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BREAKING CASE LAW

This Issue

Alberta Implementation of UN Rights of Indigenous Peoples

On July 9, 2015, the newly elected Premier of Alberta sent a mandate letter to Cabinet. http://aboriginal.alberta.ca/documents/Premier-Notley-Letter-Cabinet-Ministers.pdf The letter defined expectations for a renewed and improved relationship with indigenous peoples, and referred to the United Nations' Declaration on the Rights of Indigenous Peoples. http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf .

The July letter was preceded by the Speech from the Throne in June http://alberta.ca/release.cfm?xID=38187AFEDC714-0E6A-6F93-BC6A2C3B767D9AD9 , which began with the statement that "Alberta is a province of indigenous peoples whose roots in this land go back thousands of years, and who will be stewards of this land for thousands of years to come." The July letter was followed by meetings with First Nations' leader from Treaty 6 http://alberta.ca/release.cfm?xID=38651ABBEE341-098C-D127-D5187BFC05F259B9 and Treaty 8 http://alberta.ca/release.cfm?xID=387104A8B143D-DB86-60EE-E1A852C405C1223D.

The importance of renewed relationships between the Crown and Aboriginal peoples is explained in the opening words of the Supreme Court of Canada decision in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69: "The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions." The Premier's mandate letter is a contemporary example of respect for these words. The prior Government introduced the Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013. http://www.aboriginal.alberta.ca/documents/GoAPolicy-FNConsultation-2013.pdf?0.2505358572649561 . The opening words of this Policy also recognized the importance of relationships between the Crown and First Nations: "The Government of Alberta ("Alberta") is committed to strengthening relationships with First Nations through continued recognition of the Treaty relationship between First Nations and the Crown."

To fully appreciate the special nature of the relationship between the Crown and First Nations, it is necessary to look to how historical events shape constitutional law in Canada.

Canada acquired lands throughout western and northern Canada by virtue of the Rupert's Land and North-Western Territory Order dated 23 June, 1870. http://www.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/p1t31.html . By virtue of the Order, Canada also assumed the obligation that "[a]ny claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government… ."

The historical Numbered Treaties came about through the execution of this assurance and obligation. Treaty Commissioners appointed by Canada negotiated Treaties with Aboriginal peoples in the newly acquired lands of western and northern Canada before Alberta was created as a Province in 1905. http://www.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/p1t121.html After Alberta was created as a Province, adhesions to these Treaties brought

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additional Aboriginal peoples into the Treaty relationship with the Crown. Today all of the land in Alberta falls within the boundaries of one of Treaty 6 https://www.aadnc-aandc.gc.ca/eng/1100100028710/1100100028783#chp1, Treaty 7 http://www.aadnc-aandc.gc.ca/eng/1100100028793/1100100028803 or Treaty 8 http://www.aadnc-aandc.gc.ca/eng/1100100028813/1100100028853.

Canada retained administration and control over Crown lands and natural resources when Alberta was created as a Province. From 1905 to 1930, Canada administered these Crown lands and natural resources under Federal legislation (See: Kirk Lambrecht, The Administration of Dominion Lands, 1870 to 1930 (University of Regina, 1991). In 1930, Alberta obtained administration and control over most Crown lands and natural resources in Alberta. Indian Reserves created pursuant to the historical Treaties, and National Parks, constitute the two most prominent examples of lands in Alberta which the Province of Alberta did not administer or control after 1930.

The terms of the transfer of administration and control over Crown lands and resources from Canada to Alberta, including its exceptions, were outlined in the Natural Resource Transfer Agreement between Canada and Alberta http://www.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/p1t163.html, and were brought into legal effect by the Constitution Act, 1930 http://www.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/p1t161.html. The Preamble to the Alberta Natural Resource Transfer Agreement stated that its intent was to put the Province of Alberta in the same position as Ontario and the other original Provinces of Confederation.

The relationship between Treaty rights and provincial powers in Ontario was discussed by the Supreme Court of Canada in *Grassy Narrows First Nation v. Ontario (Natural Resources*), 2014 SCC 48, [2014] 2 S.C.R. 447. At paragraph 35 of this decision, the Supreme Court confirms that the rights of Ontario as regards the administration of Crown lands and resources were subject to Treaty rights. The Court stated: "…when the lands covered by the treaty were determined to belong to the Province of Ontario, the Province became responsible for their governance with respect to matters falling under its jurisdiction by virtue of ss. 109, 92(5) and 92A of the Constitution Act, 1867, subject to the terms of the treaty." (Underlining added)

It follows that when administration and control of Crown lands and resources was transferred to the province of Alberta through the Constitution Act, 1930, Alberta also took that interest subject to Treaty rights. (Underlining added)

Treaty rights in Alberta were first constitutionally protected by the Constitution Act, 1930. In 1982 the Constitution Act, 1982 http://canlii.ca/t/ldsx, afforded additional constitutional protections to Treaty rights in Alberta. Section 35(1) of the Constitution Act, 1982 states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Treaty 6, 7 and 8 rights in Alberta are therefore constitutional protected under both the Constitution Act, 1930, and also the Constitution Act, 1982. In 2004, when the Supreme Court of Canada recognized the duty to consult as a constitutional imperative, the Court described the sources of that duty as 'the Honour of the Crown' which was 'corollary to section 35 of the Constitution Act, 1982.' There is therefore no doubt, at all, that Treaty rights in Alberta are constitutionally protected.

The United Nations declaration on United Nations' Declaration on the Rights of Indigenous Peoples has 46 Articles. The Premier's mandate letter is directed to the application of the objectives and principles in the UN Declaration as a whole. To the extent that this involves respect for Treaty rights, it must anticipate rights as they exist in Canadian constitutional law. The Declaration tends to be discussed with reference only to one of these, Article 32(2): "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources." The terms of Article 32(2) should not distract

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observers from the true purpose of Premier's mandate letter. Domestic law in Canada, including the duty to consult and accommodate, affects the application of this specific Article (see: https://ceaa-acee.gc.ca/050/documents/p63928/92200E.pdf). The law of Aboriginal consultation and accommodation flowing from the Honour of the Crown is fully operative in domestic law today (see: Kirk Lambrecht, Aboriginal Consultation, Environmental Assessment and Regulatory Review in Canada, University of Regina Press, 2013). Under Canadian domestic law, consent may be required in some cases (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at paragraph 168) -- but it is not required in every case. The evolution of the domestic law of Aboriginal consultation and accommodation is a key development enabling Canada's support of the United Nations Declaration on the Rights of Indigenous Peoples. http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142

When provincial powers are exercised by Alberta, it is a constitutional imperative that the rights of First Nation under Treaties 6, 7 and 8 must be respected. The constitutional relationship between Treaty rights and the exercise of provincial power to take up land is described in paragraphs 50 to 53 of the Supreme Court decision in Grassy Narrows:

> [50] I conclude that as a result of ss. 109, 92(5) and 92A of the Constitution Act, 1867, Ontario and only Ontario has the power to take up lands under Treaty 3. … However, this power is not unconditional. In exercising its jurisdiction over Treaty 3 lands, the Province of Ontario is bound by the duties attendant on the Crown. It must exercise its powers in conformity with the honour of the Crown, and is subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests. These duties bind the Crown. When a government — be it the federal or a provincial government — exercises Crown power, the exercise of that power is burdened by the Crown obligations toward the Aboriginal people in question.
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> [51] These duties mean that for land to be taken up under Treaty 3, the harvesting rights of the Ojibway over the land must be respected. Any taking up of the land for forestry or other purposes must meet the conditions set out by this Court in Mikisew. As explained by the Ontario Court of Appeal (at paras. 206-12), the Crown's right to take up lands under Treaty 3 is subject to its duty to consult and, if appropriate, accommodate First Nations' interests beforehand (Mikisew, at para. 56). This duty is grounded in the honour of the Crown and binds the Province of Ontario in the exercise of the Crown's powers.
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> [53] Provided … Ontario takes up land under Treaty 3] in a manner that respects the requirements set out in Mikisew, doing this does not breach Treaty 3 harvesting rights. 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 duty to consult may serve to fulfil constitutional obligations to protect the future exercise of Treaty rights, but it will not do so in all cases. It is now clear that where taking up land amounts to an infringement of Treaty rights, the exercise of provincial power must be constitutionally justified. Seen in this perspective, the relationship between the Crown and First Nations is a dynamic objective pursued by all Governments -- and will remain so.

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