CASENOTE:
GRASSY NARROWS FIRST NATION V ONTARIO (NATURAL RESOURCES)

by Janine Seymour

INTRODUCTION

The conceptual gap between traditional Indigenous and Western legal interpretations of treaty law could not have been more evident when the Supreme Court of Canada decided *Grassy Narrows First Nation v Ontario (Natural Resources),* (hereinafter known as '*Keewatin')* in July 2014.[1] In *Keewatin* the Supreme Court was asked to adjudicate on the Province of Ontario's 'right' to issue forestry licenses within traditional territory. The disputed territory was 'Keewatin Territory' within Treaty No. 3, a historic numbered treaty covering the 55 000 square mile radius of what is now known as Northwestern Ontario and parts of the province of Manitoba.[2] After three years of negotiations Treaty No. 3 was signed between the Anishinaabeg, as represented by their traditional governance structure, the Grand Council of Chiefs and the Dominion of Canada, the British Crown, her Majesty the Queen represented by delegates including Lieutenant Governor Alexander Morris. In exchange for sharing of the land, the Treaty provided for specific guarantees of the Anishinaabeg's future descendants, including protections of their traditional way of life (hunting, harvesting, fishing and trapping) on non-reserve lands within their territory. In addition a 'taking-up clause' was incorporated into the Treaty, allowing the Government of the Dominion of Canada to 'take up lands' for various purposes, including mineral and natural resource extraction. The critical dispute before the Supreme Court in *Keewatin* was the precise interpretation of this 'taking-up clause'—namely which level of government had authority to take up lands within *Keewatin* territory.

In a decision with far reaching consequences, the Supreme Court held that while the Federal Government has exclusive jurisdiction over Indians[3] and lands reserved for Indians under section 91(24) of the *Constitution Act, 1867*, the doctrine of interjurisdictional immunity does not preclude provinces from justifiably infringing on treaty rights protected under section 35(1) of the *Constitution Act, 1982*.[4] Thus, the long-standing question of whether or not provinces can infringe on constitutionally protected Aboriginal and treaty rights under section 35(1) was determined: 'Ontario and only Ontario has the power to take up lands under Treaty No.3.'[5]

With one sentence the Court has changed the jurisprudential landscape upon which treaty rights are interpreted and litigated in Canada.

APPLICABILITY

The Supreme Court held that historic treaties were made with the Crown, not specific to the Federal Government of Canada or an individual province.[6] Treaty beneficiaries must keep their treaty promises within the framework of the division of powers under the Constitution.[7] Under the legislative authority granted in section 109, section 92(A), and section 92(5) only Ontario had the authority to take-up lands. The province remained bound by the fiduciary duties owed to Aboriginal interests and people as well as the Honour of the Crown, being the obligation of the government to act with the utmost integrity in dealings with Aboriginal peoples. Fulfillment of the Honour of the Crown requires recognition, respect and the commitment to reconciliation of Aboriginal and Treaty rights.[8] Government representatives must be truthful and honest in representations. Courts are required to assume government intended to keep these assurances while 'Aboriginal parties are entitled to rely on promises made.'[9] In obiter—despite the arguments by Grassy Narrows that the Treaty was limited to territory specifically contemplated for early settlement and territorial expansion within Treaty No. 3—the court determined that although not at issue in this case, the 'taking-up clause' was unbound and unrestricted in jurisdiction applicability and permitted taking-up lands throughout the entire 55 000 square mile radius in Treaty No.3 territory.[10] This breathtaking interpretation has far reaching consequences.

Indeed, the application of the *Keewatin* decision may apply to other Aboriginal rights holders, as well as to other historic treaty beneficiaries. This includes other historic numbered treaties, Treaties No. 1-11 extending throughout the provinces of Ontario, Manitoba, Alberta, Saskatchewan, parts of British Columbia and the Northwest territories. Both the provinces as well as Indigenous Treaty Rights holders would be impacted. This decision also provides greater certainty of 'legal authority', for the resource sector as it confirms

the provincial power to grant licenses for resource development, as well as the responsibilities for discharging those duties owed to Aboriginal peoples. The startling implications of this case must be tempered by an examination of the lower courts findings.

TREATY INTERPRETATION

At trial, the learned judge found in the negative to both questions:

- Does Ontario have the authority to take up tracks of land within the Keewatin area so as to limit the Treaty No 3 harvesting rights?
- And, if the first question is no, does Ontario have the authority under the *Constitution Act, 1867* to justifiably infringe the treaty rights?[11]

The trial judge heard evidence of treaty negotiation, which consisted of early Euro-Canadian pre-treaty history, the Ojibway perspective and history of Treaty No. 3, as well as historical records leading up to and during treaty negotiations.[12] This historical evidence was relied on to determine the intentions of the parties at the time of treaty-making based on their interests and needs, finding for the Crown it was settlement, but more importantly, it was key as a gateway for territorial expansion to the west of Canada.[13] In answering the first question, the lower court ruling found that federal approval was required for lands to be taken-up under the treaty terms, as was the intention of all the parties based on the evidence heard, which remained unaltered despite the subsequent enactment of constitutional legislation.[14] This is where the Court of Appeal and Supreme Court differed.

The Supreme Court relied on earlier case decisions, including the significant *St. Catherine's Milling and Lumber Co v The Queen,*[15] as well as legislation and the treaty text, to determine that the treaty terms were to be with the government of the Dominion of Canada. This included the province, as both levels of government are responsible for fulfilling the treaty promises and bound by the obligations to Aboriginal peoples.[16] As quoted from the *St. Catherine's Milling*—which was also a jurisdictional dispute arising from Treaty No. 3 territory—Treaty No. 3 was determined by the courts to be a 'transaction between the Indians and the Crown' and 'not an agreement between the government of Canada and the Ojibway people.'[17] It is alarming that archaic language from precedent decisions is cited in present-day court rulings for treaty interpretation.

Further to my concern of language appropriation, Chief Justice McLachlin in speaking for the court remarks '(l)astly, while not determinative, I would note that Ontario has exercised the power to take up lands for a period of over 100 years, without any objection by the Ojibway.'[18] While the language of the judgement delivered from Canada's highest Court is consistent with previous decisions on the powers of provincial governments over natural resources, there is cause for extreme concern. Critically, the Ojibway *have* objected: the longest running blockade in Canadian history stands in Treaty 3 territory, from Grassy Narrows itself.[19] The learned trial judge dismissed the argument of lack of complaints by the Ojibway as it was not useful to the understanding of Treaty No. 3, based on the evidence submitted.[20]

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DIVISION OF POWERS

According to the courts, balance and equal weight must be given to both the Aboriginal and non-Aboriginal understanding of treaties.[21] In a carefully reasoned and detailed decision, the trial judge had given this significant consideration in determining that per section 91(24) of the *Constitution Act, 1867*, Canada alone has jurisdiction, as was the intent at the time of treaty-making in 1873.[22]

In *Keewatin*, the Supreme Court relied on the strict wording of the treaty's written text to determine the drafter's intent and then the application of division of powers legislation, contrary to the need to balance both perspectives. In considering 1891 legislation between the federal and provincial crown,[23] as well as the 1912 *Ontario Boundaries Extension Act,*[24] the Court found that these jurisdictional provisions give Ontario the power to take up lands in the Keewatin area under Treaty No. 3 for provincially regulated purposes, such as forestry, as in the present case.

Given the reasoned findings by the trier of fact in *Keewatin*, the Supreme Court intended to send a strict message in their decision. By virtue of this ruling, the Court ensured that there would be no misunderstanding in the unanimous decision of both the Court of Appeal and Supreme Court, which agreed on findings, including the comments made in obiter. The interjurisdictional question and power of provinces to take-up lands in treaty territories has been put to rest in Canada.

For Aboriginal peoples in Canada, specifically the Treaty No. 3 beneficiaries, *Keewatin* does not change the Anishinaabe understanding and perspective of the Treaty, which remains intact independent of Canadian law. There was a clear conceptual gap

between the positions advanced as the First Nation put forth an argument of treaty interpretation, while the Court ultimately ruled on a strict division of powers issue. As an Anishinaabekwe and Indigenous legal scholar from Treaty No.3, it is difficult to reconcile this decision and implications. It is upsetting that the *Keewatin* case is dismissive of Indigenous peoples' understanding of the Treaty, and by extension their legal history. This apparent disconnect is contrary to Supreme Court jurisprudence that demands equal consideration of both perspectives on the Treaty.

Keewatin provides example of a deeper conceptual tension where one legal paradigm grapples with understanding and absorbing the precepts of another.

CONCLUSION

Keewatin provides example of a deeper conceptual tension where one legal paradigm grapples with understanding and absorbing the precepts of another. For those that study and are immersed in Indigenous law, it is hard to reconcile any court's apparent outright dismissal of what amounts not to singular opinions or interpretations, but a lifetime of work by the depth of knowledge held by Traditional Knowledge Keepers who are often Elders in Aboriginal societies. I would have hoped for greater caution exercised by the appellate Courts in overturning the decisions of the lower court.

With the *Keewatin* decision, Aboriginal peoples pursuing the validation of Aboriginal and treaty rights in litigation requires careful consideration. Legal advancements can be made in cases when there has been no meaningful accommodation for Aboriginal and treaty rights, particularly when the right to harvest cannot exist within resource development. The Court also articulated the clear message that when the Crown, federal or provincial, has breached its fiduciary obligations, ramifications can occur. The Crown's duty to consult, and in certain circumstances gain the consent of Aboriginal people and the Honour of the Crown, must be upheld.

As a practitioner in this field, I must remain optimistic that changes in the legal climate may occur. I take some solace in the fact that the trial judge, once fully immersed with the Indigenous understanding of the treaty, interpreted the law in a matter consistent with Indigenous law and Canadian law in the present-day. Considering the determination of the lower court and the judge who heard all evidence at trial and made a ruling (which was reversed on appeal) there is hope to future generations. While I appreciate that unclear Aboriginal and treaty rights can pose uncertainties to development and projects vital to Canada's economy, the legal landscape must remain independent of national politics. The *Keewatin* case, verdict as well as the Courts oratory of treaty interpretation, provides little comfort to the fulfillment of the Canada's national agenda outside of resource development. In terms of moving forward in Canada as a nation striving for reconciliation with Aboriginal peoples (as was the stated purpose of section 35(1) in *Sparrow)*,[25] the *Keewatin* decision will be seen by many as a setback, and used as evidence that there are significant barriers due to entrenched dual understandings, which cannot legally co-exist. However, notwithstanding that, there are also strong voices recognising that working together is key for treaty beneficiaries in Canada, both Aboriginal and non-Aboriginal peoples.

Janine Seymour (Mezhikwan) is an Anishinaabekwe, mother, lawyer, and advocate from Treaty No. 3. Janine is completing her LL.M thesis, explaining an Anishinaabe legal understanding of Treaty No. 3 to a Western legal audience.

1 *Grassy Narrows First Nation v Ontario (Natural Resources)* 2014 SCC 48 (*Keewatin).*
2 Treaty No. 3 (1873).
3 When the term 'Indian' is used throughout the paper it is in reference to the legal description under Canadian legislation of the Anishinaabe and other Indigenous Nations in Canada.
4 *Intellectual Property and Traditional Knowledge Policy,* 53.
5 Ibid 30.
6 Ibid 35.
7 Ibid 35.
8 *Keewatin v Ontario (Natural Resources)* 2013 ONCA 158 citing *R v Sparrow* [1990] 1 SCR 1075.
9 Ibid 694.
10 *Grassy Narrows First Nation v Ontario (Natural Resources)* 2014 SCC 48, 12.
11 *Keewatin v Ontario (Natural Resources)* 2013 ONCA 158, at 1452-1459,1564-1567.
12 Ibid 72-388.
13 Ibid Analysis 389- 624. Findings of fact at 760 & 775.
14 Ibid 1452-1459,1589.
15 *St. Catherine's Milling and Lumber Co v The Queen* (1888), 14 App Cas 46 (PC).
16 *Grassy Narrows First Nation v Ontario (Natural Resources)* 2014 SCC 48, 35.
17 Ibid 33.
18 Ibid 40.
19 Crystal Greene, 'Grassy Narrows First Nation on Alert for Logging', *CBC News* (online), 3 February 2014 <http://www.cbc.ca/news/aboriginal/grassy-narrows-first-nation-on-alert-for-logging-1.2520581>.

20 *Keewatin v Ontario (Natural Resources)* 2013 ONCA 158, 1241-1247, 1246.

21 Ibid 1261.

22 *Keewatin v Ontario (Natural Resources)* 2013 ONCA 158 1645.

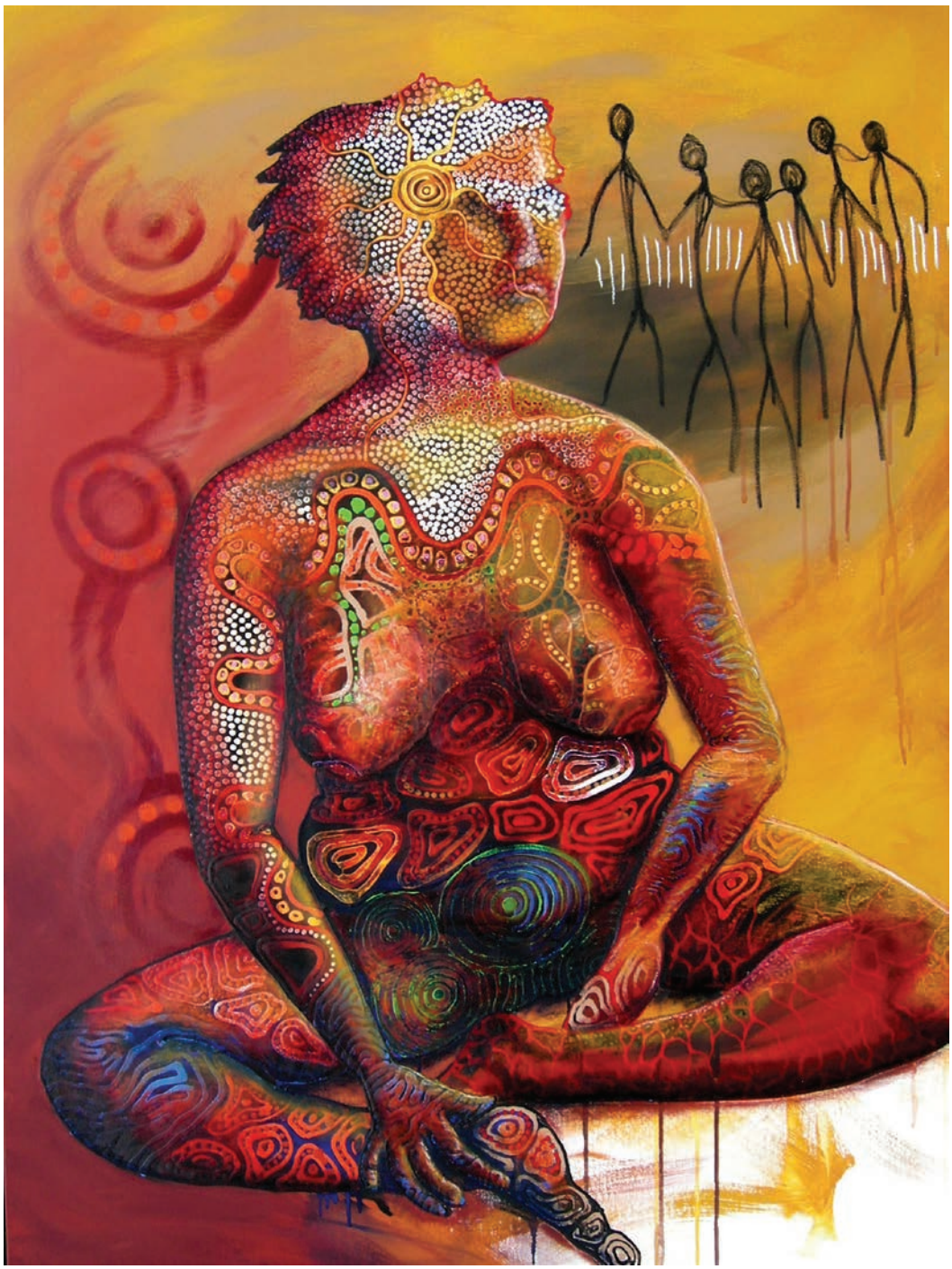
23 *Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands* (1891) (UK), 54 & 55 Vict, c 5, Sch, s 1 & *Act for the settlement of questions between the Governments of Canada and Ontario respecting Indian Lands* (1891) (Ont), 54 Vict, c 3, Sch, s 1.

24 *Ontario Boundaries Extension Act*, SC 1912, c 40, s 2.

25 *R v Sparrow* [1990] 1 SCR 1075, 62.

Colours of My Mother, 2008
Alison Williams
Acrylic, oil and pastel on canvas
680mm x 950mm

My mother is an Irish/ Aboriginal woman who brings to life our ancestors through her memories and stories. These stories are the colours of my mother.



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ARTIST NOTE
ALISON WILLIAMS

Alison Williams is a proud Gumbaynggirr woman who has loved painting and drawing from a young age. Born in Sydney in 1968, Alison grew up around Wollongong, but always harbored a feeling of belonging to her mother's country in the northern lowlands of the Gumbaynggirr. This feeling brought her to the birth place of her grandmother at Corindi Beach, where she established a studio to continue her artistic development.

For Alison, art has always been a form of expressing her personal impressions, dreams and experiences. She says that 'Visual storytelling is a deeply held tradition of Aboriginal artists, and is tremendously important, both as a way of preserving our cultural heritage, and also as a medium to bridge cultural differences in a non-confronting way, allowing non-Aboriginal people to explore Indigenous culture in a positive contemporary context.'

Throughout her career, Alison has been a spokesperson for the cultural heritage of Australian Indigenous persons, and has been provided leadership in the community through the education and communication of culture including dance, sculpture and painting.

Alison has exhibited extensively throughout Australia and NSW. In 2007, three of her pieces were selected for the NSW Parliament Indigenous Art Prize; in 2011 she was awarded the Clarence Valley Indigenous Art Award and in 2008 she was awarded the NSW Indigenous Art Fellowship from the Ministry for the Arts and Sydney City Council, which saw her work exhibited throughout Canada and USA.

Alison's artwork can be viewed and purchased on her website at: *www.indigenousinteriors.com.au*. Images courtesy of Alison Williams and the Dunghutti-Ngaku Aboriginal (DNAAG) Art Gallery.