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Keewatin Decision Potentially Invalidates Ontario Licences and Leases Granted Within Treaty Lands

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In its recent decision in *Keewatin v. Minister of Natural Resources* ("Keewatin"), the Ontario Superior Court of Justice held that the Province of Ontario does not have the authority under either Treaty 3 (described below) or the *Constitution Act, 1867* to "take up" tracts of land for forestry within lands subject to Treaty 3 that were added to Ontario in 1912 (the "Keewatin Lands") so as to limit the right to hunt and fish guaranteed to the plaintiffs under the Treaty. As will be discussed below, if allowed to stand, this judgment may have profound implications for the natural resources sector in Ontario and across Canada.

Background to the Dispute

On October 3, 1873, Canada entered into Treaty 3 with the Saulteaux Tribe of the Ojibway Indians in respect of lands that are situated in what is now northwestern Ontario and eastern Manitoba.

The Keewatin Lands became part of the Province of Ontario by virtue of the *Ontario Boundaries Extension Act*. The Treaty 3 lands, including the Keewatin Lands, cover an area of approximately 55,000 square miles.

Treaty 3 contains the following "harvesting clause" (the "Harvesting Clause"), which seeks to preserve the Ojibway Indians' right to hunt and fish (the "Treaty Harvesting Rights" or "Harvesting Rights") on the lands subject to the treaty in the following terms:

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 of duly authorized therefor by the said Government. [Emphasis added.]

In 1997, the Minister of Natural Resources (the "Minister"), under Ontario's *Crown Forests Sustainability Act* (the "CFSA"), issued to the predecessor of the Defendant, Abitibi-Consolidated Inc., a sustainable forest licence permitting it to conduct forestry (i.e., logging) operations on the Keewatin Lands, and subsequently approved various forest management plans and work schedules in respect of those operations.

The Plaintiffs are members of the Grassy Narrows First Nation and are descendants of the Saulteaux Tribe of the Ojibway Indians who signed Treaty 3. In 2000, they applied to the Court to set aside any licence(s), management plans and work schedules approved by the Minister pursuant to the CFSA. That application subsequently became an action, and in 2006, the Court ordered the trial of the following two questions, which are the subject of the *Keewatin* decision:

Question One

Does [Ontario] have the authority within that part of the lands subject to Treaty 3 that were added to Ontario in 1912, to exercise the right to "take up" tracts of land for forestry, within the meaning of Treaty 3, so as to limit the rights of the Plaintiffs to hunt or fish as provided for in Treaty 3?

Question Two

If the answer to question/issue 1 is "no," does Ontario have the authority pursuant to the division of powers between Parliament and the legislatures under the *Constitution Act, 1867* to justifiably infringe the rights of the Plaintiffs to hunt and fish as provided for in Treaty 3?

The Court's Answer to Question One

In its submissions, Ontario, while acknowledging that it must respect the Harvesting Rights guaranteed by Treaty 3, asserted that as the owner of the Keewatin Lands, it can unilaterally restrict or extinguish those rights under the Treaty by "taking up" lands and/or authorizing uses visibly incompatible with them. Ontario warned that to hold otherwise would represent a "massive incursion" upon the province's exclusive proprietary rights over lands in Ontario and is contrary to the mutual intentions of the parties to the Treaty.

In rejecting this submission, the Court held that both the express wording of the Harvesting Clause, and the voluminous historical and expert evidence filed by the Plaintiffs in respect of the context in which Treaty 3 was negotiated, indicated that the "substantive bargain" struck under the Treaty was that the Keewatin Lands could not be developed in a manner that would significantly interfere with the Treaty Harvesting Rights guaranteed under the Treaty. Ontario's rights to authorize uses of land were limited by the Treaty to authorizing uses of land that did not significantly interfere with Treaty Harvesting Rights. Only Canada can "take up" lands under the Treaty and/or extinguish Treaty Harvesting Rights. In short, the Court found that Treaty Harvesting Rights were intended by Canada and the Ojibway to be enforceable substantive rights, and were not to be interfered with without the specific authorization of the Dominion of Canada.

Accordingly, the Court's answer to Question One was "no".

The Court's Answer to Question Two

The issue at this stage of the trial was the interplay between the exercise of Ontario's proprietary powers under s. 109 of the *Constitution Act, 1867* (see below) and the federal government's exclusive right under subsection 91(24) to enact legislation in respect of "Indians, and Lands reserved for the Indians". These provisions state as follows:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

...

24. Indians, and Lands reserved for the Indians.

...

109. 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. [Emphasis added.]

Ontario submitted that because it holds the beneficial ownership in all non-reserve lands ceded under Treaty 3, it can exercise the proprietary rights afforded to it under s. 109 to authorize uses and dispositions of lands within Ontario as it sees fit, unconstrained by the division of powers under the *Constitution Act, 1867*. Moreover, while conceding that the regulation of the Treaty Harvesting Rights is within the exclusive jurisdiction of the federal government, Ontario submitted that in passing the *CFSA*, the province was not directly regulating, nor proposing to directly regulate, Treaty Harvesting Rights. Rather, licensing Crown lands for forestry purposes would only remotely and indirectly affect the Treaty Harvesting Rights by limiting where those rights can be exercised at a given point in time. Because the impact of the *CFSA* in this case was indirect, it would not impair the core of the federal s. 91(24) power as it relates to those rights, so long as a meaningful ability to exercise those rights remains.

In rejecting these submissions, the Court concluded, among other things, that:

- (a) Canada's founding fathers, centralists and provincial autonomists could act under s. 91(24) to protect Harvesting Rights and, therefore, s. 109 rights can be limited by the Harvesting Clause contained in Treaty 3. Indeed, Harvesting Rights are an interest "other than that of the province in the same" pursuant to s. 109;
- (b) Treaty Harvesting Rights are at the core of the federal s. 91(24) jurisdiction and are central to the "Indianness" of the Treaty 3 Ojibway and worthy of federal protection;
- (c) Even an indirect interference with Treaty Harvesting Rights could significantly adversely affect those rights; and

(d) Ontario is therefore constrained by the Constitutional division of powers and is not free to exercise its proprietary rights without regard to the division of powers. Canada, using its s. 91(24) jurisdiction, can make treaty provisions that may affect Ontario's proprietary interests, including promising Treaty Harvesting Rights.

Accordingly, the Court's answer to Question Two was "no".

Potential Implications of the Keewatin Decision

Although the *Keewatin* decision only decided the authority of the Province of Ontario to "take up" land located in the Keewatin Lands subject to Treaty No. 3, it may encourage Aboriginal groups to bring similar challenges to such authority granted under other numbered treaties, both in Ontario and across Canada. Indeed, counsel for the Plaintiffs, Robert Janes—in a statement to the press published the day after the *Keewatin* decision was released—suggested that the important "Ring of Fire" prospect in Northern Ontario could be affected by the Court's ruling in *Keewatin*. Therefore, an important issue arising from this decision is its applicability to other treaty lands, especially in respect of resource rich lands under Treaty No. 9 in northern Ontario and Treaty No. 8 in northern British Columbia, Alberta, Saskatchewan and part of Northwest Territories.

We note that Treaties No. 4 (1874), No. 5 (1875), No. 6 (1876) and No. 7 (1877) used the style of drafting used in Treaty No. 3 (1873). Treaty No. 8 was made 22 years after Treaty No. 7, in 1899, and uses the new wording common to Treaties No. 8, No. 9 (1905-1906), No. 10 (1906) and No. 11 (1921).

With regard to Treaty No. 9, the issue raises the prospect of challenges to existing mining and timber leases and licences granted by the Province of Ontario and the Province of Ontario being prevented from granting infringing licences or leases without the process of taking up being conducted by the federal government. In the event of a successful challenge of existing licences or leases, difficult issues would arise regarding restitution claims in respect of revenues and royalties. Both Ontario and grantees of licences or leases could be liable for substantial amounts on this account.

In assessing the likelihood of successful claims in respect of lands under Treaty No. 9, it is important to note a critical distinction in the wording of Treaty No. 3 versus Treaty No. 9. In Treaty No. 3, the taking-up clause clearly vests the power to take up lands in the federal government. In Treaty No. 9, although it is a treaty between Canada and the Aboriginal peoples identified, the taking-up clause is not as specific as to who is authorized to take up lands under the treaty. Here are the respective clauses, for comparison:

Treaty 3:

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.

Treaty 9:

And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

In correlating the two provisions, what is missing from Treaty No. 9 is identification of the agency of the taking up. Treaty No. 3 has the words "by Her said Government of the Dominion of Canada" at the end. In Treaty No. 9 one would expect the taking-up clause to end with the words "by the government of the country" but there is no agency identified. Treaty No. 9, therefore, is genuinely ambiguous and evidence of the historical context and communicated, common expectations of the parties would be even more important to a challenge under Treaty No. 9 than it was in the *Keewatin* case with respect to Treaty No. 3.

Given the patent ambiguity in drafting that was introduced in the wording of Treaty No. 8, and used in subsequent treaties, we expect that historical evidence about the context in which Treaty No. 8 was negotiated and the communicated common intentions at the time, will be significant in a case that interprets any of the later treaties with respect to the jurisdiction and authority of a province to take up land under the treaty. A case under Treaty No. 9, therefore, would involve extensive evidence about the making of both Treaty No. 8 and Treaty No. 9.

We observe that when Treaties 8, 9 and 10 were entered into, it was known that the treaties covered lands within existing provinces (British Columbia, Alberta, Saskatchewan and Northwest Territories for Treaty 8, Ontario for Treaty 9, and Saskatchewan and Alberta for Treaty

10) so it is understandable that the language of these treaties would be different than the drafting in Treaties 3 to 7, which were entered into when no provinces existed within the areas covered by the treaties. Arguably, when the taking up clause was first introduced in Treaty 3 the clause referred to the Dominion government because Treaties 3 to 7 all related to land that was Dominion land not within any province, but when land within a province was being dealt with, new language would be required to reflect the division of powers. The court in *Keewatin*, however, concluded that the Treaty 3 Aboriginals specifically required that the Dominion government, and not a provincial government, have the authority to take up lands.

In the event a court were to find that the provinces lacked authority to take up lands under any of Treaties 8-10, there would be issues as to (1) how leases and licences can be issued going forward, and (2) the status of leases, licences, royalties and profits under licences and leases that were granted pursuant to taking up that was not authorized under the treaty.

Going forward, the problem can presumably be addressed through some framework of coordinated federal and provincial inter-delegation. We note that hunting, fishing and trapping rights in the Prairie Provinces have already been addressed by Natural Resources Transfer Agreements with the federal government, so that the treaty right to hunt fish and trap should be read in light of these agreements with the provinces. Accordingly, the *Keewatin* decision should have little impact on that portion of Treaty 3 lands situate in Manitoba, lands subject to Treaties 4 to 7, lands under treaty 8 situate in the Prairie Provinces, British Columbia or Northwest Territories, or lands under Treaty 10.

With respect to licences and leases already issued, the first issue would be to determine whether the land use conducted under the licence or lease has materially infringed the Aboriginal harvesting rights under the treaty. If there is immaterial infringement, then the grant of the licence or lease would not have been a taking up by the province in violation of the treaty. The *Keewatin* decision was clear on this point.

If, however, land use under such licences or leases did materially infringe on treaty harvesting rights, then there would presumably be claims for restitution brought by or on behalf of affected Aboriginal groups. Such claims could in theory be brought against both the province and the grantee of the licence or lease, seeking some portion of royalties and revenues from the offending land use, compensation for diminishment of the value of harvesting rights, or a combination of both. It is difficult to predict the potential scope of liability without regard to the specific circumstances of each particular case, including applicability of limitation periods. In any event, there is significant potential for expensive litigation, uncertainty as to potential liability, and uncertainty as to status going forward.

We expect the *Keewatin* decision will be appealed.

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