KEEWATIN:

NATURAL EVOLUTION, NOT A REVOLUTION

These materials were prepared by Judith Rae, Olthuis Kleer Townshend LLP, for a conference held in Ottawa, ON hosted by Pacific Business & Law Institute, November 20-21, 2012.

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By Judith Rae *

* Judith Rae is an associate at Olthuis Kleer Townshend LLP. In full disclosure, I note that I and my law firm have at times acted for Grassy Narrows First Nation. I wish to thank Grassy Narrows First Nation for the honour of working with them. I also wish to thank Roger Townshend for his comments and for inspiration through the ideas presented in his article, H.W. Roger Townshend, "Recent Developments of Importance: Aboriginal Law", *Lexpert*, available at: http://www.lexpert.ca/directory/practice-areas/recent-developments/article/aboriginal-law-F1/. Notwithstanding any of the above, this paper solely represents the opinions of the author, and any errors or omissions are the author's; nothing in this paper should be taken as the opinion of Grassy Narrows First Nation or of any other person or entity.

I. BACKGROUND & INTRODUCTION

A. THE MAKING OF TREATY 3

Treaty 3 was concluded in the summer of 1873 between Canada, represented by its treaty Commissioners, and a number of Ojibwe First Nations, represented by a Grand Council of Chiefs. The area described in the treaty is located in what is now northwestern Ontario and part of southern Manitoba. It lies south of the height of land and west of the Lake Superior watershed, where rivers flow westward towards Lake Winnipeg. The total area comes to about 55,000 km^2.

Treaty 3 was negotiated over a three-year period. The Treaty Commissioners tried and failed to obtain a treaty in 1871 and again in 1872. During that time construction began on the Dawson route (a combination waterway and overland portage route), and preparations were made to build the CPR railway line through the territory to access the west. Canada was keen to secure a treaty with the local First Nations. It sent Commissioners to try again in 1873, and they eventually succeeded in reaching a deal. The central issue in the *Keewatin* case is, what was that deal? More specifically, what was the content of the treaty with respect to Ojibwe harvesting rights, generally speaking the rights to hunt, fish, trap, and gather? These harvesting rights were central to the Ojibwe livelihood and way of life.

B. THE *KEEWATIN* LITIGATION

The harvesting rights guaranteed to the Ojibwe in Treaty 3 were not only important in 1873; they remain important to Treaty 3 beneficiaries today. In the 1990s, some of those beneficiaries believed that their rights were being violated by activity in the forestry sector. Smaller-scale logging in earlier decades had turned into large-scale clearcutting in the 1980s and 1990s. When areas were logged out, they said, their ability to hunt, trap, and engage in other traditional land uses was compromised. A group of Treaty 3 beneficiaries, who remained active harvesters themselves ("trappers"), launched a case challenging Ontario's authorization of forestry activities in their traditional territory. They said those authorizations run contrary to their Treaty rights, now further guaranteed by s. 35(1) of the *Constitution Act, 1982*.

The trappers are from Grassy Narrows First Nation, and their litigation has been authorized as a representative action on behalf of that First Nation. They restricted their case to those Treaty 3 lands that are north of the English River, known as the "Keewatin lands". Some of Grassy

Narrows' traditional territory extends below the English River, outside the Keewatin lands. Nevertheless, the trappers made this restriction because of the unique history of the area, and the differing legislation that had come to apply within different parts of the Treaty 3 territory over the years. To briefly summarize that history:[1]

- When Treaty 3 was made, all of the Treaty 3 lands came under Canada's jurisdiction as part of the "Northwest Territories", formerly "Rupert's land".
- From the 1880s to early 20th century, Canada and Ontario were embroiled in a dispute about their respective territorial boundaries. In the 1890s, following among other things the *St. Catherine's Milling* decision of the Privy Council, the boundaries of the province of Ontario were extended to include part of the area within Treaty 3 that is south of the English River. As part of that very contentious process, Canada passed legislation in 1891 that includes a reference to provincial limitations on treaty rights.[2] (The effect of this legislation is discussed further in this paper at Section IV(A)).
- In 1912, the boundaries of the province of Ontario were extended further north, and took in the "Keewatin lands" north of the English River (and beyond up to Hudson's Bay). The legislation that accomplished that task was silent on treaty rights.[3]

The trappers started their case as an application. That approach was challenged, and the case was converted into an action.[4] The trappers then brought a motion for an interim cost order (*Okanagan* order). The judge deciding that motion bifurcated the action into two stages, and granted the cost order with respect to the first stage. The motions judge ordered that the first stage would consider two specific legal questions, one with respect to Ontario's authority under

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[1] Personally, I find reference to maps helpful here. I suggest consulting Wikipedia, under the heading "Territorial Evolution of Canada" (http://en.wikipedia.org/wiki/Territorial_evolution_of_Canada), the federal government's Atlas of Canada, under the heading "Territorial Evolution" (http://atlas.nrcan.gc.ca/site/english/maps/historical/#territorialevolution), or other sources. Keep in mind, however, the complex and contested nature of the Ontario/Canada boundary dispute throughout the late 19th century and early 20th century can interfere with the accuracy or fullness of some maps.

[2] *An Act for the settlement of certain questions between the Governments of Canada and Ontario respective Indian Lands*, SC 1891, c 5. This Act authorized an agreement between Canada and Ontario which was later signed in 1894.

[3] *An Act to extend the Boundaries of the Province of Ontario*, SC 1912, c 40.

[4] *Keewatin v Ontario (Minister of Natural Resources)*, 2003 CanLII 43991 (ON SCDC), (2003), 66 OR (3d) 370 (Div Ct) per Then J.

the treaty, and the other with respect to Ontario's authority under the constitutional division of powers. If required, the second stage would consider whether, in fact, the forestry activities authorized by Ontario had infringed treaty rights.[5]

The two legal questions asked at the first stage were:[6]

> 1. Does Ontario have the authority within the part of the lands subject to Treaty 3 that were added to Ontario in 1912 [i.e. the Keewatin lands], to exercise the right to "take up" tracts of land for forestry, within the meaning of Treaty 3, so as to limit the rights of the Plaintiffs to hunt or fish as provided for in Treaty 3?
>
> 2. If the answer to question one is "no", does Ontario have the authority pursuant to the division of powers between Parliament and the legislatures under the *Constitution Act, 1867* to justifiably infringe the rights of the Plaintiffs to hunt and fish as provided for in Treaty 3?

The trial proceeded on the first stage. There were 75 days of trial in 2009-2010, consisting mainly of cross-examination of experts. Justice Sanderson released her decision on August 16, 2011, reported at *Keewatin v Ontario (Minister of Natural Resources)*, 2011 ONSC 4801.[7]

The Ontario Superior Court's decision concluded "no" on both parts – no, Treaty 3 does not give Ontario the right to "take up" lands in the Keewatin area, and no, neither does the constitutional division of powers give Ontario the option to effectively "take up" by doing so as a justified infringement of those treaty rights. Justice Sanderson urged Canada and Ontario to "get on with performance", by implementing and enforcing their treaty obligations.[8]

The trappers had come to court complaining about the impacts of forestry, especially the licences granted by the province to forestry companies. The Court's reasoning in *Keewatin* does not preclude Ontario from granting forestry licences or other authorizations. Rather, it would change the process as follows:

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[5] *Keewatin v Ontario (Minister of Natural Resources)*, 2006 CanLII 35625 (ON SC) per Spies J.
[6] See the reported decision of Spies J., *ibid.* at paras. 245-248, and also the main *Keewatin* decision, *infra*, at para. 2.
[7] *Keewatin v Ontario (Minister of Natural Resources)*, 2011 ONSC 4801 [*Keewatin*]. All "*Keewatin*" references in this paper are to the Sanderson J. decision, unless otherwise specified.
[8] *Keewatin* at paras. 1625, 1646.

- If the activity would not cause a significant interference with treaty harvesting, Ontario can authorize it. This is because such activities ("compatible" activities) are consistent with the treaty harvesting rights originally contemplated (as discussed further below, see section II especially at pp. 12-13).

- If the activity would cause a significant interference with treaty harvesting, Ontario's authorization is still required but is insufficient; a second authorization from Canada must also be obtained. Ontario's authorization would be required for general purposes relating to the activity (compliance with provincial laws and policies, etc.). Canada's authorization would be required in respect of the activity's impact on treaty rights. *Keewatin* held that Canada's authorization is necessary because Canada built this into the treaty itself. Alternatively, as discussed further below (see section IV(B)), Canada's authorization is necessary to authorize a justified infringement of the harvesting rights protected in the treaty.

This dual authorization framework is not how Canada, Ontario and industry have been proceeding to date. Authorizations in a provincial sector like forestry have gone through provincial authorization only, no matter what level of impact they have on treaty harvesting.

The *Keewatin* decision was celebrated in Aboriginal circles but decried, at least by some observers, as a dramatic overturn of the established legal order. One summary called the decision a "significant upset in the balance of powers".[9] Another sounded an alarm by warning in its headline: "Keewatin Decision Potentially Invalidates Licences and Leases Granted Within Treaty Lands".[10] A *Lawyers Weekly* article said the case would cause industry, First Nations, and other governments to "assess long-assumed aboriginal law first principles".[11]

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[9] Sandra Gogal, "The Implications of the Decision in *Keewatin v Minister of Natural Resources*" Miller Thompson LLP, available online: http://www.millerthomson.com/assets/files/article_attachments2/S-Gogal_Keewatin-v-Minister-of-Natural-Resources_Miller-Thomson.pdf.

[10] "Keewatin Decision Potentially Invalidates Licences and Leases Granted Within Treaty Lands", Fasken Martineau LLP, August 25, 2011, available online: http://www.fasken.com/keewatin-decision-potentially-invalidates-licences-and-leases-granted-within-treaty-lands/.

[11] Wally Braul and Ann Bigué of Fraser Milner Casgrain LLP, "*Keewatin* raises questions over infringement of treaty rights", *Lawyers Weekly*, September 23, 2011, available online: http://www.fmc-law.com/Publications/1011_Bigue_Ann_Braul_Wally_Treaty_Rights.aspx.

In this paper I provide my own commentary on *Keewatin* and how it decided the two central questions it was asked to determine. My conclusion is that the court did not, in fact, make any revolutionary changes in Aboriginal law. Rather, the court's approach fit squarely within and evolved naturally from established principles. It should not have come as a surprise.

The *Keewatin* decision has been appealed by Ontario, Canada and Abitibi. I note that the case was originally brought against Ontario (under its Ministry of Natural Resources) and Abitibi-Consolidated Inc., the forestry company active in the trappers' home territory. Abitibi has since given up that licence, although it is still participating in the proceedings.[12] The Government of Canada was added before the trial as a third party. A number of interveners have been granted the right to participate in the appeal. The Ontario Court of Appeal is set to hear the case in January 2013.

To this author's knowledge, no dates have been set down yet for the second stage trial, which would try the issue of whether an unauthorized infringement has occurred due to the impacts of forestry authorizations that were provincially granted.

II. *KEEWATIN*'S APPROACH TO TREATY INTERPRETATION

Keewatin is primarily a treaty interpretation case. The trial judge's discussion of treaty interpretation law is found mainly at paras. 1249-1268, but perhaps the most concise summary of Her Honour's approach to treaty interpretation is near the beginning of her reasons, at para. 28:

> [28] In cases such as this, the higher Courts have directed trial judges to strive to ascertain the understanding not only of the Euro-Canadian parties, but also of the Aboriginal parties. They must look beyond the formal wording of the treaties and delve into the circumstances and the context in which each particular treaty was made. [emphasis in original]

[12] Abitibi did not appear to take an active role or present evidence at the first stage trial. However, it appealed the decision along with Canada and Ontario. Abitibi's participation in the appeal is now under the name Resolute FP Canada Inc., which I take to be its corporate successor. For ease of reference, I have kept to the name "Abitibi" in this paper.

This statement accurately captures the main principles of legal interpretation with respect to historic treaties. First, the overriding goal of treaty interpretation is to find, as best as possible, the common intention of the parties as it actually was at the time the treaty was made. Second, in accomplishing that task, courts are encouraged to look not just at the treaty text itself but at a wide variety of contextual evidentiary sources that may be presented by the parties, in order to reach the most accurate and fair reading of the treaty parties' common intention.

The "common intention" principle is rooted in the nature of treaties, what treaties *are*. Treaties are agreements between the Crown and Aboriginal parties.[13] They are first and foremost agreements, although not routine agreements: the promises exchanged in treaties are solemn, even sacred.[14]

Being agreements, the Supreme Court of Canada has made it very clear that the overriding goal in treaty interpretation is to ascertain the *common intention* of the parties at the time when the treaty was made. This longstanding principle was articulated as early as the 1990 *Sioui* decision, over twenty years old, which sought out from among competing interpretations "the definition of the common intent of the parties which best reflects the actual intent of the Hurons and of Murray [the Crown representative] on September 5, 1760."[15] The common intention principle has been cited and applied in leading Supreme Court cases since *Sioui*, including *Marshall No. 1* (1999), and *Morris* (2006).[16] It is, in the Supreme Court's words, the "bottom line" of treaty interpretation.[17]

Getting to this bottom line can be challenging, especially when dealing with historic treaties. The courts have long recognized that it is often necessary to look beyond the text of a historic treaty to determine what the parties' common intention actually was. This necessity arises from the simple reality surrounding the making of the historic treaties. Most if not all historical treaty documents were written by one side only (the Crown), in one language only (the Crown's), using

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[13] See *R v Badger*, [1996] 1 SCR 771, 1996 CanLII 236 (SCC) [*Badger*] at para. 41; *R v Sundown*, [1999] 1 SCR 393 [*Sundown*] at para. 24; *R v Sioui*, [1990] 1 SCR 1025, [1990] S.C.J. No. 48 [*Sioui*] at p. 1063; *Simon v The Queen*, [1985] 2 SCR 387, 1985 CanLII 11 (SCC) at p. 401.

[14] *Ibid.*

[15] *Sioui*, *supra* note 14 at p. 1071 (para. 120 in QuickLaw).

[16] *R v Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915 [*Morris*] for the majority at paras. 18, 33, 34, 35, 37, 38, 56, 57, 58, and for the dissent at para. 107; *R v Marshall*, [1999] 3 S.C.R. 456 [*Marshall No.* 1] at para. 14 for the majority and at para. 78 for the dissent.

[17] *Marshall No.* 1, *supra* note 16 at para. 14.

legal concepts that were familiar to one side only (the Crown), with the benefit of legal advice to one side only (the Crown). They were concluded many decades ago, at a time when the First Nation parties usually did not speak or write English, and neither did the Commissioners usually speak the First Nations' languages. The treaty parties relied on oral translation to conduct oral negotiations.

Even if one goes beyond the treaty text to look at other sources, the evidence available may be limited and one-sided.[18] Live witnesses to the negotiations have, almost always, passed on long ago.[19] The contemporaneous written record is likely to be from the Crown's perspective or at least a Euro-Canadian perspective, since Aboriginal parties tended to pass their knowledge orally and not in writing. Despite such challenges, litigants and courts must do their best to reach into the past and ascertain the historic views of the treaty parties on both sides, to identify what really transpired.

As Sanderson J. acknowledged, it is by now well-established that one cannot take the treaty text at face value, one must go beyond it, considering notes, diaries, historical circumstances, anthropological evidence, oral history, or whatever sources might be available in an effort to understand the parties' mutual intentions by drawing from "the context in which each particular treaty was made" (at para. 28, quoted above).

This point was recognized and applied by the Supreme Court of Canada as early as *Sioui*, which spoke of "deducing the common intention of the parties from the historical context".[20] The Supreme Court has not been blind to the reality in which the historic treaties were made and recorded. It pointed out in *Mitchell v Peguis* (1990) that: "From the perspective of the Indians, treaties were drawn up in a foreign language, and incorporated references to legal concepts of a system of law with which Indians were unfamiliar."[21] In *Sundown* (1999), the Supreme Court noted: "In many if not most [historic] treaty negotiations, members of the First Nations could not

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[18] There may be exceptions. For example, there is said to have been an "Indian Recorder" at the Treaty 3 negotiations who took written notes, but these notes did not survive to the present day in an original form. See *Keewatin* at para. 316.

[19] For an exception, see *Paulette v Canada (Register of Titles) No. 2*, [1973] NWTJ No. 22, [1973] 6 WWR 97, 42 DLR (3d) 8. *Paulette* was a 1973 case that dealt with Treaty 11, made in 1921, and live witnesses to the treaty negotiations testified in court. I am not aware of any other exceptions.

[20] *Sioui*, *supra* note 14 at p. 1070 (para. 116 in QuickLaw).

[21] *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, [1990] S.C.J. No. 63 at p. 142 (para. 118 in QuickLaw).

read or write English and relied completely on the oral promises made by the Canadian negotiators."[22]

The most fulsome explanation of the need to go beyond the text was laid out in *Marshall No. 1*. This 1999 decision clarified that even in the absence of an ambiguity in the treaty text, extrinsic evidence is admissible and should be considered.[23] *Marshall No. 1* explicitly noted that the written text of a historic treaty may not represent a full or accurate account of the oral promises exchanged.[24] The reasons are obvious, as the Supreme Court explained in that case, citing *Badger* in part:

> [A]s more recently discussed by Cory J., in *Badger*, *supra*, at para. 52:
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> > . . . when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement: [sources omitted]. The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. [Emphasis added in *Marshall No. 1*]
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> "Generous" rules of interpretation should not be confused with a vague sense of after-the-fact largesse. The special rules are dictated by the special difficulties of ascertaining what in fact was agreed to. The Indian parties did not, for all practical purposes, have the opportunity to create their own written record of the

[22] *Sundown*, *supra* note 14 at para. 24.
[23] *Marshall No. 1*, *supra* note 16 at paras. 9-14.
[24] *Marshall No. 1*, *supra* note 16, see especially paras. 11, 12, 14.

> negotiations. Certain assumptions are therefore made about the Crown's approach to treaty making (honourable) which the Court acts upon in its approach to treaty interpretation (flexible) as to the existence of a treaty (*Sioui*, *supra*, at p. 1049), the completeness of any written record (the use, e.g., of context and implied terms to make honourable sense of the treaty arrangement: *Simon v. The Queen*, 1985 CanLII 11 (SCC), [1985] 2 S.C.R. 387, and *R. v. Sundown*, 1999 CanLII 673 (SCC), [1999] 1 S.C.R. 393), and the interpretation of treaty terms once found to exist (*Badger*). The bottom line is the Court's obligation is to "choose from among the various possible interpretations of the common intention [at the time the treaty was made] the one which best reconciles" the Mi'kmaq interests and those of the British Crown (*Sioui*, *per* Lamer J., at p. 1069 (emphasis added)). In *Taylor and Williams*, *supra*, the Crown conceded that points of oral agreement recorded in contemporaneous minutes were included in the treaty (p. 230) and the court concluded that their effect was to "preserve the historic right of these Indians to hunt and fish on Crown lands" (p. 236).[25]

There are finer points of interpretation, of course, that may arise in some cases. For instance, certain default assumptions may come into play, at least in the case of historic treaties, e.g. of generous construction in favour of the First Nations, of Crown honour, etc. However, while important, I understand those assumptions to be subsidiary to the main effort of finding the parties' common intention; for instance, they could assist by filling in gaps in the record or by preferring one possible common intention over another. The common intention principle is the "bottom line" and other principles have developed (especially for historic treaties) to meet that end under challenging interpretive circumstances.

In *Keewatin*, the parties presented their evidence largely through historical documents and experts: historians, ethno-historians, anthropologists and a political scientist. These experts put forward their learned opinions, from numerous vantage points, about the intentions and understandings of the Crown parties and the First Nation parties in 1873. Having reviewed all of that available evidence, what did the trial judge determine about the conclusion of Treaty 3?

The court found that Canada urgently wanted the treaty in order to secure safe passage for immigrants headed from Ontario to the prairies. It saw the Treaty 3 area as a transportation

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[25] *Marshall No. 1*, *supra* note 16 at para. 14.

corridor and did not anticipate much settlement in the Treaty 3 area itself.[26] The Ojibwe wanted a smooth relationship with the newcomers but were not desperate to make a treaty.[27]

The court found that, after difficult negotiations, Canada and the Ojibwe eventually reached an agreement that included the following:

- Peace and friendship were central purposes and concepts in the treaty.[28]
- The Ojibwe believed, and the Commissioners promised, that they were entering into a relationship with Canada that would provide the Ojibwe with economic benefits.[29]
- The Ojibwe agreed to give up their exclusive use of their territory and resources by *sharing* them with Euro-Canadians.[30] The Ojibwe did not have a concept of land ownership, and the Commissioners did not explain land ownership concepts.[31]
- The Ojibwe were guaranteed their right to make a living by harvesting natural resources (hunting, fishing, gathering, etc.) as they had in the past.[32] This right was guaranteed without qualification or limitation, whether by time,[33] space (i.e. progressive "taking up" of geographic areas) with the exception of the Dawson road and CPR railway line areas,[34] or regulation. [35]

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[26] *Keewatin* at paras. 719-724, 760.
[27] *Keewatin* at paras. 770-773.
[28] *Keewatin* at paras. 726-729.
[29] *Keewatin* at paras. 775, 794-795, 798, etc.
[30] *Keewatin* at paras. 781, 794, 801-803, 913, 917-918, 1293, etc.
[31] *Keewatin* at paras. 256-257 and 790.
[32] About the harvesting clause in general, see *Keewatin* at paras. 813-814, 828-831, 835, 912-924, 1299, 1637. The scope of the right flows from an exchange by the parties that used the phrase "hunting and wild rice harvest", as best the court could determine. The court accepted the evidence that the cultural and linguistic meaning of this was to mean "to make a living from resources". The court (at para. 814) found that the Ojibwe demand, which was accepted by the Commissioners, was understood as relating to "their ability after the Treaty to be able to make a living as in the past on all of the Treaty 3 lands." An interesting point is that the court said that the treaty harvesting right was a pre-existing right of the Ojibwe that they *reserved* in the treaty, i.e. it was not granted to them by Canada, but rather was originally held and reserved by them: see paras. 1368-1373. It is not clear if there are consequences to this point.
[33] *Keewatin* at paras. 830-831.
[34] On the absence of any agreement to "take up", see *Keewatin* at paras. 833, 820, 833, 854-866, 918, 1294-1296, 1476-1477, etc. and the evidence reviewed at paras. 516-519 and following on that the evidence reviewed in further detail in paras. 520-568. On the Dawson road and CPR line, the court described this as an exception where the parties mutually anticipated that these areas would be generally incompatible with harvesting. The harvesting right applies to the rest of the Treaty 3 area.
[35] *Keewatin* at para. 861.

- The parties accepted that Euro-Canadian uses could occur that were compatible with Ojibwe land use and did not cause *significant interference* with Ojibwe harvesting rights; they expected, at the time, that most uses would be compatible.[36]
- Note that there are other treaty terms in relation to reserves, annuities and so on that are mentioned in *Keewatin* but not discussed in as much detail, since the questions before the court focused on harvesting rights.

These were the court's factual findings about the agreement reached between the parties. As a matter of law, the court interpreted the treaty in line with that agreement, with one exception: despite the finding of fact that the Ojibwe were promised unlimited harvesting rights, and that this point was crucial to their overall consent, the court found that the Treaty permits Canada to authorize taking up (although not Ontario). The court based that finding on the wording of the written text, which said that the harvesting right was subject to "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", and its analysis of Canada's intentions.[37] I shall comment further on this exception below (see Section IV(B)).

Aside from that exception, Sanderson J.'s approach followed the well-established canons of treaty interpretation. Indeed, there was nothing new or remarkable about the court's approach, nor did its decision articulate any new legal principles. The court looked at all the evidence (including, but not limited to the treaty text), and sought out the common intention of the parties.

III. *KEEWATIN*'S APPROACH TO THE DIVISION OF POWERS

The division of powers question that was asked of the Ontario Superior Court in *Keewatin* was already answered by the Supreme Court of Canada in *Morris*. The *Morris* decision was released in December 2006, just a few months after the motions judge framed the first stage trial

[36] *Keewatin* at paras. 793, 801, 809-810, 832, 917, etc.
[37] See the section in *Keewatin* called "Answer to Question One", paras. 1248-1478, in particular paras. 1288-1314.

questions in *Keewatin*.[38] Had the timing been different, it seems to me that this question would probably not have been put to Sanderson J. at all.

In *Morris*, the Supreme Court held that, on the constitutional division of powers, provinces do not have the power to infringe treaty rights. While Canada can infringe a treaty right if it successfully justifies that infringement under the *Sparrow / Badger* test, provinces cannot.

The reasoning is straightforward. Treaty rights are at the core of exclusive federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*. Provinces can neither make nor break treaties. Because treaties lie at the core of a federal power, treaties are protected by inter-jurisdictional immunity which acts as a complete shield from provincial action. Provincial laws cannot, therefore, apply of their own force to infringe treaty rights. It may be possible for the federal government to give force to provincial legislation of that nature; s. 88 of the *Indian Act* is the classic example of this.[39] However s. 88 of the *Indian Act* is "subject to the terms of any treaty" (as the provision itself states), so it has no application.

In *Keewatin*, Ontario tried rather desperate arguments to avoid or distinguish *Morris*. Its main argument was that acting as a landowner (i.e. the owner of Crown lands in the province as per section 109 of the *Constitution Act, 1867*), rather than as a law-maker *per se*, it is unconstrained by the usual limits of the constitutional division of powers. However, Ontario's landowning rights under s. 109 are "subject to … any Interest other than that of the Province" (according to the wording of that section) and it has already been held that aboriginal and treaty rights are such interests.[40] Ontario's legal arguments on the division of powers question relied on extremely old and outdated cases;[41] ultimately, they did not convince the court.

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[38] *Morris, supra* note 16 is dated December 21, 2006. The *Keewatin* questions were defined by an Order issued on June 28, 2006: see *Keewatin* paras. 2 and 1656.

[39] Whether s. 88 of the *Indian Act* is constitutional is an open question, and one for another day.

[40] This question about the interaction of aboriginal or treaty rights and section 109 of the *Constitution Act, 1867* was left open *St. Catherine's Milling and Lumber Co. v The Queen* (1888), 14 AC 46 (PC) (see p. 52) and *Ontario Mining Co. v Seybold* (1902), [1903] AC 73 (PC) (see p. 79), and see also *Keewatin* at paras. 1538-1539. It was picked up in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras. 175-176 and *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 51, at paras. 58-59, and see also *Keewatin* at para. 1540.

[41] See *Keewatin* at paras. 1498-1502, 1509-1510, 1531-1536.

It is truly no surprise that *Keewatin* found that *Morris* applies, and therefore that Ontario is not constitutionally enabled to infringe a treaty right and then justify that infringement. Indeed a contrary finding would have been a shock, by challenging the existing law set out in *Morris* and in other division of powers cases. Instead, Sanderson J. followed the leading precedents.

IV. POINTS OF DIFFERENCE

In this section, I will discuss two points in *Keewatin* that I believe should have been treated differently. For the reasons stated below, neither of these points would have changed the outcome of the decision. My comments, therefore, might be seen as nitpicking, but I believe these points are significant doctrinally even if they would not have affected the practical outcome of this case. They were dealt with in somewhat strange ways largely, I believe, due the somewhat strange way the case came before the court, including its complex procedural history and the use of very specific questions, pre-defined in the course of a costs motion, to shape a long trial that dealt with a large volume of evidence and a wide range of issues.

A. EFFECT OF THE 1891 LEGISLATION

As noted, the questions before the court were limited in application to the Keewatin lands, being the lands in Treaty 3 that lie north of the English River and were added to Ontario's provincial boundaries by the 1912 legislation. The Treaty 3 lands south of the English River were added to Ontario earlier and were subject to the 1891 legislation, containing controversial provisions on treaty rights.

It was necessary for the court to decide whether the 1891 legislation applied to the Keewatin lands. The court found it did not.[42]

Following on that finding, it was unnecessary for the court to interpret the *effect* of the 1891 legislation on treaty rights. On its face, the 1891 legislation contains some statements that appear designed to limit Aboriginal harvesting rights. It provide that "the rights of hunting and fishing by the Indians … do not continue with reference to any tracts which have been or from time to

[42] *Keewatin* at paras. 1407-1432.

time may be, required or taken up … by the said Government of Ontario". The effect this provision may have on Treaty 3 harvesting rights is certainly controversial. But, since it has no application in the Keewatin lands, it is not relevant to the question posed in *Keewatin* about treaty rights in the Keewatin lands.

However, in the course of examining the 1891 legislation, the court made comments about its effect on treaty rights in the non-Keewatin lands (south of the English River).[43] It said that the 1891 legislation "had the effect of amending Treaty 3" in that area by limiting harvesting rights.[44] It is perhaps understandable that the court would slip into such comments, but it is problematic.

The concept of amendment seems to have arisen in counterpoint to Ontario's argument that the 1891 legislation did nothing but merely reflect the original 1873 agreement in Treaty 3. That argument was rejected.[45] However 'amendment' is not an easy fit. In my view, it is not logically or legally possible for one party to a treaty to unilaterally amend the terms of the treaty. A treaty is an agreement; any amendments require mutual agreement.[46] There is no analysis in *Keewatin* about whether treaties can be amended and how, whether there are any circumstances in which treaties can be unilaterally amended and if so under what conditions, and whether (if it is possible) a unilateral amendment was accomplished here.

It is conceivable that the court instead meant to characterize the 1891 legislation as effecting a partial extinguishment by Parliament. Indeed, sometimes extinguishment language is used in the decision. However, extinguishment is not a question to be taken lightly either. There is good authority that extinguishment of treaty rights (as opposed to aboriginal rights) is not possible.[47]

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[43] The *Keewatin* decision refers to this area as the Disputed Lands, in reference to the Ontario/Canada boundary dispute.

[44] *Keewatin* at paras. 1242, 1403.

[45] *Keewatin* at paras. 1403, 1404

[46] Others might argue that there are exceptions. *Badger* found that the *Natural Resources Transfer Agreement, 1930* (*Constitution Act, 1930*, Schedule 2) amended or modified the rights in Treaty 8. I admit, despite *Badger*, I find the concept of unilateral amendment deeply problematic. However, *Badger* made its findings in very rare circumstances, since the *NRTA* is a constitutional instrument. The 1891 legislation is not, to my knowledge, part of the constitution.

[47] *R v Sparrow*, [1990] 1 SCR 1075, [1990] SCJ No 49, suggested that it could be possible for pre-1982 federal legislation with "clear and plain intent" to extinguish aboriginal rights: pp. 1091-1099 (paras. 23-39 in QuickLaw). But *Sioui* held that treaties are based on consent and cannot be unilaterally extinguished: "It must be remembered that a treaty is a solemn agreement between the Crown and the Indian, an agreement

At the very least, when extinguishment has been discussed in other cases, courts have applied a very high bar to claims of unilateral extinguishment, and have been extremely reluctant to find it. A formal extinguishment analysis was not undertaken in *Keewatin*.

My point is not that a full analysis of amendment or extinguishment should have been undertaken, but that the court should have been more careful to refrain from making any rulings or commentary on this point since, on the court's own analysis, it was not required. Moreover, the outcome of such an analysis is by no means obvious.

The court's comments are arguably *obiter* in any event, and arguably do not bind strangers to the litigation. And indeed, the court's comments here have no impact on the outcome of its decision, since this was an irrelevant issue. However, in the interests of seeing issues determined fairly, with full argument by interested parties – especially when dealing with issues that stand to affect the constitutional rights of many people – this is more than a technical point. It is important for courts not to give the impression of sanctioning a unilateral "amendment" or "extinguishment" of treaty rights without, at the very least, a thorough and critical analysis following full argument.

B. CANADA'S POWER TO "TAKE UP"

As noted above, the court in *Keewatin* was asked to interpret the harvesting rights clause of Treaty 3. In doing so, it examined historical evidence to determine the common intention of the treaty parties. In its findings of *fact*, the court found that the Ojibwe were promised unlimited harvesting rights, without any "taking up" (see Section II above).

However, in interpreting the *legal* effect of the treaty, the court made one variation. It held that Canada did have the power to take up under the treaty. It based that finding on the wording of the

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> the nature of which is sacred: *Simon, supra,* at p. 410, and *White and Bob, supra,* at p. 649. The very definition of a treaty thus makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned." I add that different treatment is justified here in that treaties are agreements of compromise. In making a treaty, First Nations have already altered their rights, in consideration of non-First Nation interests, with Crown consent. The *Sparrow* and *Sioui* decisions were both issued by the Supreme Court of Canada in May, 1990.

written treaty text, which referred to taking up by the Dominion of Canada, and its analysis of Canada's unilateral intentions (especially those of Commissioner Morris).[48]

This finding, in my view, runs contrary to the established legal principles of what a treaty is and how treaties are interpreted. As discussed above, treaties are *agreements*, created by the solemn exchange of promises between the Crown and Aboriginal parties. The interpretation of treaty terms must be guided by the ultimate question of the *common intention* of the parties.

On the court's own findings of fact, it was not the common intention of the parties to have any limitation on Ojibwe harvesting rights. The court was exceedingly clear in its finding that the Ojibwe understood and were specifically promised otherwise (i.e. that harvesting would not be limited). A taking up power by Canada was not among the possible common intentions of the parties, according to the court's own findings.

It is not open to the court to give effect to a unilateral intention of either party, whether it is the First Nations' intention or the Crown's intention.[49] A treaty is an agreement, not a declaration.

The court's reasoning on this point may have been influenced by the fact that it was being asked to focus on Ontario's authority, not Canada's. The parties' arguments therefore focused on Ontario, and indeed it seems that the Plaintiffs were content to rely on the text's indication that Canada (but not Ontario) had the power to take up. But even if the Plaintiffs – or even if all parties – had made this argument, in my view it does not make it proper for the court to interpret the treaty in a manner that is contrary to its actual findings about the historic parties' common intention. If the court found as a fact that it was agreed and understood that harvesting would not be limited (as it did), it was not open to the court to then hold that the treaty meant something different because of what one party wrote or one party intended.

Interestingly, the court in *Keewatin* could have reached the same conclusion about dual authorization on the basis of the division of powers. As the court recognized, the Supreme Court in *Sparrow* and *Badger* has held that the federal government has the power, under s. 91(24) to restrict aboriginal and treaty rights, despite their constitutional protection in s. 35(1) of the

[48] See the section in *Keewatin* called "Answer to Question One", paras. 1248-1478, in particular paras. 1288-1314.
[49] See e.g. Sioui, *supra* note 14 at p. 1069 (para. 114 in QuickLaw).

Constitution Act, 1982, if its infringement of those rights if "justified". Thus, *despite* an unlimited harvesting right in Treaty 3, Canada would have had the power to make justified infringements. And, as held in *Morris*, this power is Canada's alone, not Ontario's.

There was no need for the court to mirror or double-up Canada's ability to infringe, as a legal matter under the division of powers as applied to the *Sparrow* test, with a parallel ability under the treaty itself. Indeed the court's treatment of this question at times seems to confuse the issues of treaty interpretation and infringement / division of powers.[50] It would have been cleaner and more accurate to keep them separate. Canada's ability to justify infringements of a treaty right does not modify the *content* of the right itself. In this case, Canada's ability to interfere with treaty rights should be kept solely as an infringement / division of powers issue, and the definition of the treaty right itself should have been kept within the bounds of what the parties actually agreed to in 1873 (i.e. an unlimited harvesting right).

V. THE TAKE-HOME LESSON

Many observers have noted that, technically speaking, *Keewatin* applies only to a small area, the Keewatin lands. Therefore one of the most common questions with respect to *Keewatin* is, what kind of impact will it have elsewhere?

This paper has argued that the reasoning and findings in *Keewatin* are rather unremarkable. With narrow exceptions, that would not have changed the outcome, the court's conclusions flowed directly from an application of well-established legal principles of treaty interpretation and the division of powers. We should not be surprised with its approach.

Nor should we be surprised about where that approach ended up, i.e. its conclusions as applied to the facts. First Nations in historic treaty areas have told us loud and clear, over and over again, that they are not being treated in accordance with their solemn treaty commitments, commitments that do not line up very well with the written treaty texts. And courts have been clear, too, for quite some time, that they will not assume historic treaty texts are always correct

[50] See, for example, *Keewatin* at paras. 1315-1382 (where a division of powers analysis seems to creep into the treaty interpretation analysis).

and complete. They will look at the circumstances and oral exchanges from the time a treaty was made and try, as difficult as it may be, to find the true common intention of the parties.

Keewatin contains no surprises in this regard but I suggest that it serves as a useful reminder. The reminder lesson is simple: we cannot take historic treaty texts at face value. The reason behind this point is equally simple: because of the circumstances in which historic treaties were made and recorded, the treaty texts are often one-sided and not necessarily reflective of the true agreements.

This is a lesson that applies to all historic treaty territories, not just in the *Keewatin* lands. It is not a lesson that comes from *Keewatin*, but *Keewatin* serves as an illustration of its application.

Many key subsidiary points flow from this lesson. Take, for instance, the point that one cannot assume historic treaties with the same text have the same actual treaty content.

Canada and Ontario argued otherwise in *Keewatin* itself, asserting "with seeming confidence" that *Mikisew* provided a complete answer to the meaning of 'taking up' language in Treaty 3 due to its interpretation of a 'taking up' clause in another treaty text.[51] That argument forgets that treaty rights, like aboriginal rights, are specific.[52] Each treaty is unique and dependent upon what actually transpired at different Crown–First Nation meetings, in different places, at different times, under different circumstances, between different people. Sanderson J. was correct in stating that "one size does not fit all".[53]

Despite Sanderson J.'s reminder, even some of the commentaries on the *Keewatin* case seem to have perpetuated a mistaken approach, by suggesting how *Keewatin* might affect or not affect other areas merely by comparing the wording of certain numbered treaties to others. That approach misses the mark.

Another key subsidiary point is that that anyone, industry, government or otherwise, who operates on the assumption that a narrow, strict reading of historic treaty texts will prevail is operating at their own risk. My view is that it is a significant risk.

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[51] *Keewatin* at paras. 1460-1478, quoted at 1460.
[52] *Sundown*, *supra* note 14 at para. 25.
[53] *Keewatin* at para. 1467.

I am not aware of any instance where the Crown and First Nations have engaged in negotiations and reached a clear agreement between them on the interpretation of a historic treaty. I know of many First Nations that have urged such discussions, but Crown parties have generally shown little interest. Neither has there been much in the way of thorough litigation to legally determine how those treaties should be interpreted. Such litigation is risky, expensive and slow; First Nations have generally been reluctant to undertake it.

It is only realistic to admit that there is a great deal of uncertainty in the legal landscape here, for lands and resources and many other matters, and it is a real problem. However, it is not fair, in my view, to blame any of that uncertainty on *Keewatin*. The uncertainty arises from the circumstances in which historic treaties were made, and the subsequent unwillingness of provincial and federal governments to respond to many calls to sit down with First Nations and try to reach modern clarifications of those treaties. If anything, *Keewatin* serves to reduce this uncertainty for a small part of Treaty 3, to the benefit of not just First Nations but all participants in the Ontario legal landscape. It is everywhere else, where thorough treaty interpretation litigation has been scant (and neither have there been meaningful negotiations), where uncertainty is highest.

Keewatin carried no surprises. So why did it elicit such strong reactions? To me, the reactions say more about the audience than about the court's decision or about Aboriginal law. The field of Aboriginal law is, I think, largely about the Canadian legal environment slowly – very slowly – coming to grips with an Aboriginal reality it originally ignored or suppressed. The great challenge is to see the truth, through the fog of current practice, and reasonably advise about the future. The way business is currently done – how decisions are made, licences are issued, forests are managed, and so and on and so forth – can go on for long enough, and seem immutable enough, that we can be lulled into believing it will remain the same. This situation reminds me of the story of the Emperor who had no clothes. When a child called out the obvious, the crowd was shocked and scandalized. But shouldn't they have known? Didn't they, in fact, see the truth?

Shouldn't we have known, too? We already knew the circumstances in which historic treaties were made, and we already knew the law about how to interpret them. To the extent that *Keewatin* has reminded us of the obvious, it is a welcome and significant decision.