Treaty Rights and Resource Development in Saskatchewan

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Aboriginal Rights and Resource Development – General Trajectory

- See accompanying paper – DRAFT version of a forthcoming Macdonald-Laurier Institute paper on legal trajectory of the past five years
- (1) Vast activity in courts and otherwise
- (2) Significant resource rights held by Aboriginal communities, though also sometimes overstated
- (3) Legal over-reaching in some claims – negative consequences for Aboriginal parties/non-parties
- (4) Significant legal uncertainties generated in litigation

Treaty Rights and Resource Development – Broad Considerations

- Treaties in Saskatchewan – 2, 4, 5, 6, 10, 8
- Treaty areas not within provincial boundaries and we have overlaps with MB, AB, BC, NWT
- Similar language throughout numbered treaties – may bear on interpretation questions. But also distinct history of negotiation on each.

Treaty Rights – Two Streams of Interpretation on Resource Rights

- (1) “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.”
- (2) View of treaties as developing relationships, with the possibility of a broad, purposive reading concerned with enabling different communities to flourish together

Provincial Effects on Treaty Rights

- *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48
- paras 51-52 – need to respect harvesting rights, consultation obligations when taking up land, cannot exclude accommodation at the outset, infringement if leave no meaningful right to hunt/fish/trap

Justified Infringements

- *Grassy Narrows, supra*
- Para 53 – “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, [2014] 2 S.C.R. 256). While it is unnecessary to consider this issue, this Court’s decision in *Tsilhqot’in Nation* is a full answer. “
- [change from R v Morris, 2006 SCC 59]

Some Noteworthy Recent Case Law from Other Jurisdictions

- *Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto Alcan Inc.*, 2015 BCCA 154 (just released – subject to possible appeal) – ability to sue private company based on previously unproven Aboriginal title/rights; some comments on riparian rights
- *Wabauskang First Nation v. Minister of Northern Development and Mines*, 2014 ONSC 4424 (Div. Ct.) (under appeal) – Treaty 3 not including rights to resource revenue sharing and shared decision-making

From other jurisdictions…

- *Daniels v. Minister of Indian Affairs and Northern Development*, 2013 FC 6, var'd 2014 FCA 101, leave granted 20 Nov 2014 (SCC File No 35945) – constitutional jurisdiction re Metis and non-status Indians
- Blueberry Rivers First Nations lawsuit under Treaty 8 in northeastern British Columbia – cumulative impacts on treaty rights

From other jurisdictions…

- *Brokenhead Ojibway First Nation v. Canada (Attorney General)*, 2009 FC 484 – duty to consult not arising in context of pipelines on private land and existing rights of way
- *Long Plain First Nation v. Canada,* 2012 FC 1474 – re duty to consult and TLE – appeal heard by FCA in 2014

Recent/Current Claims in Saskatchewan

- *Fond du Lac Denesuline First Nation v. Canada (Attorney General)*, 2012 FCA 73 – no duty to consult on renewal of mine license – cannot assume speculative impacts on treaty rights
- *Peter Ballantyne Cree Nation v. Canada (Attorney General)*, 2014 SKQB 327 – no broad reading of honour of the Crown from NRTA, no duty to consult for past construction, Saskatchewan limitations periods apply to claims, provincial legislation of general application able to apply to limit claims
- *Buffalo River Dene Nation v. Saskatchewan (Minister of Energy and Resources)*, 2015 SKCA 31 – duty to consult does not arise at early stage of subsurface minerals disposition
- Northern trappers situation
- "Depth of a plough" argument and arguments for resource revenue sharing

Strategic Considerations

- Early engagement and positive relationships working well for many industry stakeholders
- Challenges for different types of industry stakeholders – industry and governments need to find means of responding to differing circumstances
- Contrary to what is sometimes asserted, case law does not support extensive control of resource development based on treaty rights under historic numbered treaties, but developments to keep watching – TLE, ongoing case law, attempts to seek parity with modern treaties

Strategic Considerations…

- Policy environment can seek to foster ongoing good relationships through responsiveness to matters of concern – protections of core rights and fostering equitable participation in growing economy
- Ongoing disagreement on resource revenue sharing – complex policy considerations at stake
- Policy environment could degrade into extensive litigation – general environment, involvement of outside counsel
- Those in all related sectors need to be monitoring carefully developments elsewhere and here