Harvesting rights — Interpretation of taking-up clause — Certain lands subject to treaty annexed to Ontario after signature of treaty between Ojibway and Canada — Whether province has authority to take up tracts of that land so as to limit harvesting rights under treaty or whether it requires federal approval to do so — Constitution Act, 1867, ss. 91(24), 92(5), 92A, 109 — Constitution Act, 1982, s. 35 — Treaty No. 3.

In 1873, Treaty 3 was signed by treaty commissioners acting on behalf of the Dominion of Canada and Ojibway Chiefs from what is now Northwestern Ontario and Eastern Manitoba. The Ojibway yielded ownership of their territory, except for certain lands reserved to them. Among other things, they received in return the right to harvest the non-reserve lands surrendered by them until such time as they were “taken up” for settlement, mining, lumbering, or other purposes by the Government of the Dominion of Canada. At the time that Treaty 3 was signed, a portion of land known as the Keewatin area was under the exclusive control of Canada. It was annexed to Ontario in 1912 and since that time, Ontario has issued licences for the development of those lands.

In 2005, the Grassy Narrows First Nation, descendants of the Ojibway signatories of Treaty 3, commenced an action challenging a forestry licence issued by Ontario to a large pulp and paper manufacturer and which authorized clear-cut forestry operations within the Keewatin area.

The trial judge held that Ontario could not take up lands within the Keewatin area so as to limit treaty harvesting rights without first obtaining Canada’s approval. According to her, the taking-up clause in the treaty imposed a two-step process involving federal approval for the taking up of Treaty 3 lands added to Ontario in 1912.

The Ontario Court of Appeal allowed the appeals brought before it. That court held that s. 109 of the *Constitution Act, 1867* gives Ontario beneficial

ownership of Crown lands within Ontario. That provision, combined with provincial jurisdiction over the management and sale of provincial public lands and the exclusive provincial power to make laws in relation to natural resources gives Ontario exclusive legislative authority to manage and sell lands within the Keewatin area in accordance with Treaty 3 and s. 35 of the *Constitution Act, 1982*.

Held: The appeal should be dismissed.

The central question on this appeal is whether Ontario has the power to take up lands in the Keewatin area under Treaty 3 so as to limit the harvesting rights under the treaty, or whether this is subject to Canada's approval.

Ontario and only Ontario has the power to take up lands under Treaty 3. This is confirmed by constitutional provisions, the interpretation of the treaty, and legislation dealing with Treaty 3 lands.

First, although Treaty 3 was negotiated by the federal government, it is an agreement between the Ojibway and the Crown. Both levels of government are responsible for fulfilling the treaty promises when acting within the division of powers under the Constitution. Sections 109, 92(5) and 92A of the *Constitution Act, 1867* establish conclusively that Ontario holds the beneficial interest in the Keewatin lands and has exclusive power to manage and sell those lands as well as to make laws in relation to the resources on or under those lands. Together, these provisions give Ontario the power to take up lands in the Keewatin area under Treaty 3 for

provincially regulated purposes such as forestry. Further; s. 91(24) of that same Act does not give Canada the authority to take up provincial land for exclusively provincial purposes.

Second, nothing in the text or history of the negotiation of Treaty 3 suggests that a two-step process requiring federal supervision or approval was intended. The text of the taking-up clause supports the view that the right to take up land rests with the level of government that has jurisdiction under the Constitution. The reference in the treaty to Canada merely reflects the fact that the lands at the time were in Canada, not Ontario.

Lastly, legislation subsequent to the signature of the treaty and which dealt with Treaty 3 lands confirmed Ontario's right to take up that land by virtue of its control and beneficial ownership of the territory. It did not amend the terms of Treaty 3.

Ontario's power to take up lands under Treaty 3 is not unconditional. When a government — be it the federal or a provincial government — exercises Crown power, the exercise of that power is burdened by the Crown obligations toward the Aboriginal people in question. 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 S.C.R. 388, 2005 SCC 69. 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.

Cases Cited

Referred to: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *R. v. Horseman*, [1990] 1 S.C.R. 901; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46; *Dominion of Canada v. Province of Ontario*, [1910] A.C. 637; *Smith v. The Queen*, [1983] 1 S.C.R. 554; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Badger*, [1996] 1 S.C.R. 771; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.

Statutes and Regulations Cited

Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands (1891) (U.K.), 54 & 55 Vict., c. 5, Sch., s. 1.

Act for the settlement of questions between the Governments of Canada and Ontario respecting Indian Lands (1891) (Ont.), 54 Vict., c. 3, Sch., s. 1.

Constitution Act, 1867, ss. 91(24), 92A, 92(5), 109.

Constitution Act, 1982, s. 35.

Ontario Boundaries Extension Act, S.C. 1912, c. 40, s. 2.

Treaty No. 3 (1873).

APPEAL from a judgment of the Ontario Court of Appeal (Sharpe, Gillese and Juriansz JJ.A.), 2013 ONCA 158, 114 O.R. (3d) 401, 304 O.A.C. 250, [2013] 3 C.N.L.R. 281, [2013] O.J. No. 1138 (QL), 2013 CarswellOnt 2910, setting aside a decision of Sanderson J., 2011 ONSC 4801, [2012] 1 C.N.L.R. 13, [2011] O.J. No. 3907 (QL), 2011 CarswellOnt 8900. Appeal dismissed.

Robert J. M. Janes and *Elin R. Sigurdson*, for the appellants Andrew Keewatin Jr. and Joseph William Fobister, on their own behalf and on behalf of all other members of the Grassy Narrows First Nation.

Bruce McIvor and *Kathryn Buttery*, for the appellant Leslie Cameron, on his own behalf and on behalf of all other members of the Wabauskang First Nation.

Michael R. Stephenson, *Mark Crow* and *Christine Perruzza*, for the respondent the Minister of Natural Resources.

Christopher J. Matthews, for the respondent Resolute FP Canada Inc. (formerly Abitibi-Consolidated Inc.).

Mark R. Kindrachuk, Q.C., and *Mitchell R. Taylor, Q.C.*, for the respondent the Attorney General of Canada.

Thomas F. Isaac, William J. Burden, Linda I. Knol and Brian P. Dominique, for the respondent Goldcorp Inc.

Heather Leonoff, Q.C., for the intervener the Attorney General of Manitoba.

Paul E. Yearwood, for the intervener the Attorney General of British Columbia.

Richard James Fyfe and Macrina Badger, for the intervener the Attorney General for Saskatchewan.

Douglas B. Titosky, for the intervener the Attorney General of Alberta.

Zachary Davis, Peter W. Hutchins and Jessica Labranche, for the intervener the Grand Council of Treaty # 3.

Meaghan M. Conroy and Abram B. Averbach, for the interveners the Blood Tribe, the Beaver Lake Cree Nation, the Ermineskin Cree Nation, the Siksika Nation and the Whitefish Lake First Nation # 128.

Written submissions only by *Karin Buss and Kirk Lambrecht, Q.C.*, for the intervener the Fort McKay First Nation.

Karey Brooks, for the intervener the Te'mexw Treaty Association.

Donald R. Colborne, for the interveners the Ochiichagwe'Babigo'Ining First Nation, the Ojibways of Onigaming First Nation, the Big Grassy First Nation and the Naotkamegwanning First Nation.

Jason Madden and *Nuri G. Frame*, for the intervener the Métis Nation of Ontario.

David M. Robbins, *Dominique Nouvet* and *Heather Mahony*, for the intervener the Cowichan Tribes, represented by Chief William Charles Seymour, on his own behalf and on behalf of the members of Cowichan Tribes.

David G. Leitch, for the interveners the Lac Seul First Nation and the Sandy Lake First Nation.

Joseph J. Arvay, Q.C., and *Catherine J. Boies Parker*, for the intervener the Assembly of First Nations/National Indian Brotherhood.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Overview

[1] In the early 1870s, Canada was a young country looking to promote Western expansion and Confederation. Settlers travelled west along an immigrant travel route called the Dawson Route, and British Columbia agreed to join Confederation on the condition that Canada build a transcontinental railway. But the immigrant travel route and the prospective railway to the west ran through traditional Ojibway land in what is now Northwestern Ontario and Eastern Manitoba. Canada was concerned about the security of immigrant travellers and surveyors preparing for the construction of the Canadian Pacific Railway (“CPR”), and feared that it may need to station troops in the area. Securing a safe route through the Ojibway lands was critical for the addition of British Columbia to Confederation and to the development of the West. It was against this historical backdrop that Treaty 3, which is at the heart of this case, was negotiated.

[2] In 1873, Treaty 3 was signed by treaty commissioners acting on behalf of the Dominion of Canada and Chiefs of the Ojibway. The Ojibway yielded ownership of their territory, except for certain lands reserved to them. In return, the Ojibway received annuity payments, goods, and the right to harvest the non-reserve lands surrendered by them until such time as they were “taken up” for settlement, mining, lumbering, or other purposes by the Government of the Dominion of Canada.

[3] The Treaty 3 lands include the Keewatin area. At the time Treaty 3 was concluded, the Keewatin area was under the exclusive control of Canada. In 1912, it

was annexed to Ontario through the *Ontario Boundaries Extension Act*, S.C. 1912, c. 40 (“1912 Legislation”), and since that time, Ontario has issued licences for the development of lands in the Keewatin area. In 2005, the Grassy Narrows First Nation, descendants of the Ojibway signatories of Treaty 3, commenced an action challenging a forestry licence for lands that fell within the Keewatin area. The legal issue in this case is whether Ontario can “take up” lands in the Keewatin area under Treaty 3 so as to limit the harvesting rights under the treaty, or whether it needs federal authorization to do so.

[4] I conclude that Ontario has the authority to take up lands in the Keewatin area so as to limit the harvesting rights set out in Treaty 3. By virtue of ss. 109, 92A, and 92(5) of the *Constitution Act, 1867*, Ontario alone has the ability to take up Treaty 3 land and regulate it in accordance with the treaty and its obligations under s. 35 of the *Constitution Act, 1982*. A two-step process involving federal approval for provincial taking up was not contemplated by Treaty 3.

II. History of Treaty 3

A. *Treaty 3 Territory*

[5] The Treaty 3 territory covers approximately 55,000 sq. mi. in what is now Northwestern Ontario and Eastern Manitoba. In 1873, Canada claimed ownership over all the Treaty 3 lands. The Keewatin area was unquestionably under Canada’s jurisdiction at that time, but the ownership of the rest of the Treaty 3 territory was

disputed with Ontario. Since 1912, all of the Treaty 3 territory, except for a small portion in Manitoba, has been within the borders of Ontario. This appeal only concerns the Keewatin area.

B. *Treaty Negotiations*

[6] In 1868, Canada needed to complete a treaty with the Ojibway in order to fulfill its promise to build a transcontinental railway to the west and to establish an immigrant travel route across the Treaty 3 lands.

[7] Treaty negotiations were attempted in 1871 and 1872, but failed. In 1873, intent on securing agreement, Canada appointed three new treaty commissioners: Alexander Morris, a founder of Confederation and the Lieutenant Governor of Manitoba, Joseph Provencher, a federal Indian agent, and Simon Dawson, who supervised the construction of the Dawson Route.

[8] The trial judge found that the Ojibway Chiefs who were key players in the negotiation of Treaty 3 were in no rush to make a deal. They were under no immediate threat, as settlers were only passing through their territory, not settling on it. They were only prepared to cooperate if they could retain their way of life, particularly their traditional hunting, fishing and trapping activities.

[9] The negotiations lasted from October 1 to October 3, 1873. There are several historical accounts of the negotiations leading to the conclusion of the treaty:

Morris’s official report on the making of the treaty, a record of discussions published in *The Manitoban* newspaper, handwritten notes prepared by Dawson during the negotiations, the notes taken on behalf of the Ojibway Chiefs by a Métis hired by them and a record of negotiations published in *The Manitoba Free Press*.

[10] On October 3, 1873, the parties signed Treaty 3. The Ojibway ceded the Treaty 3 territory to Canada in return for reserves, annuities, and goods. The treaty also provided that the Ojibway would retain harvesting rights on the non-reserve land within the Treaty 3 territory until the land was “taken up”.

C. *The Harvesting Rights and the Taking-Up Clause*

[11] The harvesting rights were set out in the text of the treaty as follows (the “taking-up clause”):

. . . they, the said Indians, shall have [the] right to pursue their avocations of hunting and fishing throughout the [said] tract surrendered as hereinbefore described . . . 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. [p. 6]

[12] At the Court of Appeal, the parties disagreed about the trial judge’s interpretation of the scope of the taking-up clause. It was suggested by Ontario and Canada that the trial judge interpreted the treaty so as to restrict the exercise of the taking-up clause to the Dawson Route and the CPR line such that other areas within

the Treaty 3 territory could not be “taken up”. The Court of Appeal rejected this interpretation of the trial judge’s findings, concluding that when her reasons are read as a whole, the trial judge found that the taking-up clause permitted the taking up of lands throughout the entire Treaty 3 territory, subject only to the legal limits imposed by the honour of the Crown and s. 35 of the *Constitution Act, 1982*. The scope of the taking up power in Treaty 3 is not at issue in this case, and I agree with the Court of Appeal’s reading of the trial judge’s reasons.

D. *Boundary Dispute*

[13] Treaty 3 was negotiated amidst a dispute between Ontario and Canada over Ontario’s western and northern boundaries. Canada’s position was that all the Treaty 3 lands were under the control of the Dominion of Canada, while Ontario took the position that its boundaries extended westward to include much of the Treaty 3 lands. The lands that were the object of this dispute are referred to as the “disputed territory”. The Keewatin area was not part of this dispute; it was unquestionably under the control of Canada at the time Treaty 3 was negotiated and signed. However, the boundary dispute, and the subsequent legislation that settled the dispute, nonetheless provide insight into the parties’ understanding of the taking-up clause in Treaty 3.

[14] In 1874, Canada and Ontario reached a provisional boundary agreement. Under this agreement, Ontario would grant patents and licences for the lands to the east and south of the provisional boundary, while Canada would do so for the lands

west and north of the boundary. Ontario's position in the boundary dispute was accepted by a panel of arbitrators in August 1878. The disputed territory was within Ontario's borders. This ruling was endorsed by the Judicial Committee of the Privy Council in 1884, and confirmed in reciprocal legislation in 1891: *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands* (1891) (U.K.), 54 & 55 Vict., c. 5; *An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indian Lands* (1891) (Ont.) 54 Vict., c. 3 (the "1891 Legislation").

[15] The 1891 Legislation incorporated a draft agreement between Canada and Ontario that was ultimately executed in 1894 (the "1894 Agreement"). Article 1 of the 1894 Agreement provided that as the disputed territory belonged to Ontario, "the rights of hunting and fishing by the Indians throughout the tract surrendered, not including the reserves to be made thereunder, do not continue with reference to any tracts which have been, or from time to time may be, required or taken up for settlement, mining, lumbering or other purposes by the Government of Ontario" (Schedule to 1891 Legislation (U.K.)). In other words, Ontario was responsible for the "taking up" of Treaty 3 lands within its boundaries.

E. *1912 Transfer of Keewatin*

[16] As noted above, the Keewatin area was not part of the boundary dispute between Canada and Ontario. At the time Treaty 3 was concluded, it was part of

Canada. There was no suggestion that Ontario had any interest in the Keewatin area at that time.

[17] The 1912 Legislation extended Ontario's borders to include the Keewatin area.

III. Judicial History

A. *The Claim*

[18] In 1997, Ontario's Minister of Natural Resources issued a licence to Abitibi-Consolidated Inc. (now known as Resolute FP Canada Inc.), a large pulp and paper manufacturer, to carry out clear-cut forestry operations on Crown lands situated within the Keewatin area. In 2005, the Grassy Narrows First Nation, descendants of the Ojibway signatories of Treaty 3, launched an action to set aside the forestry licence on the basis that it violated their Treaty 3 harvesting rights.

[19] In 2006, Spies J. made a case management order dividing the trial into two phases. The first phase consisted of two threshold questions: (1) Does Ontario have the authority to "take up" tracts of land within the Keewatin area so as to limit Treaty 3 harvesting rights? and (2) If the answer to the first question is no, does Ontario have the authority under the *Constitution Act, 1867* to justifiably infringe the appellants' treaty rights?

[20] The second phase of the trial has not yet commenced.

B. *Judgments Below*

[21] In the first phase of the trial, Sanderson J. concluded that the answer to both threshold questions was “no” (2011 ONSC 4801, [2012] 1 C.N.L.R. 13). First, she found that Ontario could not take up lands within the Keewatin area so as to limit harvesting rights without first obtaining Canada’s approval. The taking-up clause imposed a two-step process involving federal approval for the taking up of Treaty 3 lands, and neither the 1891 nor the 1912 Legislation altered this process with respect to the Keewatin area. The trial judge then proceeded to answer the second question, concluding that the doctrine of interjurisdictional immunity prevents provinces from infringing treaty rights, even if the infringement can be justified.

[22] The Ontario Court of Appeal allowed the appeals of Ontario, Canada and Resolute FP Canada Inc. (“Resolute”) (2013 ONCA 158, 114 O.R. (3d) 401). The court held that the trial judge erred in concluding that Ontario requires Canada’s approval to take up the lands in the Keewatin area. Section 109 of the *Constitution Act, 1867* gives Ontario beneficial ownership of Crown lands within Ontario. That provision, combined with provincial jurisdiction over the management and sale of provincial public lands and the exclusive provincial power to make laws in relation to natural resources (ss. 92(5) and 92A), gives Ontario exclusive legislative authority to manage and sell lands within the Keewatin area in accordance with Treaty 3 and s. 35 of the *Constitution Act, 1982*. As the answer to the first question was “yes”, the Court

of Appeal did not consider the second question of whether interjurisdictional immunity applies to provincial infringements of treaty rights.

IV. Parties and Interveners on Appeal

[23] On appeal, there are 2 appellants, 4 respondents, and 13 interveners.

[24] The appellants are the Grassy Narrows First Nation, descendants of the Ojibway, and the Wabauskang First Nation, whose traditional territory includes lands within the Keewatin area.

[25] The first two respondents are the Attorney General of Canada and the Ontario Minister of Natural Resources. The third respondent is Resolute, a company that owns and operates a currently idle paper mill on land subject to Treaty 3, but not in the Keewatin area. Resolute was a defendant in this litigation because it was granted the forestry licence that gave rise to this appeal. The final respondent is Goldcorp Inc., a gold producer with a mine situated in the Keewatin area and whose operations rely in part on permits from the provincial Minister of Natural Resources. Goldcorp was granted status to intervene as a party at the Court of Appeal.

[26] The Attorneys General of Manitoba, British Columbia, Saskatchewan, and Alberta intervene in support of the respondents. The appellants are supported by the following interveners: the Grand Council of Treaty # 3; the Blood Tribe, the Beaver Lake Cree Nation, the Ermineskin Cree Nation, the Siksika Nation, and the

Whitefish Lake First Nation # 128, intervening together; the Fort McKay First Nation; the Te'mexw Treaty Association; the Ochiichagwe'Babigo'Ining First Nation, the Ojibways of Onigaming First Nation, the Big Grassy First Nation, and the Naotkamegwanning First Nation, intervening together; the Métis Nation of Ontario; the Cowichan Tribes; the Lac Seul and Sandy Lake First Nations; and the Assembly of First Nations/National Indian Brotherhood.

V. Issues

[27] This appeal raises the following issues:

1. Does Ontario have the authority under Treaty 3 to “take up” tracts of land in the Keewatin area?
2. Does the doctrine of interjurisdictional immunity preclude Ontario from justifying infringement of Treaty 3 rights?

VI. Analysis

A. *The Power to Take up Lands Under Treaty 3*

[28] The central question on this appeal, simply put, is whether the Province of Ontario has the power to take up lands in the Keewatin area under Treaty 3, or

whether this must be done by or in cooperation with the government of Canada. Ontario's power to take up other Treaty 3 lands is not at issue on this appeal.

[29] The Court of Appeal held that the Province of Ontario has the power to take up the lands. The trial judge, by contrast, held that this could be done only by a two-step procedure involving approval by both the federal and provincial governments.

[30] I agree with the Ontario Court of Appeal that Ontario and only Ontario has the power to take up lands under Treaty 3. This conclusion rests on Canada's constitutional provisions, the interpretation of Treaty 3, and legislation dealing with Treaty 3 lands. First, although Treaty 3 was negotiated by the federal government, it is an agreement between the Ojibway and the Crown. The level of government that exercises or performs the rights and obligations under the treaty is determined by the division of powers in the Constitution. Ontario has exclusive authority under the *Constitution Act, 1867* to take up provincial lands for forestry, mining, settlement, and other exclusively provincial matters. Federal supervision is not required by the Constitution. Second, nothing in the text or history of the negotiation of Treaty 3 suggests that a two-step process requiring federal supervision or approval was intended. Third, legislation dealing with Treaty 3 land confirms that no two-step process was contemplated. I elaborate on each of these points below.

(1) Constitutional Provisions

[31] Once the Keewatin lands came within Ontario's borders in 1912, s. 109 of the *Constitution Act, 1867* became applicable. Section 109 provides:

All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

Section 109 establishes conclusively that Ontario holds the beneficial interest in the Keewatin lands and the resources on or under those lands. In addition, s. 92(5) of the *Constitution Act, 1867* gives the Province exclusive power over the "Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon" and s. 92A gives the Province exclusive power to make laws in relation to non-renewable natural resources, forestry resources, and electrical energy. Together, these provisions give Ontario the power to take up lands in the Keewatin area under Treaty 3 for provincially regulated purposes, such as forestry.

[32] The view that only Canada can take up, or authorize the taking up of, lands under Treaty 3 rests on a misconception of the legal role of the Crown in the treaty context. It is true that Treaty 3 was negotiated with the Crown in right of Canada. But that does not mean that the Crown in right of Ontario is not bound by and empowered to act with respect to the treaty.

[33] The theory of the trial judge, supported by the appellants, was that since the treaty was made with the federal Crown, only the federal Crown has obligations and powers over matters covered by the treaty. But this reasoning does not apply in the treaty context. For example, this Court has held that Crown obligations to First Nations such as the duty to consult are owed by both levels of government (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511) and that a change in the level of government responsible for regulating hunting rights did not constitute a modification of a treaty (*R. v. Horseman*, [1990] 1 S.C.R. 901). Furthermore, in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), Lord Watson concluded that Treaty 3 purported to be “from beginning to end a transaction between the Indians and the Crown”, not an agreement between the government of Canada and the Ojibway people (p. 60). In the same vein,

it is abundantly clear that the Commissioners who represented Her Majesty, whilst they had full authority to accept a surrender to the Crown, had neither authority nor power to take away from Ontario the interest which had been assigned to that province by the Imperial Statute of 1867. [*ibid.*]

[34] Similar views were expressed in *Dominion of Canada v. Province of Ontario*, [1910] A.C. 637 (P.C.), at p. 645, and *Smith v. The Queen*, [1983] 1 S.C.R. 554, at pp. 562-65.

[35] The promises made in Treaty 3 were promises of the Crown, not those of Canada. Both levels of government are responsible for fulfilling these promises when

acting within the division of powers under the *Constitution Act, 1867*. Thus, when the lands covered by the treaty were determined to belong to the Province of Ontario, the Province became responsible for their governance with respect to matters falling under its jurisdiction by virtue of ss. 109, 92(5) and 92A of the *Constitution Act, 1867*, subject to the terms of the treaty. It follows that the Province is entitled to take up lands under the treaty for forestry purposes.

[36] The appellants further argue that s. 91(24) of the *Constitution Act, 1867*, grants Canada a residual and continuing role in respect of the taking up of Treaty 3 lands. Section 91(24) provides that Canada has jurisdiction over “Indians, and Lands reserved for the Indians”. Thus, the appellants submit that the trial judge’s two-step process is merely a restatement of the double aspect doctrine: to the extent that any taking up displaces or limits the federally promised treaty rights, both aspects of the land or resource must be addressed — the provincial aspect of the land *qua* proprietary rights and the federal aspect of the land as subject to a treaty right (Grassy Narrows’ factum, at para. 66).

[37] Section 91(24) does not give Canada the authority to take up provincial land for exclusively provincial purposes, such as forestry, mining, or settlement. Thus, s. 91(24) does not require Ontario to obtain federal approval before it can take up land under Treaty 3. While s. 91(24) allows the federal government to enact legislation dealing with Indians and lands reserved for Indians that may have incidental effects on provincial land, the applicability of provincial legislation that

affects treaty rights through the taking up of land is determined by *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, and s. 35 of the *Constitution Act, 1982*.

(2) Interpretation of Treaty 3

[38] The text of the taking-up clause supports the view that the right to take up land rests with the level of government that has jurisdiction under the Constitution. The taking-up clause provides that the Ojibway will have continuing harvesting rights throughout the Treaty 3 lands “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” (p. 6).

[39] The clause does not contemplate a two-step process involving both levels of government. It only refers to the Government of the Dominion of Canada. The treaty, as discussed, was between the Crown — a concept that includes all government power — and the Ojibway. The reference to Canada reflects the fact that the lands at the time were in Canada, not Ontario. Canada and Canada alone had beneficial ownership of the lands and therefore jurisdiction to take up the lands. This said, Treaty 3 was negotiated against the backdrop of a boundary dispute between Ontario and Canada. The possibility of provincial acquisition of the lands was patent. It follows that if the drafters of the treaty wanted Canada to have a continuing supervisory role in taking up lands under the treaty, the treaty would have said this.

[40] Before this Court, the appellants rely on the trial judge's factual findings that the treaty commissioners contemplated and intended a two-step process involving federal approval and supervision. In my view, the Ontario Court of Appeal was correct in concluding that the trial judge's factual findings amounted to overriding and palpable errors (paras. 156-72). First, there is no evidence that Morris communicated to the Ojibway any intention to require a two-step process, or that he intentionally drafted the taking-up clause to require such a process — assuming that Morris's subjective intention is even relevant here. Second, there is no evidence that the Ojibway intended or insisted upon a two-step process. Third, a provisional boundary agreement reached by Canada and Ontario in 1874 to deal with the administration of the treaty lands pending the settlement of the boundary dispute reflects an understanding that the right to take up lands attached to the level of government that enjoyed beneficial ownership of those lands. Indeed, the agreement provided that if the provisional boundary was subsequently determined to be wrong, the government found to have jurisdiction over the lands would ratify any patents that had been issued by the other government. Lastly, while not determinative, I would note that Ontario has exercised the power to take up lands for a period of over 100 years, without any objection by the Ojibway. This also suggests that federal approval was never considered part of the treaty.

(3) Legislation Dealing With Treaty 3 Lands

[41] This result is also consistent with the way subsequent governments dealt with the right to take up land under Treaty 3. The 1894 Agreement between Canada and Ontario, incorporated in the 1891 Legislation, provided that the disputed territory belonged to Ontario and confirmed that as such Ontario would have the power to take up that land under the treaty. The relevant provision says:

1. With respect to the tracts to be, from time to time, taken up for settlement, mining, lumbering or other purposes and to the regulations required in that behalf, as in the said treaty mentioned, it is hereby conceded and declared that, as the Crown lands in the surrendered tract have been decided to belong to the Province of Ontario, or to Her Majesty in right of the said Province, the rights of hunting and fishing by the Indians throughout the tract surrendered, not including the reserves to be made thereunder, do not continue with reference to any tracts which have been, or from time to time may be, required or taken up for settlement, mining, lumbering or other purposes by the Government of Ontario or persons duly authorized by the said Government of Ontario; and that the concurrence of the Province of Ontario is required in the selection of the said reserves.

[42] This expressly provides that Ontario has the right to take up the lands. Again, there is no mention of any continuing supervisory role for Canada in the process, or any two-step federal/provincial process. I agree with the Court of Appeal that the 1894 Agreement *confirmed* Ontario's right to take up Treaty 3 land by virtue of its control and beneficial ownership of the territory. It did not *amend* Treaty 3.

[43] The 1894 Agreement covered the disputed territory, not the Keewatin lands. In 1912, the *Ontario Boundaries Extension Act* extended Ontario's boundaries

to include the Keewatin territory. The 1912 Legislation included the following terms and conditions:

2....

(a) That the province of Ontario will recognize the rights of the Indian inhabitants in the territory above described to the same extent, and will obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights and has obtained surrender thereof, and the said province shall bear and satisfy all charges and expenditure in connection with or arising out of such surrenders;

(b) That no such surrender shall be made or obtained except with the approval of the Governor in Council;

(c) That the trusteeship of the Indians in the said territory, and the management of any lands now or hereafter reserved for their use, shall remain in the Government of Canada subject to the control of Parliament.

[44] The 1912 transfer of lands confirmed that Ontario would stand in Canada's shoes with respect to the rights of the Indians in those lands (s. 2(a)). The reference to the "rights of the Indian inhabitants" in s. 2(a) includes the harvesting rights under Treaty 3. As the Court of Appeal said, "[t]his condition contemplates, therefore, that Ontario could take up Keewatin lands under the treaty only to the same extent that Canada could validly do so prior to 1912" (para. 198). Section 2(b) provided that Canada's approval was required for the *surrender* of Aboriginal rights — not the taking up of land pursuant to the taking-up clause. The evidence at trial was that the reference to the surrender of rights is a reference to lands not ceded by treaty (at para. 1082). Finally, s. 2(c) provided that the trusteeship of *Indians* and the

management of *reserved* lands would remain with the Government of Canada, subject to the control of Parliament.

[45] In my view, this legislation means that the federal government would remain responsible for Indians and lands reserved to Indians under its power over Indians pursuant to s. 91(24) of the *Constitution Act, 1867*, but that the taking up of other lands within the territory would be for the Province of Ontario alone. Nothing in the legislation contemplates a two-step process involving both levels of government.

[46] This legislation did not constitute a transfer of Crown rights and obligations by Canada to Ontario, as the appellants argue, but a transfer of beneficial interest in land. Having acquired the land, Ontario's constitutional power over lands within its boundaries entitled it to take up lands, subject to the Crown's duties to the Aboriginal peoples who had interests in the land.

[47] It is argued that the 1912 Legislation is not as explicit as the 1894 Agreement with respect to Ontario's power to take up lands under the treaty. While that may be true, there was no need for the 1912 Legislation to use the same language as the 1894 Agreement. I have concluded that the 1894 Agreement *confirmed* Ontario's rights at the time the parties entered into Treaty 3, while the 1912 Legislation transferred beneficial ownership of the Keewatin lands to Ontario along with the responsibilities which attached to those lands. Moreover, as discussed above, the wording of s. 2(a) in the 1912 Legislation constitutes an explicit acknowledgement that Ontario could henceforward do whatever Canada had done

before it, i.e. take up lands. The fact that the words “taking up” were not used in the 1912 Legislation does not diminish the import of s. 2(a).

[48] Nor did transferring to Ontario the right to take up lands within the Keewatin area amend Treaty 3, as the appellants suggest. The treaty allowed for the taking up of land by the beneficial owner of the land — after 1912, this was Ontario. Changing the beneficial owner of the land and the emanation of the Crown responsible for dealing with the lands conveyed did not amend the treaty.

[49] The 1912 Legislation altered which level of government would have authority in terms of taking up the land. It did not modify the treaty or change its partners. As this Court stated with respect to Treaty 8 in *Horseman*, at pp. 935-36:

The Transfer Agreement of 1930 changed the governmental authority which might regulate aspects of hunting in the interests of conservation. This change of governmental authority did not contradict the spirit of the original Agreement. . . . [Emphasis added.]

(4) Conclusion With Respect to the Power to Take Up Lands

[50] I conclude that as a result of ss. 109, 92(5) and 92A of the *Constitution Act, 1867*, Ontario and only Ontario has the power to take up lands under Treaty 3. This is confirmed by the text of Treaty 3 and legislation dealing with Treaty 3 lands. However, this power is not unconditional. In exercising its jurisdiction over Treaty 3 lands, the Province of Ontario is bound by the duties attendant on the Crown. It must

exercise its powers in conformity with the honour of the Crown, and is subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests. These duties bind the *Crown*. When a *government* — be it the federal or a provincial government — exercises Crown power, the exercise of that power is burdened by the Crown obligations toward the Aboriginal people in question.

[51] These duties mean that for land to be taken up under Treaty 3, the harvesting rights of the Ojibway over the land must be respected. Any taking up of the land for forestry or other purposes must meet the conditions set out by this Court in *Mikisew*. As explained by the Ontario Court of Appeal (at paras. 206-12), the Crown's right to take up lands under Treaty 3 is subject to its duty to consult and, if appropriate, accommodate First Nations' interests beforehand (*Mikisew*, at para. 56). This duty is grounded in the honour of the Crown and binds the Province of Ontario in the exercise of the Crown's powers.

[52] Where a province intends to take up lands for the purposes of a project within its jurisdiction, the Crown must inform itself of the impact the project will have on the exercise by the Ojibway of their rights to hunt, fish and trap, and communicate its findings to them. It must then deal with the Ojibway in good faith, and with the intention of substantially addressing their concerns (*Mikisew*, at para. 55; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 168). The adverse impact of the Crown's project (and the extent of the duty to consult and accommodate) is a matter of degree, but consultation cannot exclude accommodation

at the outset. 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).

B. *Does the Doctrine of Interjurisdictional Immunity Preclude Ontario From Justifying Infringement of Treaty 3 Rights?*

[53] I have concluded that Ontario has the power to take up lands in the Keewatin area under Treaty 3, without federal approval or supervision. Provided it does so in a manner that respects the requirements set out in *Mikisew*, doing this does not breach Treaty 3 harvesting rights. If Ontario's taking up of Keewatin lands amounts to an infringement of the treaty, the *Sparrow/Badger* analysis under s. 35 of the *Constitution Act, 1982* will determine whether the infringement is justified (*R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Badger*, [1996] 1 S.C.R. 771). The doctrine of interjurisdictional immunity does not preclude the Province from justifiably infringing treaty rights (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44). While it is unnecessary to consider this issue, this Court's decision in *Tsilhqot'in Nation* is a full answer.

VII. Conclusion

[54] I would dismiss this appeal.

[55] Prior to this appeal, the Court ordered Ontario and Canada to pay the appellant the Grassy Narrows First Nation advanced costs of this appeal. For that reason, there is no need for a further costs award with respect to the Grassy Narrows First Nation. However, the appellant the Wabauskang First Nation also seeks its costs of this appeal. With the consent of Ontario and in light of the fact that Canada does not oppose such an order, costs of the appeal are now also awarded to the Wabauskang First Nation, on the same basis as the costs order earlier granted to the Grassy Narrows First Nation.

APPENDIX A

[Treaty taking-up clause]

Her Majesty further agrees with Her said Indians that they, the said Indians, shall have [the] 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.

Constitution Act, 1867

92. [Subjects of exclusive Provincial Legislation] In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

...

5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

...

92A. (1) [Laws respecting non-renewable natural resources, forestry resources and electrical energy] In each province, the legislature may exclusively make laws in relation to

(a) exploration for non-renewable natural resources in the province;

(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

(2) [Export from provinces of resources] In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

(3) [Authority of Parliament] Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

(4) [Taxation of resources] In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and

(b) sites and facilities in the province for the generation of electrical energy and the production therefrom, whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

(5) [“Primary production”] The expression “primary production” has the meaning assigned by the Sixth Schedule.

(6) [Existing powers or rights] Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

...

109. [Property in Lands, Mines, etc.] All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

Constitution Act, 1982

35. (1) [Recognition of existing aboriginal and treaty rights] The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) [Definition of “aboriginal peoples of Canada”] In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

(3) [Land claims agreements] For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

(4) [Aboriginal and treaty rights are guaranteed equally to both sexes] Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands, (1891) (U.K.), 54 & 55 Vict. c. 5, Sch. [1894 Agreement]

1. With respect to the tracts to be, from time to time, taken up for settlement, mining, lumbering or other purposes and to the regulations required in that behalf, as in the said treaty mentioned, it is hereby conceded and declared that, as the Crown lands in the surrendered tract have been decided to belong to the Province of Ontario, or to Her Majesty in right of the said Province, the rights of hunting and fishing by the Indians throughout the tract surrendered, not including the reserves to be made thereunder, do not continue with reference to any tracts which have been, or from time to time may be, required or taken up for settlement, mining, lumbering or other

purposes by the Government of Ontario or persons duly authorized by the said Government of Ontario; and that the concurrence of the Province of Ontario is required in the selection of the said reserves.

Ontario Boundaries Extension Act, S.C. 1912, c. 40 [1912 Legislation]

2. . . .

(a) That the province of Ontario will recognize the rights of the Indian inhabitants in the territory above described to the same extent, and will obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights and has obtained surrender thereof, and the said province shall bear and satisfy all charges and expenditure in connection with or arising out of such surrenders;

(b) That no such surrender shall be made or obtained except with the approval of the Governor in Council;

(c) That the trusteeship of the Indians in the said territory, and the management of any lands now or hereafter reserved for their use, shall remain in the Government of Canada subject to the control of Parliament.

Appeal dismissed.

Solicitors for the appellants Andrew Keewatin Jr. and Joseph William Fobister, on their own behalf and on behalf of all other members of the Grassy Narrows First Nation: Janes Freedman Kyle Law Corporation, Vancouver and Victoria.

Solicitors for the appellant Leslie Cameron, on his own behalf and on behalf of all other members of the Wabauskang First Nation: First Peoples Law, Vancouver.

Solicitor for the respondent the Minister of Natural Resources: Attorney General of Ontario, Toronto.

Solicitors for the respondent Resolute FP Canada Inc. (formerly Abitibi-Consolidated Inc.): Aird & Berlis, Toronto.

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Saskatoon and Vancouver.

Solicitors for the respondent Goldcorp Inc.: Osler Hoskin & Harcourt, Calgary; Cassels Brock & Blackwell, Toronto.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the Grand Council of Treaty # 3: Hutchins Légal inc., Montréal.

Solicitors for the interveners the Blood Tribe, the Beaver Lake Cree Nation, the Ermineskin Cree Nation, the Siksika Nation and the Whitefish Lake First Nation # 128: MacPherson Leslie & Tyerman, Edmonton and Calgary.

Solicitors for the intervener the Fort McKay First Nation: Henning Byrne, Edmonton; Shores Jardine, Edmonton.

Solicitors for the intervener Te'mexw Treaty Association: Janes Freedman Kyle Law Corporation, Vancouver.

Solicitor for the interveners the Ochiuchagwe 'Babigo' Ining First Nation, the Ojibways of Onigaming First Nation, the Big Grassy First Nation and the Naotkamegwanning First Nation: Donald R. Colborne, Victoria.

Solicitors for the intervener the Métis Nation of Ontario: Pape Salter Teillet, Toronto.

Solicitors for the intervener the Cowichan Tribes, represented by Chief William Charles Seymour, on his own behalf and on behalf of the members of Cowichan Tribes: Woodward & Company, Victoria.

Solicitors for the interveners the Lac Seul First Nation and the Sandy Lake First Nation: Keshen & Major, Kenora, Ont.

Solicitors for the intervener the Assembly of First Nations/National Indian Brotherhood: Farris, Vaughan, Wills & Murphy, Vancouver.