**Case Brief – Grassy Narrows First Nation v. Ontario (Natural Resources), 2014 SCC 48**

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**Summary**

In *Grassy Narrows*the Supreme Court of Canada unanimously confirmed that Ontario, and Ontario alone, has the authority to “take up” Treaty 3 lands for matters falling under its constitutional jurisdiction provided that it adequately consults and accommodates treaty rights holders. Ontario’s constitutional jurisdiction, the text of Treaty 3, and legislation dealing with Treaty 3 lands all support this conclusion. The implications of the ruling directly extend to Ontario’s activity conducted in the Treaty 3 territory. Second, the decision will likely inform the nature of provincial consultation and accommodation where provincial activity deals with treaty rights on provincial Crown lands.

Grassy Narrows First Nation is a party to Treaty 3 meaning that its members are entitled to hunt and fish within the Treaty 3 territory subject to the Crown’s right to take up lands as required for “settlement, mining, lumbering or other purposes” [para. 11].

In 1997, Ontario issued a forestry licence to a pulp and paper manufacturer to clear-cut lands in the Keewatin area of the Treaty 3 territory. In 2005, Grassy Narrows challenged the licence for violating their harvesting rights under Treaty 3 [para 18]. The trial judge held that the taking up clause in Treaty 3 required a two step process whereby Ontario could not limit the harvesting rights of treaty holders without first obtaining federal approval. Second, the doctrine of interjurisdictional immunity restrained Ontario from justifiably infringing treaty rights [para. 21].

The Court of Appeal reversed the decision of the trial judge by holding that Ontario does not require federal approval to take up lands in the Keewatin area, as it has exclusive jurisdiction to manage and sell lands within the Keewatin area [para 22]. The Court of Appeal did not discuss the application of the doctrine of interjurisdictional immunity in its decision. 

**Ontario has the Power to Take Up Lands in the Treaty 3 Territory**

The Supreme Court of Canada unanimously upheld the result of the Court of Appeal that Ontario has the exclusive jurisdiction to take up lands within the Keewatin area. The Supreme Court agreed that Ontario’s exclusive jurisdiction flows from the *Constitution Act*,*1867*. Their finding was supported by the text of Treaty 3, the historical context of the treaty negotiations, and legislation dealing with Treaty 3 lands.

The Supreme Court reiterated the reasoning of the Court of Appeal. Ontario has the power to take up the Keewatin lands because it is the beneficial owner of provincial Crown lands, has the power to manage and sell provincial and public lands, and has the power to make laws in relation to natural resources [para 31]. Even though Treaty 3 was entered into with the “Dominion of Canada”, the promises therein were promises of the Crown, not those of one level of government [para. 35]. Accordingly, when the Keewatin lands were transferred to Ontario in 1912, the province became responsible for matters falling under its jurisdiction. The federal government cannot take up provincial lands for provincial purposes and therefore it does not follow that s. 91(24) requires the province to obtain federal approval before it takes up provincial lands for matters under its exclusive jurisdiction i.e. property and civil rights [para. 37].

The Supreme Court also considered the text of Treaty 3 and the historical context surrounding its execution. The taking-up clause does not explicitly provide for a two step process.  There was no evidence that the Ojibway or the treaty commissioners contemplated a two-step process. A provincial boundary agreement executed in 1874 between Ontario and Canada contemplated that the right to take up lands rested with the level of government holding beneficial ownership of the lands [para. 40]. Finally, legislation dealing with Treaty 3 lands in 1912 did not contemplate a two-step process [paras. 42-44, 46]. Per the Supreme Court’s previous decision in *Horseman,*a change in the level of government responsible for regulating treaty rights does not modify the treaty [para. 33].

**Provinces Must Act in Accordance with the Honour of the Crown**

Ontario is burdened by Crown obligations towards Aboriginal people. When dealing with Aboriginal interests the province is subject to the fiduciary duties of the Crown and must uphold the honour of the Crown [para. 50]. For land to be taken up under Treaty 3 in accordance with these principles and to avoid breaching Treaty 3 harvesting rights, the province must meet the conditions set out in the Supreme Court decision of *Mikisew Cree*[para. 37]. Ontario is obligated to consult and, if appropriate, accommodate First Nation’s interests before it acts [para. 51].  Consultation requires the province to inform itself of the impact of the contemplated action on treaty rights and to deal with the rights holders in good faith with the intention to substantially address their concerns. The taking up cannot deprive the treaty right holders of the meaningful right to hunt, fish or trap in relation to the territories where those activities were traditionally carried out [para. 52]. This is the clearest statement yet that the provinces must meet the Crown’s obligations under historic Treaties when taking up lands or potentially infringing Treaty rights.

**Interjurisdictional Immunity does not Preclude Ontario from Justifying Infringement of Treaty Rights**

In conformity with its recent decision in *Tsilhqot’in,*the Supreme Court held that Ontario is not precluded from justifiably infringing treaty rights because of interjurisdictional immunity. If the taking up of Keewatin lands constitutes a breach of Treaty 3, it may be justified if it meets the criteria discussed in the *Sparrow/Badger*analysis under s. 35 of the *Constitution Act*, *1982*[para. 53]*.*