What Are the Natural Resources Transfer Agreements and Why Do They Matter?

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On August 29, 2023, Federation of Sovereign Indigenous Nations (a Saskatchewan-based group of independent First Nations) held a press conference announcing that it would be commencing a legal action in the courts of Saskatchewan to attempt to set aside the Natural Resource Transfer Agreements of 1930.

What are the Natural Resource Transfer Agreements and how are they relevant today? What is the meaning and purpose of this proposed court action?

Let us look back to Canada in 1867, the time of Canada's Confederation. The boundaries of Upper Canada (now Ontario), Lower Canada (now Québec) and the three Atlantic Provinces that got together to form a new country were not at all the way that they are today. Remember that the Hudson's Bay Company still controlled all of the land draining into Hudson's Bay, then known as Rupertsland. Beyond that, north and west, were the vast Northwest Territories. Rupertsland was bought back from the company. Those first provinces had legislative and legal control over the natural resources and Crown lands within their respective territories. Under the terms of the British North America Act that created Canada, they retained that legal jurisdiction. The Government of the Dominion of Canada (as it then was) controlled the resources and Crown lands in the Territories.

Fast forward to 1870. Following the call for recognition of Francophone and Métis rights led by Louis Riel and others, Manitoba was created as the "Postage Stamp Province". It was not until 1905 that Saskatchewan and Alberta were created as provinces. What the Prairie Provinces had in common was that, at the time of their creation, the Dominion Government retained control over natural resource rights within their respective boundaries.

This discrepancy in control over Crown lands and natural resources between the original provinces and the Prairie Provinces resulted in considerable consternation between the federal government in Ottawa and its Prairie counterparts. After all, how could the original provinces have control over their resource wealth while the new entries into Confederation did not?

This consternation gave rise to many years of negotiation, culminating in the Natural Resource Transfer Agreements of 1930. These agreements, which form part of the

Constitution, gave the Prairie Provinces the same control over Crown lands and natural resources as enjoyed by the other provinces. One exception was that each of the agreements, which are cast in almost identical terms contained a provision that made provincial fish and game laws apply to First Nations peoples, but reserved to them the right to hunt and fish on all unoccupied Crown lands. Manitoba's agreement provides:

In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

In the meantime, since the 1870s, Canada had been entering into the Numbered Treaties with First Nations. Each of these Treaties contained provisions allowing the party First Nations to pursue their practices of hunting and fishing on their traditional lands until those lands were "taken up" for uses is consistent with those traditional practices (for example, farming, industrial development, etc.).

First Nations and Métis objected at the time that the Natural Resource Transfer Agreements were being negotiated. They saw this as an interference with Treaty rights. They also saw this as granting powers to the Prairie Provinces to regulate traditional activities that they did not otherwise have. It should be kept in mind that the Indian Act, as it then existed, prohibited First Nation Peoples from employing lawyers in seeking their legal advice.

Since 1930, the Prairie Provinces have exercised full authority over the lands and resources within their respective jurisdictions. Over that time Canadian Aboriginal law has developed, including the recognition of the rights of our Indigenous Peoples in our Constitution, as enacted in 1982.

The courts have weighed in on the scope of hunting and fishing rights reserved under the Natural Resource Transfer Agreements, usually in response to attempts by the Prairie Provinces to limit Aboriginal hunting and fishing rights through licensing and restrictions. Those rights have been found to extend to all affected Indigenous Peoples for all unoccupied Crown land, regardless of their traditional territories.

Some First Nations and Métis groups are now advancing the legal argument that Canada did not live up to its duties to them when it negotiated and entered into those agreements. Among other things, they argue that the purported transfer of Crown lands and natural resources to the Prairie Provinces resulted in an ongoing attempts by those provinces to curtail Aboriginal and Treaty rights. Further, it allowed the Prairie Provinces to benefit from

the exploitation of those natural resources without appropriate consultation and participation of Indigenous Peoples who were the original occupants and stewards of those lands.

Anyone who looks back at the history of the Prairie Provinces over the last ninety-plus years can clearly see the importance of natural resources to their development and to the influx settlement into the region. Think first of farming, then forestry, mining, oil and gas. Think of the population growth. Think of the tremendous wealth generated from those resources and lands. Think of the corresponding impacts on harvesting rights and traditional activities of Indigenous Peoples.

The magnitude of the impacts of historical resource development and the control of Crown land since 1930 raises the question of whether the court system is even capable of adjudicating such disputes, let alone deciding upon a remedy in favour of the successful party. If not the courts, then who?

My guess is that only through government-to-government negotiation in a spirit of reconciliation will there be any prospect for resolution of these complex issues.

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*If you have an environmental or natural resources law matter, **contact John** or any one of our **natural resources and energy law** lawyers.*
