Province has the Right to Take Up Treaty Land The Keewatin Appeal

By John Stefaniuk

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On March 18, 2013 the Ontario Court of Appeal gave its decision in the case of Keewatin v. Minister of Natural Resources. In doing so, the Court reversed a Superior Court decision that significantly complicated the way in which resource developers and provinces deal with approvals to carry on activities on Crown lands that fall under certain of the "Numbered Treaties".

In 1997, the Ontario Minister of Natural Resources ("MNR") issued a sustainable forest license to Abitibi-Consolidated Inc. ("Abitibi") to carry out clear-cut forestry operations in parts of the Whiskey Jack Forest. The forest was part of an area that was the subject of Treaty 3 made in 1873 between the Government of Canada and the Saulteaux Tribe of the Ojibway Indians. At that time the forest formed part of the Keewatin District. It was not until 1912 that most of the Keewatin district became part of the Province of Ontario.

Treaty 3 contains what is referred to as a "harvesting" or "taking up" clause that allows government to authorize activities that interfere with the Treaty rights to hunt and fish in the Treaty area. The taking up clause in Treaty 3 is similar to those contained in some of the other Numbered Treaties:

> … they, the said Indians, shall have the right to pursue their avocations of hunting and fishing throughout the said tract surrendered and herein before described… saving and excepting said 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, dully authorized therefore by the said Government.

Grassy Narrows First Nation challenged the issuance of the license by Ontario. They said that at the time of the Treaty the land was not part of Ontario and that the Government of Canada was the only government that could authorize uses that interfere with the harvesting rights. In 2011 the trial judge agreed. The judge held that Ontario did not have the jurisdiction to "take up" lands within the Keewatin District under the Treaty; Canada's approval was required. This put into doubt Ontario's ability to issue resource licenses and permits over a significant portion of its territory. The decision also made certain evidentiary findings regarding the understanding of the Ojibway people with the meaning of Treaty 3, including a finding that the Ojibway understood the Treaty as calling for a sharing of resources.

This caused a brief shake-up in the resource industry. MNR appealed and several other parties joined the appeal as parties and interveners. By 2009, Abitibi withdrew from the case, due to its own restructuring. Goldcorp signed on. Other Treaty 3 and Treaty 6 First Nations joined in. Treaty 6 contains similar a similar taking-up clauses. (For the Treaty text and maps, go to Aboriginal and Northern Affairs Canada at: www.aadnc-aandg.gc.ca.)

The Court of Appeal reviewed the history of Treaty 3 and the constitutional wrangling between Canada and Ontario following Confederation. It found that the trial judge's decision was at odds with the established constitutional framework and could not be sustained. The Court of Appeal reiterated the law that Treaties are made with the Crown, not by a particular level of government; where a First Nation looks to the Crown to enforce Treaty promises, it must do so within the framework of the division of powers between Canada and the provinces under the constitution. The Court concluded that, through the boundary legislation, Ontario "stepped into the shoes of Canada for the purposes of Treaty 3's harvesting clause in the Keewatin Lands."

In keeping the status quo, the Court took the time to remind us of the general principles applicable to government decisions that impact upon Treaty rights:

To uphold the honour of the Crown, the governmental entity must first inform itself of the degree to which the contemplated conduct would adversely affect the Aboriginal peoples' right to hunt, fish and trap and whether that triggers the duty to consult. It must communicate its findings to the affected Aboriginal peoples. It must attempt to deal with First Nations in good faith and with the intention of substantially addressing their concerns. The duty to consult is triggered at a low threshold but adverse impact is a matter of degree, as is the extent of the content of the governmental entity's duty to consult and accommodate. …

Ontario must respect those rights and manage changes to them in accordance with the honour of the Crown and s. 35 of the Constitution Act, 1982. Ontario cannot take up lands so as to deprive the First Nation signatories of a meaningful right to harvest in their traditional territories. Further, honourable management requires that Ontario, as the government with authority to take up in the Keewatin Lands, must consult with First Nations and accommodate their treaty rights whenever they are sufficiently impacted by the taking up.

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John Stefaniuk engages in a broad practice with emphasis on environmental law, real estate and development law, natural resources and energy, commercial law and municipal law matters. He has particular experience in relation to contaminated sites, mining and mine rehabilitation, wind power development, natural resource development, environmental approvals and licensing, commercial real estate, leasing, financing and development, municipal approvals, taxation and assessment and business acquisitions. He appears regularly before government licensing bodies and administrative tribunals including the Manitoba Clean Environment Commission and Municipal Board, municipal councils, provincial legislative committees and in all levels of court in Manitoba and in the Federal Court in connection with environmental, resource, regulatory municipal, and property issues.