Is Canada No Longer Responsible for Historical Treaties?

Case Comment on *Keewatin v. Ontario*, 2013 ONCA 158

By Bruce McIvor

Has the Canadian constitution evolved to eliminate the federal government’s obligations to honour the historical treaties between Aboriginal people and the Crown? Based on its recent decision in *Keewatin v. Ontario*, that is the view of the Ontario Court of Appeal. The decision will be of surprise and concern to First Nations across the country.

What it is about

The case is about Ontario’s authority to issue forestry authorizations in Treaty 3, which covers most of north-western Ontario and extends into Manitoba. After one of the longest and most thorough treaty interpretation trials in Canadian history, Justice Sanderson of the Ontario Superior Court of Justice decided that the Ojibway made treaty in 1873 with Canada, not Ontario. This, coupled with Canada’s exclusive responsibility for “Indians, and lands reserved for the Indians” under the constitution, meant that only Canada had the authority to issue forestry authorizations that significantly affect Treaty 3 hunting and fishing rights.

What the Court said

A unanimous Court of Appeal disagreed. Relying heavily on the Privy Council’s 1888 decision in *St. Catherine’s Milling*, the Court held that Ontario’s ownership of Crown lands in Treaty 3 left no role for the federal government in land-use decisions affecting treaty rights. To involve Canada, said the Court, would create an “unnecessary, complicated, awkward and likely unworkable” process.

The correct understanding, according to the Court, is that the constitution has evolved to allow Ontario to step into Canada’s shoes in respect of the Crown’s obligation to honour its treaty promises. Providing that it respects the Crown’s responsibilities to consult and possibly accommodate, Ontario is free to make any land-use decisions it likes without Canada’s involvement. The only limit is if the province goes so far as to virtually eliminate a First Nation’s ability to exercise its treaty right. And even then Canada would have no role. Instead, the First Nation’s only recourse would be to sue the province for treaty infringement.
Why it matters

The decision is a setback for the supposed solemn promises embedded in the historical treaties across Canada. While Justice Sanderson in the court below relied heavily on contextual evidence and the Aboriginal perspective, the Court of Appeal looked almost exclusively at the wording of the written treaty document. Even more troubling, the Court relied on what it called the “doctrine of constitutional evolution” to conclude that regardless of the Ojibway’s understanding that Canada was and is their treaty partner, the country and the constitution has moved on since 1873 and the province now has complete responsibility for treaty promises.

This raises the second major concern with the Court of Appeal’s decision. Twice in the last seven years the Supreme Court of Canada has confirmed the continuing relevance of Canada’s exclusive legislative responsibility under the constitution for “Indians, and lands reserved for the Indians”—a federal responsibility that prohibits a provincial government from doing anything that has more than an insignificant effect on a treaty right. It is difficult to reconcile the Supreme Court’s view on this issue with the Court of Appeal’s decision in Keewatin.

The First Nations involved in Keewatin are likely to ask the Supreme Court to consider these important issues. First Nations across Canada will be anxious to find out whether the federal government really is no longer responsible for honouring historical treaties.

Dr. Bruce Stadfeld McIvor is principal of First Peoples Law